Federal Court  Cour fédérale

Date: 20230111

Docket: T-88-21

Citation: 2023 FC 32

Ottawa, Ontario, January 11, 2023

PRESENT: The Honourable Madam Justice Aylen

PROPOSED CLASS PROCEEDING

BETWEEN:

MARTHA KAHNAPACE AND AILEEN MICHEL

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER

[1] The Court has before it a motion brought by the Plaintiffs pursuant to section 334.12 of the *Federal Courts Rules*, SOR/98-106, seeking certification of the present action as a class action and the appointment of the Plaintiffs as the representative plaintiffs.

[2] The Plaintiffs advance this proposed class action on behalf of all Indigenous female offenders who are or have been in the custody of the Correctional Service of Canada [CSC] since 1991. The Plaintiffs allege that CSC employs a tool called the Custody Rating Scale [CRS] to

determine the security classification of inmates (minimum, medium or maximum security) that improperly overclassifies Indigenous female offenders into higher security classifications than otherwise warranted. This in turn results in a deprivation of residual liberty and ineligibility for discretionary release and parole. The Plaintiffs assert that CSC has been aware since as early as 2004 that the CRS overclassifies certain inmates, but continues to use the CRS in breach of various provisions of the *Corrections and Conditional Release Act,* SC 1992, c 20 [*CCRA*] and sections 7 and 15 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

[3] The Plaintiffs also assert that use of other tools (the Static Factor Assessment [SFA], the Dynamic Factor Identification and Analysis - Revised [DFIA-R] and the Reintegration Potential [RP]) in the offender intake assessment [OIA] process (which process is used to assess and gather information regarding an offender before determining their security classification and penitentiary placement) breaches section 79.1 of the *CCRA* by: (a) incorporating factors that relate to historical and colonial oppression of Indigenous people in Canada (also known as Indigenous social history factors or *Gladue* factors); and (b) improperly causing the scoring of such factors to be used in a manner that increases an offender's risk and resulting security classification.

[4] The Plaintiffs seek general damages, special damages, exemplary and punitive damages and *Charter* damages, together with various forms of declaratory relief (including declarations that CSC's use of the CRS, SFA, DFIA-R and RP is contrary to section 79.1 of the *CCRA*) and an injunction preventing CSC from using the CRS, SFA, DFIA-R and RP tools in respect of prospective class members.

[5] The Defendant opposes the motion in its entirety, asserting that the Plaintiffs have failed to meet all five criteria required for certification as prescribed by Rule 334.16 of the *Federal Courts Rules*.

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

[7] Moreover, the Defendant asserts that while the SFA, DFIA-R and RP assessments form part of the information gathered in the OIA process, they are primarily used to determine the appropriate interventions, not security classification. The Defendant further denies that the presence of Indigenous social history factors impacts these assessments, resulting in higher security classifications contrary to section 79.1 of the *CCRA*.

[8] With respect to the test for certification, the Defendant asserts that: (a) the Plaintiffs have failed to plead any reasonable cause of action; (b) the proposed class and subclasses are overly broad, include time-barred claims and are not rationally connected to genuinely common issues; (c) the proposed common issues regarding the CRS and other tools cannot be determined on a class-wide basis, as each offender's security classification would have to be individually examined to determine the basis for the classification and whether the use of the challenged tools resulted in a breach of the offender's *Charter* rights entitling them to a remedy; (d) as the issues inevitably require individual examination, a class proceeding is not an efficient or manageable way to adjudicate the issues; and (e) Ms. Kahnapace does not meet the test for an appropriate representative and the proposed litigation plan has significant deficiencies.

[9] For the reasons that follow, I find that: (a) the Third Amended Statement of Claim does not disclose a reasonable cause of action; (b) numerous individual issues overwhelm the common issues and the common issues are intrinsically individualistic; (c) a class proceeding is not the preferable procedure for the just and efficient resolution of the common questions; (d) Ms. Kahnapace would not fairly and adequately represent the interests of the class and subclasses; and (e) the Plaintiffs have not prepared a plan for the proceeding that sets out a workable method of advancing the action. Accordingly, the certification motion shall be dismissed.

I. Background

A. Evidence on the Motion

[10] The evidentiary record before the Court on this motion was extensive. The Plaintiffs filed the following affidavits in support of their motion:

1. Affidavit of Ms. Kahnapace affirmed September 30, 2021;

2. Affidavit of Ms. Michel affirmed August 8, 2022;

3. Affidavit of Dr. R. Karl Hanson affirmed May 21, 2021;

4. Affidavit of Dr. Stephen Hart affirmed May 27, 2021 (expert opinion);

5. Affidavit of Dr. Stephen Hart affirmed August 23, 2021 (expert opinion);

6. Affidavit No. 1 of Jodi Kaldestad, paralegal to counsel for the Plaintiffs, affirmed May 27, 2021;

7. Affidavit No. 2 of Jodi Kaldestad affirmed May 27, 2021;

8. Affidavit No. 3 of Jodi Kaldestad affirmed May 27, 2021;

9. Affidavit No. 4 of Jodi Kaldestad affirmed September 30, 2021;

10. Affidavit No. 1 of Shauna Stewart, paralegal to counsel for the Plaintiffs, affirmed April 8, 2022; and

11. Affidavit No. 2 of Shauna Stewart affirmed June 17, 2022.

[11] The Defendant filed the following affidavits in response to the motion:

1. Affidavit of Katherine Belhumeur, Director of the Reintegration Operations Division within the Correctional Operations and Programs Sector for CSC, sworn July 21, 2021;

2. Affidavit of Dr. Larry Motiuk, Assistant Commissioner Policy with CSC, affirmed July 21, 2021;

3. Affidavit of Dr. Larry Motiuk sworn January 26, 2022;

4. Affidavit of Michael Hayden, Manager, Statistical Analysis in the Policy Sector of CSC, affirmed July 21, 2021;

5. Affidavit of Michael Hayden affirmed September 28, 2021;

6. Affidavit of Dr. Mark Olver (expert report) affirmed July 22, 2021;

7. Affidavit of Dr. Mark Olver (expert report) affirmed October 19, 2021;

8. Affidavit of Marty Maltby, Acting Director General, Indigenous Initiatives Directorate at CSC, affirmed July 21, 2021;

9. Affidavit of Brigitte Bouchard, Acting Director General of the Women Offender Sector and Director of the Montreal Metropolitan District for CSC, sworn January 27, 2022;

10. Affidavit No. 1 of Attila Turi, Acting Warden for Fraser Valley Institute for Women operated by CSC, affirmed January 27, 2022;

11. Affidavit No. 2 of Attila Turi affirmed January 27, 2022;

12. Affidavit No. 3 of Attila Turi affirmed May 18, 2022; and

13. Affidavit of Ariyana Pirmohamed, legal assistant to counsel for the Defendant, sworn October 7, 2022.

[12] Extensive documentation was filed in relation to each of the proposed representative plaintiffs, Ms. Kahnapace and Ms. Michel. In relation to Ms. Kahnapace, the Court had before it, in addition to her affidavit, the following documentation related to her incarceration and her security classification determinations:

1. Indictment dated July 31, 2007;
2. Warrant Remanding a Prisoner dated September 26, 2007;
3. Sentencing transcript from September 2007;
4. Warrant of Committal upon Conviction dated September 27, 2007;
5. Preliminary Assessment Report dated October 3, 2007;
6. Custody Rating Scale dated October 4, 2007;
7. Offender Admission Form dated October 16, 2007;
8. Letter dated assigning Ms. Kahnapace's case management team dated October 17, 2007;
9. Community Assessment dated October 26, 2007;
10. Family Violence Risk Assessment dated December 11, 2007;

11. Criminal Profile Report dated January 14, 2008;

12. Correctional Plan Report dated January 14, 2008;

13. Assessment for Decision – Offender Security Level dated January 14, 2008;

14. Intake Assessment dated February 4, 2008;

15. Referral for Decision – Offender Security Level dated March 4, 2008;

16. Final Security Classification Decision made by the Regional Deputy Commissioner dated March 4, 2008;

17. Warden's memo to file re: security classification dated March 6, 2008;

18. First level maximum security classification grievance dated July 9, 2008 and response thereto;

19. Third level security classification grievance dated July 21, 2008 and response thereto;

20. Grievance coordinator's letter dated July 23, 2008;

21. Notice of Application for Judicial Review in T-89-09 regarding her security classification grievance decision;

22. Individual Education Plan dated November 10, 2008;

23. Offender Grievance Response dated November 14, 2008;

24. *Kahnapace v AGC*, 2009 FC 1246;

25. First level two-year review grievance presentation and response thereto dated October 2009;

26. Second level two-year review grievance and response thereto;

27. Security Reclassification Scale for Women dated January 5, 2010;

28. Assessment for Decision – Offender Security Level dated January 7, 2010;

29. Referral Decision Sheet dated February 25, 2010;

30. Classification Decision dated February 25, 2010;

31. 2010 decision of the British Columbia Court of Appeal;

32. Notice of Inmate's Release dated May 20, 2010;

33. *Kahnapace v Canada (Attorney General)*, 2010 FCA 281;

34. Indictment dated March 18, 2011;

35. Sentencing transcript dated June 29, 2011;

36. Warrant of Committal Upon Conviction dated June 29, 2011;

37. Preliminary Assessment Report dated July 5, 2011;

38. Custody Rating Scale dated July 5, 2011;

39. Inmate complaint presentation to reinstate her 2009 two-year grievance dated July 18, 2011;

40. Offender Admission Form dated July 21, 2011;

41. Substance Abuse Assessment Summary completed July 21, 2011;

42. Third level grievance dated July 27, 2011 and response thereto;

43. Individual Education Plan dated July 29, 2011;

44. Assessment for Decision – Offender Security Level dated August 18, 2011;

45. Referral Decision Sheet for Offender Security Level dated August 22, 2011;

46. Approval for the Pathways Unit as of August 23, 2011;

47. Elder Review Report dated August 25, 2011;

48. Static Factor Assessment Report dated August 30, 2011;

49. Dynamic Factor Assessment Report dated August 31, 2011;

50. Criminal Profile dated September 2, 2011;

51. Correctional Plan dated September 2, 2011;

52. Sentencing Transcript dated September 27, 2011;

53. BC Court of Appeal Order for Release pending appeal dated June 14, 2012;

54. Notice of Inmate Release dated June 15, 2012;

55. Sentencing decision dated January 2013;

56. *R v Kahnapace*, 2014 BCSC 2410; and

57. Sentencing transcript dated March 20, 2014.

[13] In relation to Ms. Michel, the Court had before it, in addition to her affidavit, the following documentation related to her incarceration and her security classification determinations:

1. Amended Warrant of Committal Upon Conviction dated November 8, 2022;
2. Indictment dated August 10, 2000;
3. British Columbia Superior Court Oral Reasons for Judgment dated March 2, 2001;
4. Warrant of Committal Upon Conviction dated March 2, 2001;
5. Custody Rating Scale dated February 18, 2003;
6. Assessment for Decision – Offender Security Level dated March 6, 2003;
7. Correctional Plan dated March 6, 2003;
8. Intake Assessment dated March 6, 2003;
9. Offender Security Level – Referral Decision Sheet dated March 6, 2003;

10. Correctional Plan Progress Report No. 1 dated October 6, 2003;

11. Assessment for Decision – Offender Security level dated November 26, 2003;

12. Offender Security Level – Referral Decision Sheet dated March 1, 2003;

13. Assessment for Decision – Offender Security Level dated February 4, 2005;

14. Offender Security Level – Referral Decision Sheet dated February 25, 2005;

15. Correctional Plan Progress Report No. 5 dated October 14, 2005;

16. Assessment for Decision – Offender Security Level dated March 27, 2006;

17. Offender Security Level – Referral for Decision Sheet dated March 30, 2006;

18. National Parole Board Decision dated May 25, 2006;

19. Correctional Plan Progress Report No. 10 dated November 2, 2006;

20. Correctional Plan Progress Report No. 11 dated December 1, 2006;

21. National Parole Board Decision dated January 8, 2007;

22. National Parole Board Decision dated January 24, 2007;

23. Correctional Plan Progress Report No. 12 dated April 17, 2007;

24. Correctional Plan Progress Report No. 13 dated May 14, 2007;

25. Assessment for Decision – Offender Security Level dated June 8, 2007;

26. Referral Decision Sheet – Offender Security Level dated June 27, 2007;

27. National Parole Board Decision dated September 28, 2007;

28. National Parole Board Decision dated March 20, 2008;

29. Correctional Plan Progress Report No. 14 dated June 13, 2008;

30. Assessment for Decision – Offender Security level dated July 4, 2008;

31. Custody Rating Scale dated July 7, 2008;

32. Referral Decision Sheet – Offender Security level dated July 7, 2008;

33. Assessment for Decision – Offender Security Level dated November 26, 2008;

34. Referral Decision Sheet – Offender Security level dated December 11, 2008;

35. Correctional Plan Progress Report No. 15 dated September 10, 2009;

36. Correctional Plan Progress report No. 16 dated October 9, 2009;

37. National Parole Board Decision dated November 27, 2009;

38. Correctional Plan Update dated June 30, 2010;

39. National Parole Board Decision dated December 1, 2010;

40. National Parole Board Decision dated May 19, 2011;

41. National Parole Board Decision dated November 10, 2011;

42. National Parole Board Decision dated May 24, 2012;

43. Correctional Plan Updated dated July 20, 2012;

44. Parole Board of Canada Decision dated November 20, 2012;

45. Correctional Plan Updated dated February 20, 2013;

46. Parole Board of Canada Decision dated May 31, 2013;

47. Assessment for Decision – Offender Security Level dated July 26, 2013;

48. Custody Rating Scale dated July 26, 2013;

49. Referral Decision Sheet – Offender Security Level dated July 30, 2013;

50. Parole Board of Canada Decision dated October 17, 2013;

51. Correctional Plan Updated dated October 25, 2013;

52. Correctional Plan Updated dated November 12, 2013;

53. Custody Rating Scale dated December 31, 2013;

54. Referral Decision Sheet – Offender Security Level dated January 8, 2014;

55. Parole Board of Canada Decision dated April 2, 2014;

56. Assessment for Decision – Offender Security Level dated May 18, 2015;

57. Referral Decision Sheet – Offender Security Level dated June 4, 2015;

58. Parole Board of Canada Decision dated September 24, 2015;

59. Correctional Plan Updated dated February 16, 2016;

60. Parole Board of Canada Decision dated March 2016;

61. Correctional Plan Updated dated July 22, 2016;

62. Parole Board of Canada Decision dated August 30, 2016;

63. Correctional Plan Updated dated November 24, 2016;

64. Custody Rating Scale dated September 18, 2017;

65. Assessment for Decision – Offender Security Level dated September 25, 2017;

66. Referral Decision Sheet – Offender Security Level dated September 25, 2017;

67. Correctional Plan Updated dated May 4, 2018;

68. Parole Board of Canada Decision dated June 7, 2018;

69. Correctional Plan Updated dated June 18, 2018;

70. Custody Rating Scale dated November 14, 2018;

71. Assessment for Decision – Offender Security Level dated November 16, 2018;

72. Referral Decision Sheet – Offender Security Level dated November 19, 2018;

73. Parole Board of Canada Decision dated February 12, 2019;

74. Assessment for Decision – Offender Security Level dated July 9, 2019;

75. Referral Decision Sheet – Offender Security Level dated July 30, 2019;

76. Parole Appeal Decision dated August 9, 2019;

77. Correctional Plan Updated dated December 20, 2019;

78. Parole Board of Canada Decision dated February 21, 2020;

79. Correctional Plan Updated dated December 8, 2020;

80. Parole Board of Canada Decision dated January 29, 2021;

81. Parole Board of Canada Decision dated May 27, 2021;

82. Correctional Plan Updated dated July 6, 2021;

83. Parole Board of Canada Decision dated August 5, 2021;

84. Full Parole Certificate dated February 18, 2022; and

85. Parole Board of Canada Decision dated February 18, 2022.

[14] The parties rely on a number of articles and reports related to the CRS and its predictive validity (or lack thereof) for various segments of the offender population, including Indigenous female offenders. These articles and reports included the following:

1. An article entitled “Classification without Validity or Equity: An Empirical Examination of the Custody Rating Scale for Federally Sentenced Women

Offenders in Canada" by Cheryl Marie Webster and Anthony N. Doob published in the Canadian Journal of Criminology and Criminal Justice in July 2004;

2. An article entitled "Taking Down the Straw Man or Building a House of Straw? Validity, Equity, and the Custody Rating Scale" by Cheryl Marie Webster and Anthony N. Doob published in the Canadian Journal of Criminology and Criminal Justice in October 2004;

3. An article entitled "Taking Down the Straw Man: A Reply to Webster and Doob" by Kelley Blanchette and Dr. Motiuk published in the Canadian Journal of Criminology and Criminal Justice in October 2004;

4. Classification for Correctional Programming: The Offender Intake Assessment (OIA) Process;

5. Report by Frank Porporino, Fred Luciano and Dr. Motiuk entitled "Pilot Implementation of a Custody Rating Scale: Interim Report";

6. Report by Joseph Johnston and Dr. Motiuk entitled "Factors Related to Unlawful Walkaways from Minimum Security Institutions";

7. Report by Joseph Johnston and Dr. Motiuk entitled "Unlawful Departures from Minimum Security Institutions: A Comparative Investigation";

8. Report by Fred Luciani, Dr. Motiuk and Mark Nafekh entitled "An Operational Review of the Custody Rating Scale: Reliability, Validity and Practical Utility";

9. Report by Fred Luciani entitled “Tried and True: Proof that the Custody Rating Scale is still reliable and valid”;

10. Report by Brian Grant and Fred Luciani entitled “Security Classification Using the Custody Rating Scale”;

11. Report by Fred Luciani entitled “Initiating safe reintegration: A decade of Custodial Rating Scale results”;

12. Report by Kelley Blanchette, Paul Verbrugge and Cherami Wichmann entitled “The Custody Rating Scale, Initial Security Level Placement, and Women Offenders”;

13. Report by Renee Gobeil entitled “Use of the Custody Rating Scale with Male Offenders”;

14. Report by Geoffrey Barnum and Renee Gobeil entitled “Revalidation of the Custody Rating Scale for Aboriginal and non-Aboriginal Women Offenders”;

15. Report by Sara Rubenfeld entitled “An Examination of a Reweighted Custody Rating Scale for Women”;

16. Report by Kayla Wanamaker entitled “Risk Factors Related to the Initial Security Classification of Women Offenders: A literature Review”;

17. CSC Publications RIB-21-03, RIB-21-04, RIB-21-05, and RIB-21-09;

18. CSC research report entitled “A comprehensive study of recidivism rates among federal offenders”;

19. Forensic Risk Assessment with Indigenous Peoples: A Systemic Literature Review and Synthesis; and

20. Forensic Risk Assessment with Indigenous Peoples: A Systemic Literature Review and Synthesis (updated).

[15] The parties placed before the Court numerous Commissioner’s Directives [CD], Policy Bulletins and Guidelines, including:

1. CD 081 – Offender Complaints and Grievances;

2. CD 578 – Intensive Intervention Strategy in Women Offender Institutions/Units;

3. CD 702 – Aboriginal Offenders;

4. CD 705 – Intake Assessment Process and Correctional Plan Framework;

5. CD 705-1 – Preliminary Assessments and Post-Sentence Community Assessments;

6. CD 705-2 – Information Collection;

7. CD 705-3 – Immediate Needs Identification and Admission Interviews;

8. CD 705-4 – Orientation;

9. CD 705-5 – Supplementary Assessments;

10. CD 705-6 – Correctional Planning and Criminal Profile;

11. CD 705-7 – Security Classification and Penitentiary Placement;

12. CD 706 – Classification of Institutions;

13. CD 710-3 – Temporary Absences;

14. CD 710-6 – Review of Inmate Security Classification;

15. CD 726 – Correctional Programs;

16. CD 70502 - Supplementary Intake Assessments;

17. Guideline 702-1 – Establishment and Operation of Pathways Initiatives;

18. Guideline 710-2-1 – CCRA Section 81: Transfers;

19. Policy Bulletin 107 entitled Security Classification of Offenders Serving a Minimum Life Sentence for First or Second Degree Murder;

20. December 10, 2007 memorandum from the Assistant Commissioner, Correctional Operations and Programs, Ross Toller, to the Regional Deputy Commissioner regarding initial penitentiary placement of inmates serving a minimum life sentence for first or second degree murder;

21. Policy Bulletins and Interim Policy Bulletins 194, 202, 607, 648, 650 and 677; and

22. Standard Operating Practices 700-14.

[16] A number of affiants were cross-examined, some over multiple days or on multiple occasions. The Court had before it the following transcripts:

1. Cross-examination of Katherine Belhumeur on October 20, 2021;

2. Cross-examination of Dr. Motiuk held October 21, 2021 and exhibits 1-3 thereto;

3. Continuation of the cross-examination of Dr. Motiuk held November 4, 2021 and exhibit 4 thereto;

4. Cross-examination of Michael Hayden held October 22, 2021;

5. Cross-examination of Marty Malby held October 22, 2021 and exhibits 1-4 thereto;

6. Cross-examination of Dr. Hanson held October 25, 2001 and exhibit 1 and A thereto;

7. Cross-examination of Dr. Olver held October 26, 2021 and exhibit 1 thereto, together with the amended transcript;

8. Continuation of the cross-examination of Dr. Olver held October 27, 2021 and exhibit 2 thereto, together with the amended transcript;

9. Cross-examination of Dr. Hart held November 2, 2021 and exhibits 2-3 thereto;

10. Cross-examination of Brigitte Bouchard held March 3, 2022;

11. Cross-examination of Dr. Motiuk held March 9, 2022;

12. Cross-examination of Attila Turi on March 11, 2022;

13. Cross-examination of Attila Turi on May 27, 2022;

14. Cross-examination of Ms. Kahnapace held March 30, 2022; and

15. Cross-examination of Ms. Michel held October 5, 2022.

[17] The Plaintiffs also placed before the Court the following reports, publications and bulletins:

1. 2016 Fall Report of the Auditor General of Canada: Report 3 – Preparing Indigenous Offenders for Release – Correctional Service of Canada;

2. Report of the House of Common Standing Committee on the Status of Women released June 2018 entitled “A Call to Action: Reconciliation with Indigenous Women in the Federal Justice and Correctional Systems”;

3. Report of the House of Commons Standing Committee on Public Safety and National Security released June 2018 entitled “Indigenous People in the Federal Correctional System”;

4. Publication of Public Safety Canada entitled “Corrections and Conditional Release Statistical Overview 2019 Annual Report: Building a Safe and Resilient Canada”;

5. Report published by CSC (Evaluation Division, Policy Sector) in November 2012 entitled “Evaluation Report: The Strategic Plan for Aboriginal Corrections”;

6. Bulletin published by CSC in September 2017 entitled “Indigenous Offenders: Major Findings from the DFIA-R Research Studies”;

7. Print out of interlinked web pages published by CSC entitled “Indigenous Corrections”; and

8. Document published by CSC entitled “Response to the 46th Annual Report of the Correctional Investigator 2018-2019”.

[18] For the purpose of this motion, I do not need to determine the weight or credibility of any of the evidence and no admissibility issues were raised regarding the expert evidence.

[19] The Defendant did raise an issue regarding the admissibility of the report from the Auditor General, the House of Commons Standing committee reports and a CSC response to a report from the Correctional Investigator. The Defendant asserts that these reports are not admissible for the truth of their content and cannot be used to demonstrate that any cause of action asserted by the Plaintiffs is reasonable. Rather, the Defendants assert that these reports can only be used for the

limited purpose of putting the facts pleaded into context. The Plaintiffs did not make any submissions on this issue.

[20] I am satisfied that nothing on this motion turns on the contested reports. Moreover, the Court's consideration of whether the Third Amended Statement of Claim discloses a reasonable cause of action is limited to a consideration of the pleading alone.

B. Relevant Statutory Provisions

[21] Section 3 of the *CCRA* provides:

> The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
>
> (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
>
> (b) 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.
>
> Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

[22] Parliament directs CSC to achieve the purposes set out in section 3 through the principles set out in sections 3.1 and 4, which include the principles that: (a) the protection of society be the paramount consideration in the corrections process; (b) CSC use the least restrictive measures consistent with the protection of the public, staff members and offenders; (c) CSC ensure 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; and (d) 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 mental health care and other groups.

[23] The principle of "least restrictive measures" is echoed in the language of section 28 of the *CCRA*, which provides:

If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with the least restrictive environment for that person, taking into account	Le Service doit s’assurer, dans la mesure du possible, que le pénitencier dans lequel est incarcéré le détenu constitue un milieu où seules existent les restrictions les moins privatives de liberté pour celui-ci, compte tenu des éléments suivants :
(a) the degree and kind of custody and control necessary for	a) le degré de garde et de surveillance nécessaire à la sécurité du public, à celle du pénitencier, des personnes qui s’y trouvent et du détenu;
(i) the safety of the public,	
(ii) the safety of that person and other persons in the penitentiary, and	
(iii) the security of the penitentiary;	
(b) accessibility to	b) la facilité d’accès à la collectivité à laquelle il appartient, à sa famille et à un milieu culturel et linguistique compatible;
(i) the person’s home community and family,	
(ii) a compatible cultural environment, and	
(iii) a compatible linguistic environment; and	c) l’existence de programmes et de services qui lui conviennent et sa volonté d’y participer ou d’en bénéficier.

> (c) the availability of appropriate programs and services and the person's willingness to participate in those programs.

[24] Section 30 of the *CCRA* requires CSC to assign a security classification of maximum, medium, or minimum to each inmate in accordance with regulations. The *CCRA* contemplates broad delegation of legislative power in respect of inmate placement and the elaboration of crucial operational detail in two ways - regulations and Commissioner's Rules and Directives.

[25] Section 96(d) of the *CCRA* provides that the Governor in Council may make regulations "respecting the placement of inmates pursuant to section 28". Pursuant to this provision, the *Corrections and Conditional Release Regulations*, SOR/92-620 [*Regulations*] were enacted. Of particular relevance to inmate placement are sections 17 and 18 of the *Regulations*, which provide:

> 17. For the purposes of section 30 of the Act, the Service shall consider the following factors in assigning a security classification to each inmate:
>
> (a) the seriousness of the offence committed by the inmate;
>
> (b) any outstanding charges against the inmate;
>
> (c) the inmate's performance and behaviour while under sentence;
>
> (d) the inmate's social, criminal and, if available, young-offender history and any dangerous offender designation under the Criminal Code;
>
> 17. Pour l'application de l'article 30 de la Loi, le Service attribue une cote de sécurité à chaque détenu en tenant compte des éléments suivants :
>
> a) la gravité de l'infraction commise par le détenu;
>
> b) toute accusation en instance contre lui;
>
> c) son rendement et sa conduite pendant qu'il purge sa peine;
>
> d) ses antécédents sociaux et criminels, y compris ses antécédents comme jeune contrevenant s'ils sont disponibles et le fait qu'il a été déclaré délinquant dangereux en application du Code criminel;

(e) any physical or mental illness or disorder suffered by the inmate;

(f) the inmate's potential for violent behaviour; and

(g) the inmate's continued involvement in criminal activities.

e) toute maladie physique ou mentale ou tout trouble mental dont il souffre;

f) sa propension à la violence;

g) son implication continue dans des activités criminelles.

18. For the purposes of section 30 of the Act, an inmate shall be classified as

(a) maximum security where the inmate is assessed by the Service as

(i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or

(ii) requiring a high degree of supervision and control within the penitentiary;

(b) medium security where the inmate is assessed by the Service as

(i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or

(ii) requiring a moderate degree of supervision and control within the penitentiary; and

(c) minimum security where the inmate is assessed by the Service as

(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and

18. Pour l'application de l'article 30 de la Loi, le détenu reçoit, selon le cas :

a) la cote de sécurité maximale, si l'évaluation du Service montre que le détenu :

(i) soit présente un risque élevé d'évasion et, en cas d'évasion, constituerait une grande menace pour la sécurité du public,

(ii) soit exige un degré élevé de surveillance et de contrôle à l'intérieur du pénitencier;

b) la cote de sécurité moyenne, si l'évaluation du Service montre que le détenu :

(i) soit présente un risque d'évasion de faible à moyen et, en cas d'évasion, constituerait une menace moyenne pour la sécurité du public,

(ii) soit exige un degré moyen de surveillance et de contrôle à l'intérieur du pénitencier;

c) la cote de sécurité minimale, si l'évaluation du Service montre que le détenu :

(i) soit présente un faible risque d'évasion et, en cas d'évasion,

(ii) requiring a low degree of supervision and control within the penitentiary.	constituerait une faible menace pour la sécurité du public, (ii) soit exige un faible degré de surveillance et de contrôle à l'intérieur du pénitencier.

[26] The second broad delegation consists of Commissioner's Rules and Directives. Pursuant to section 6(1) of the *CCRA*, the Governor in Council may appoint a Commissioner who, under the direction of the Minister of Public Safety and Emergency Preparedness, "has the control and management of [CSC] and all matters connected with the Service". The Commissioner may make rules, under section 97 of *CCRA*, for: (a) the management of CSC; (b) for matters described in section 4; and (c) generally for carrying out the purposes and provisions of the *CCRA* and the *Regulations*. Under section 98 of *CCRA*, the Commissioner has the power to designate any rules, made pursuant to s. 97, as "Commissioner's Directives".

[27] With respect to inmate programs, section 76 of the *CCRA* provides that CSC shall provide a range of programs designed to address the needs of offenders and contribute to their successful reintegration into the community. The *CCRA* provides that CSC must also provide programs designed to particularly address the needs of female offenders (section 77) and Indigenous offenders (section 80).

[28] With respect to Indigenous offenders, Parliament enacted section 79.1 of the *CCRA* in June 2019, which provides, at subsection (1):

(1) In making decisions under this Act affecting an Indigenous offender, the Service shall take the following into consideration:	(1) Dans le cadre de la prise de toute décision au titre de la présente loi concernant un délinquant autochtone, le Service

> (a) systemic and background factors affecting Indigenous peoples of Canada;
>
> (b) systemic and background factors that have contributed to the overrepresentation of Indigenous persons in the criminal justice system and that may have contributed to the offender's involvement in the criminal justice system; and
>
> (c) the Indigenous culture and identity of the offender, including his or her family and adoption history.

> tient compte des éléments suivants :
>
> a) les facteurs systémiques et historiques touchant les peuples autochtones du Canada;
>
> b) les facteurs systémiques et historiques qui ont contribué à la surreprésentation des Autochtones dans le système de justice pénal et qui peuvent avoir contribué aux démêlés du délinquant avec le système de justice pénale;
>
> c) l'identité et la culture autochtones du délinquant, notamment son passé familial et son historique d'adoption.

[29] Important to any consideration of the factors detailed in section 79.1(1) is the limitation imposed by subsection (2), which provides:

> The factors described in paragraphs (1)(a) to (c) are not to be taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous offender unless those factors could decrease the level of risk.

> Les éléments énoncés aux alinéas (1)a) à c) ne sont pas pris en considération pour les décisions concernant l'évaluation du risque que représente un délinquant autochtone, sauf dans les cas où ces éléments pourraient abaisser le niveau de risque.

C. Maximum v Medium v Minimum Security Inmates and Institutions

[30] In her affidavit, Ms. Belhumeur provides the following summary of the general characteristics of the inmates in each security classification category and the characteristics of their associated institutions:

> <u>Maximum Security Institutions</u>

9. Maximum security institutions house offenders presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or requiring a high degree of supervision and control within the institution. Offenders at maximum security may show less interest and participation in their correctional plans, and are more likely to be involved in institutional incidents, violence, Security Threat Groups, drug trafficking, or other breaches of institutional rules.

10. Movement, association and privileges are restricted and the perimeter of the institution is well-defined, secure, and controlled. Offenders are expected to interact effectively and responsibly, while subject to frequent direct/indirect monitoring. Maximum security institutions aim to prepare offenders for a medium security institution, including through programs and interventions.

Medium Security Institutions

11. Medium security institutions house offenders presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or requiring a moderate degree of supervision and control within the institution. These offenders are more likely to be following their correctional plan and working towards conditional release by engaging in institutional activities and programs, complying with institutional rules and procedures, and being respectful towards staff members and other offenders.

12. Movement, association and privileges are moderately restricted, which allows for more interaction among offenders, compared to maximum security. This requires offenders to interact effectively and responsibly while subject to regular/indirect monitoring. As in maximum security institutions, the perimeter of a medium security institution is well-defined, secure, and controlled.

Minimum Security Institutions

13. Minimum security institutions house offenders presenting a low probability of escape and a low risk to the safety of the pubic in the event of escape, and requiring a low degree of supervision and control within the institution. These offenders have demonstrated a high propensity to comply with institutional rules, a low propensity for violence, and engagement with their correctional plans.

14. Movement, association and privileges continue to be monitored and managed by correctional staff, but with fewer restrictions. This prepares offenders for their eventual return to the community. The perimeter of a minimum security institution is clearly defined, but is

> not normally directly controlled; nor is there generally a physical barrier around the perimeter.
>
> 15. The environment of a minimum security institution promotes personal development, responsible behaviour and effective and responsible interactions with minimal monitoring. Offenders in minimum security institutions are expected to demonstrate a high level of motivation towards self-improvement by actively participating in their correctional plans and are moving towards release.

[31] CSC operates five penitentiaries for women: (i) Edmonton Institution for Women; (ii) Fraser Valley Institution [FVI]; (iii) Grand Valley Institution for Women; (iv) Joliette Institution for Women; and (v) Nova Institution for Women. CSC also operates one women's Healing Lodge (Okimaw Ohci) and has two contracts with Indigenous organizations than run women's healing lodges. Healing lodges only accommodate female inmates classified as minimum and medium security.

[32] Each women's institution is multi-level, accommodating women in maximum, medium and minimum security. Women classified as maximum security are housed in Secure Units, where high-level intervention and supervision are provided by specialized staff. The Secure Units, which are governed by CD 578, are autonomous, physically separated from the rest of the institution and are subject to entry and exit controls. The security measures include closed sub-units, a checkpoint, the layout of cells and a secure courtyard.

[33] According to Ms. Bouchard, in women's institutions, there can be contact between maximum security and medium or minimum security inmates, as women in the Secure Unit have access to shared spaces in the Main Compound, such as the gym, recreational facilities, health services and spiritual and vocational areas. Women in the Secure Unit also have access to activities, programs and interventions provided in the Main Compound. Any movements to the

Main Compound are dependent on the inmate's specific circumstances and are governed by CD 578.

[34] Minimum and medium security inmate populations in women's institutions can be fully integrated within a Main Compound, living together in the same housing units. According to Ms. Bouchard, the living conditions of women in the Main Compound are the same regardless of whether they are classified as minimum or medium security. Women are accommodated in individual houses, each with six to eight bedrooms, two bathrooms, a kitchen and a common living room and the women have keys to their rooms. They are responsible for making their own meals and taking care of their houses. There are no cameras in the Main Compound housing units, nor constant direction supervision.

[35] No activities or programs in the institutions are reserved only for women in minimum security. Ms. Bouchard's evidence is that the only differences in privileges are those that are inherent to the security level – namely, how escorted and unescorted temporary absences may be accessed, with women in minimum security having more ready access.

[36] Some institutions also have separate living units outside the perimeter fence of the institution that are available to minimum security women.

D. Offender Intake Assessment/OIA Process

[37] Section 30 of the *CCRA* requires that CSC assign each inmate a security classification. On admission to federal custody, CSC fulfills that obligation through the OIA process, which is described in CD 705. The OIA process is to be completed within 90 days following an offender's admission to federal custody. The purpose of the OIA process is to gather information about the

offender to assess and address their immediate and on-going needs, develop their correctional plan and determine their security classification and penitentiary placement.

[38] There are seven components to the OIA. The first is the "Preliminary Assessments and Post-Sentence Community Assessments". Prior to the offender's transfer to federal custody, a community parole officer meets with them in a provincial facility to gather available information and completes a Preliminary Assessment in accordance with CD 705-1. The Parole Officer will also complete the CRS. Together, the CRS and any available information will inform the offender's initial admission placement pending the completion of the OIA process, which is typically completed within 60 to 90 days of admission to the federal institution.

[39] The second is "Information Collection". As outlined in CD 705-2, CSC continues to collect relevant information regarding the offenders from the police, courts, remand centres, provincial and territorial correctional centres and the Crown Attorney.

[40] The third is "Immediate Needs Identification and Admissions Interviews". As outlined in CD 705-3, within 24 hours of an offender's arrival into federal custody, the offender is interviewed to review their needs, document additional needs and complete referrals to address those needs.

[41] The fourth is "Orientation". As outlined in CD 705-4, CSC provides the offender with an orientation of the various counselling, services, programs, advisors and officers available to them, as well as the case management process.

[42] The fifth is "Supplementary Intake Assessments". As outlined in CD 705-5, an offender may receive a number of additional assessments, such as mental health screening and assessment, psychological risk assessments, substance abuse assessments, educational assessments and an

Elder review (for those Indigenous offenders who have expressed an interest in following a healing path).

[43] Once the information from the first five stages is gathered together, CSC moves on to the sixth stage, Correctional Planning and Criminal Profile, which is addressed in CD 705-6. At this stage, the offender's Criminal Risk Index score is generated. The Criminal Risk Index is a research-based instrument used to assess static risk and guide offender intervention levels and is used to determine the level of correctional program intensity. The offender's parole officer prepares their correctional plan, which is a roadmap of their sentence that identifies dynamic factors, interventions to address their risk and needs, objectives for behaviour, participation in programs and court-ordered obligations, all with the goal of promoting rehabilitation and reintegration.

[44] In developing the correctional plan, information is gathered to: (a) identify criminal risk and risk management strategies using actuarial tools, assessment and professional judgment; (b) assess the offender's accountability, motivation, responsivity, engagement, reintegration potential and level of intervention; and (c) identify the offender's continuum of correctional intervention and sentence planning.

[45] The final stage is the "Security Classification and Penitentiary Placement", which is addressed in CD 705-7. A parole officer prepares an Assessment for Decision document explaining the recommended initial security level and penitentiary placement for the offender and summarizing the information gathered during the OIA process. The parole officer will administer the CRS (or review any CRS already conducted in a provincial facility and update it as required) based on the information obtained during the OIA process. The parole officer recommends a

security level based on the CRS and the parole officer's assessment of the offender's institutional adjustment, escape risk, public safety risk and the factors prescribed in section 18 of the *Regulations*. This assessment and recommendation is completed pursuant to Annex E of CD 705-7, which sets out a number of factors that a parole officer must consider when assessing an offender's institutional adjustment, security risk and escape risk ratings, as well as the indication of a rating of low, moderate or high risk in these areas. This includes the factors set out in section 17 of the *Regulations*, as well as a consideration of Indigenous social history factors.

[46] The evidence before the Court is that the CRS result is, in effect, the starting point for classification. Once it is completed, the clinical judgment of experienced and specialized staff is used to consider the CRS result and the other information and assessments made during the OIA process become important to determine the recommended security classification of the offender.

[47] In the case of Indigenous female offenders, the parole officer must consider Indigenous social history factors, as outlined on CD 702, including effects of the residential school system, sixties scoop into the adoption system, effects of the dislocation and dispossession of Inuit people, family or community history of suicide, family or community history of substance abuse, family or community history of victimization, family or community fragmentation, level or lack of formal education, level of connectivity with family/community, experience in the child welfare system, experience with poverty and loss of or struggle with cultural/spiritual identity. The parole officer must consider such factors in order to contextualize the index offence, identify alternative programming and support for Indigenous offenders and to provide a rationale for recommendations for culturally appropriate or restorative options.

[48] The final offender security level and penitentiary placement is thereafter generally made by the Warden of the institution. The evidence of Mr. Turi, the Warden of FVI, is that such determinations are made based on all available information gathered during the OIA process. While the Parole Officer summarizes the information in the Assessment for Decision document, the Warden will consider the offender's entire file, which may include their correctional plan, CRS, SFA, DFIA-R, Domain Motivation Level, Criminal Profile Report, Offender Accountability, Offender Motivation, Responsivity Factors, Offender Engagement, RP, Psychological/Psychiatric/Mental Health information, Offence Cycle and any other supplemental assessments, such as Elder Reviews or case management team observations gathered during the offender's incarceration.

[49] According to Warden Turi, the security classification decision is unique to each offender, based on a holistic assessment of the offender as an individual, her motivations, needs and risk posed. The ratings from the various tools (CRS, DFIA-R, SFA and RP) are not considered in isolation and, in general, no single assessment or instrument is more important or weighed more than any other.

[50] The initial security level decision is thereafter reviewed on a regular basis in accordance with CD 710-6. Subsequent security classification redeterminations may not necessarily take into consideration the CRS recommendation.

E. The Assessment Tools at Issue

(1) Custody Rating Scale/CRS

[51] The CRS is an assessment tool or instrument used by CSC commencing in 1991 to assist classification of offenders at intake on their level of public and institutional risk. It was designed to make the classification of inmates more objective and transparent.

[52] The CRS consists of an Institutional Adjustment subscale with five items (institutional incidents, escape history, street stability, alcohol/drug use and age at time of sentencing) and a Security Risk subscale with seven items (number of prior convictions, most severe outstanding charge, severity of current offence, sentence length, street stability, prior parole and/or mandatory supervision/statutory release and age at time of first federal admission).

[53] Each item is assigned a numerical score and then added together to generate the Institutional Risk score and the Public Safety score. Pre-determined cut-off values are set for minimum, medium and maximum security placement. The security level cut-off score for maximum security is 95 or greater on the Institutional Adjustment dimension, or 134 or greater on the Security Risk dimension. The security level cut-off score for medium security is 86-94 on the Institutional Adjustment dimension and 0-133 on the Security Risk dimension, or between 0-85 on the Institutional Adjustment dimension and 64-133 on the Security Risk dimension. The security level cut-off score for minimum security is 0-85 on the Institutional Adjustment dimension and 0-63 on the Security Risk dimension.

(2) Static Factors Assessment/SFA

[54] As part of the OIA process, CSC uses the SFA to assign a static factors rating to the offender's risk to reoffend. The SFA is a quantitative assessment of the offender's criminal record and is addressed in Annex D of CD 705-6. It assesses 137 static factors (i.e. historical facts that

cannot be changed) about the offender and her offence history. The parole officer sets a rating for level of intervention based on the offender's score that is either high, medium or low risk. The SFA results are integrated into the offender's correctional plan.

(3) Dynamic Factor Identification And Analysis-Revised/DFIA-R

[55] As part of the OIA process, CSC uses the DFIA-R to assign a dynamic factors rating to the offender's risk to reoffend. The DFIA-R identifies and prioritizes an offender's criminogenic needs according to seven dynamic risk areas (employment and education, marital/family, associates, substance abuse, community functioning, personal/emotional and attitudes) to focus correctional intervention on facts that, when appropriately addressed, reduce the likelihood of reoffending. It is addressed in detail in Annex E to CD 705-6.

[56] The DFIA-R report sets out a summary of the dynamic factor indicators identified, the parole officer's professional judgment on the need for improvement, the priority of each domain area and the offender's assessed motivation. The report provides a narrative (called a domain analysis) that considers each domain area, in order of assessed priority, identifies which indicators are present for the offender and explains the parole officer's findings.

[57] For Indigenous female offenders, the parole officer must explain in their report how Indigenous social history may have impacted each contributing dynamic factor and how different cultural and restorative options may meet a need area.

[58] The DFIA-R results are integrated into the offender's correctional plan.

(4) Reintegration Potential/RP

[59] RP is a point-in-time assessment of an offender's ability to reintegrate into the community and is addressed in CD 705-6. Offenders with "low" reintegration potential require institutional correctional interventions, while offenders with "high" reintegration potential should not normally require formal correctional intervention.

[60] This assessment is part of the offender's correctional plan and assists with sentence planning. Sentence planning identifies an offender's objectives and related significant events to support a reduced security classification, temporary absences, work releases and/or conditional release.

[61] For Indigenous female offenders, RP is a combination of the CRS recommendation, SFA rating and DFIA-R rating. If the parole officer disagrees with the calculated RP score, the parole officer has the discretion to adjust the assessed level if a clear rationale is documented in the correction plan.

F. The Predictive Validity of the CRS

[62] The parties filed extensive evidence on the predictive validity of the CRS (or lack thereof) for Indigenous female inmates in the form of expert opinion affidavits from Dr. Hart and Dr. Olver, fact affidavits from Dr. Motiuk and Dr. Hanson and numerous academic articles and reports.

[63] The Plaintiffs rely in large measure (but not exclusively) on a 2004 report prepared by Dr. Hanson and two colleagues at CSC (Dr. Bonta, Chief, Corrections Research and Ms. Yessine, Research Officer). The report states that the genesis for the report was the following:

> Recently, the reliability and validity of the CRS has been called into question especially with respect to its use with women. The

> criticisms have come from government agencies (e.g. Auditor General of Canada, 2003; the Canadian Human Rights Commission, 2003) and non-governmental associations (e.g., the Canadian Association of Elizabeth Fry Societies). In addition, academic researchers have now entered the debate raising concerns over the use of CRS to determine penitentiary placement for both Aboriginal and non-Aboriginal female offenders (e.g., Webster & Doob, 2004). Within the context of these criticisms, the Commissioner of CSC has requested an independent review by the Department on the validity of the CRS as it applies to Non-Aboriginal and Aboriginal women.

[64] In his affidavit, Dr. Hanson summarizes the conclusions of the 2004 report as follows:

> 11. In terms of scale development practices, the methods used to develop the CRS had both strengths and weaknesses. In terms of strengths, the scale used relatively objective criteria (e.g., age, current sentence length), which could be scored with high degree of reliability, that is, different raters would be likely to agree on how to score the items and arrive at the final score. In terms of weaknesses, the scale examined only a limited set of static, historical indicators. Another limitation was that it was developed on men in CSC, with no attention to special concerns of women, nor was there any evidence that the developers consulted with Indigenous groups or attempted to address the culturally specific concerns of Indigenous women.
>
> 12. In terms of predictive validity for women, many of the items of CRS had either no predictive accuracy or only very small relationships with the outcomes of interest (escapes, institutional rule violations). Consequently, the overall score was only weakly related to these negative outcomes for women within CSC. The CRS also appeared to be systemically biased against women of Indigenous heritage. To quote from our report:
>
> > In the 2002 study, 70.6% of Aboriginal women were rated as medium security compared to 42.8% of Non-Aboriginal women. This could be justified if, in fact, Aboriginal women were more likely than Non-Aboriginal women to escape and violate institutional rules. The 2002 study, however, suggests that opposite pattern. Compared to Non-Aboriginal women, Aboriginal women appear less likely to incur institutional infractions.

> 13. These findings indicate that CRS appeared to be systemically biased against women of Indigenous heritage. Indigenous women were, on average, given worse scores than non-Indigenous women, but showed fewer of the problems that the CRS was designed to predict. Consequently, decisions based on the CRS would result in Indigenous women being placed in higher security settings than necessary. Overall, we concluded the custody placement tool used by CSC at that time (i.e., the CRS) did not meet the highest standards for custody placement tools, and that continued research and development in this area should be a high priority.

[65] I will not summarize the balance of evidence that is before the Court on the issue of the predictive validity of the CRS for Indigenous female offenders as no determination need be made on this motion as to whether the tool lacks predictive validity for the class members. However, I note that the Defendant takes issue with the Plaintiffs' evidence regarding the import of the 2004 report and relies on other studies both before and after the 2004 report that the Defendant asserts broadly support the continued use of CRS for federally sentenced Indigenous women.

G. The Parties

[66] CSC is represented in this proceeding by the Attorney General of Canada.

[67] The Plaintiffs are the proposed representative plaintiffs, Martha Kahnapace and Aileen Michel.

(1) Ms. Kahnapace

[68] Ms. Kahnapace is an Indigenous woman of the Pasqua First Nation who was convicted of second-degree murder of her common-law partner in September 2007 and sentenced to a term of imprisonment for life without eligibility for parole for 10 years.

[69] While in provincial custody awaiting transfer to federal custody, a Preliminary Assessment Report was completed for Ms. Kahnapace on October 3, 2007 and the CRS was administered to Ms. Kahnapace on October 4, 2007 (Institutional Adjustment Rating of 22 and Security Risk Rating of 139), with the resulting CRS recommendation being maximum.

[70] On October 11, 2007, Ms. Kahnapace was admitted to FVI and accommodated in the Secure Unit.

[71] Following the completion of her offender intake assessment (which included the SFA, DFIA-R and RP), her case management team recommended that she be classified as medium, notwithstanding her CRS recommendation of maximum. As a result of Policy 107 that was in place at the time, when a Warden and case management team recommend an initial security classification other than maximum for an offender serving a life sentence for murder such as Ms. Kahnapace, the recommendation had to be sent to the Regional Deputy Commissioner [RDC]. On March 4, 2008, the RDC assessed Ms. Kahnapace's file and classified her security level as maximum, noting a number of factors, including the extremely violent nature of the offence, her lengthy history of intimate partner violence and her pervasive substance abuse issues.

[72] Ms. Kahnapace grieved her maximum security classification through the CSC grievance process and then to the Federal Court and Federal Court of Appeal. This Court ultimately dismissed her application for judicial review, finding that Policy 107 was not unlawful, her section 7 and 9 *Charter* rights had not been breached and her third-level grievance decision was not unreasonable. The Federal Court of Appeal dismissed her appeal as moot, as by the time it was heard she had been released from custody.

[73] In February 2010 and in accordance with CD 710-6 (which requires a security classification review to be completed at least once every two years for inmates classified at maximum or medium security), Ms. Kahnapace's security classification was reviewed and she was reclassified as medium and moved into FVI's Main Compound.

[74] In May 2010, Ms. Kahnapace's conviction was overturned and she was released from custody. Following a retrial, in June 2011, Ms. Kahnapace was again convicted of second-degree murder and given the same sentence.

[75] Again, while in provincial custody awaiting transfer to federal custody, a Preliminary Assessment Report was completed for Ms. Kahnapace and on July 5, 2011, the CRS was administered to Ms. Kahnapace (Institutional Adjustment Rating of 22 and Security Risk Rating of 142), resulting in a recommendation of maximum.

[76] On July 15, 2011, Ms. Kahnapace returned to FVI and was temporarily accommodated in maximum security. Her case management team completed an Assessment for Decision and recommended a security classification of medium. On August 22, 20211, the Warden classified Ms. Kahnapace as medium security, notwithstanding her CRS recommendation, and she was moved into FVI's Main Compound.

[77] Ms. Kahnapace's SFA, DFIA and RP ratings were reassessed in late August 2011 and included in her September 2011 correctional plan.

[78] Ms. Kahnapace appealed her second conviction and in June 2012, she was released on bail pending the results of her appeal. In January 2013, her appeal was granted and a retrial was ordered.

[79] In March 2014, Ms. Kahnapace was convicted of manslaughter and sentenced to time served.

[80] Ms. Kahnapace has not been in federal custody since June 2012.

(2) Ms. Michel

[81] Ms. Michel is an Indigenous woman of the Bridge River Indian Band who was convicted of second-degree murder on February 28, 2001 and sentenced to life imprisonment without eligibility for parole for six years. In November 2002, her conviction was amended to manslaughter.

[82] When she was initially incarcerated in 1999, she was placed at the Willington Youth Detention Centre and then subsequently moved to the Burnaby Correctional Centre for Women in 2002. She was thereafter transferred from provincial custody to FVI in March 2004.

[83] Ms. Michel was released on day parole in June 2006 to attend community treatment programs. Between 2006 and 2022, Ms. Michel spent the majority of the time on day parole, although there were intermittent suspensions and revocations of her parole for breaches of conditions. When her parole was suspended or revoked, she was held in provincial custody and then transferred to federal custody. On February 18, 2022, Ms. Michel was granted full parole and currently remains on full parole, with no further criminal charges.

[84] According to the documentation before the Court, the CRS was administered to Ms. Michel on six occasions – namely, February 18, 2003 (Institutional Adjustment Rating of 142 and Security Risk Rating of 205), July 7, 2008 (Institutional Adjustment Rating of 131 and Security Risk Rating

of 148), July 26, 2013 (Institutional Adjustment Rating of 67 and Security Risk Rating of 151), December 31, 2013 (Institutional Adjustment Rating of 67 and Security Risk Rating of 143), September 18, 2017 (Institutional Adjustment Rating of 51 and Security Risk Rating of 144) and November 14, 2018 (Institutional Adjustment Rating of 51 and Security Risk Rating of 144). On each occasion, the resulting CRS recommendation was maximum.

[85] However, despite her CRS recommendation, Ms. Michel never received a security classification of maximum and was never accommodated in a maximum security institution while in federal custody (as opposed to provincial custody). Rather, Ms. Michel's security classification was initially determined to be medium, was reduced to minimum in March of 2006 and thereafter fluctuated between minimum and medium until her ultimate release on full parole. While the Plaintiffs assert that Ms. Michel was repeatedly placed in maximum during her initial offender intake period, the Plaintiffs have not pointed the Court to any specific evidence of maximum security placements while in federal custody.

[86] The SFA and DFIA-R were both administered to Ms. Michel in March 2003. Her need for intervention was assessed as high and her reintegration potential was assessed as low. Her DFIA-R was later reassessed as medium for need for intervention and her reintegration potential was reassessed as high.

H. History of the Proceeding

[87] The Statement of Claim was issued on January 11, 2021. The original pleading sought to certify a class proceeding involving four classes covering various groups of Indigenous female inmates, female inmates, Indigenous inmates and more generally all inmates in medium or

maximum security, and was focused exclusively on CSC's use of the CRS. Ms. Kahnapace was the sole proposed representative plaintiff and Jane Doe was named as the only plaintiff in addition to Ms. Kahnapace.

[88] On June 2, 2021, the Plaintiffs filed an Amended Statement of Claim. The amendments: (a) added additional sections of the *CCRA* that the Plaintiffs assert have been breached by CSC; and (b) added declaratory relief seeking to invalidate any Commissioner's Directives requiring the use of the CRS.

[89] On June 3, 2021, the Court granted a motion by the Defendant to extend the date for delivery of the Statement of Defence until after determination of the certification motion.

[90] On February 14, 2022, the Court dismissed a motion by the Plaintiffs for production of various data sets of CRS scores for Indigenous and non-Indigenous female offenders, which motion arose in the context of a motion by the Plaintiffs for an interlocutory injunction to enjoin CSC from using the CRS (which motion ultimately did not proceed).

[91] On April 8, 2022, the Plaintiffs filed a Further Amended Statement of Claim. The amendments: (a) added allegations related to the SFA, DFIA-R and RP tools; (b) added a declaration that using all four tools on Indigenous inmates is contrary to section 79.1 of the *CCRA*; and (c) added injunctive relief to prevent CSC from using the CRS, SFA, DFIA-R and RP in respect of prospective class members.

[92] On September 9, 2022, the Plaintiffs filed the Third Amended Statement of Claim, which is the current pleading. The focus of the amendment was to remove Jane Doe and replace her with Ms. Michel and put Ms. Michel forward as a proposed representative plaintiff.

II. Analysis

A. *General Principles*

[93] The five requirements for certification of an action as a class proceeding are set out in Rule 334.16 of the *Federal Courts Rules* as follow:

1. The pleading must disclose a reasonable cause of action;

2. There must be an identifiable class of two or more persons;

3. The claims of the class members must raise common questions of law or fact;

4. A class proceeding must be the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

5. There must be a representative plaintiff who: (i) would fairly and adequately represent the interests of the class; (ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying the members of its progress; (iii) does not have an interest in conflict with the other class members regarding the common questions of law and fact; and (iv) has provided a summary of the agreement with legal counsel respecting fees and disbursements.

[94] The Federal Court of Appeal has noted that the criteria set out in Rule 334.16(1) are substantially similar to the class action certification criteria applied in Ontario and British

Columbia, with the result that the jurisprudence emanating from those jurisdictions is instructive [see *Canada (Attorney General) v Jost*, 2020 FCA 212 at para 23 (*Jost*)].

[95] The requirements of Rule 334.16(1) are conjunctive. As a consequence, if the Plaintiffs fail to meet any one of the five listed criteria, the certification motion must fail [see *Sivak v Canada*, 2012 FC 271; *Samson Cree Nation v Samson Cree Nation (Chief and Council)*, 2008 FC 1308 at para 35 (*Samson Cree Nation*)]. It is also important to note that, if the five requirements are all met, the Court has no overriding discretion to refuse certification [see *Manuge v Canada*, 2008 FC 624 at para 24].

[96] The burden of satisfying the requirements of Rule 334.16(1) is solely upon those seeking certification. While the role of the Court in managing class actions is to be active and flexible, this does not extend to permitting those seeking certification to "cooper up" their motion or to help them meet the substantive requirements of certification. The Court must remain a neutral arbiter of whether those requirements have been met [see *Buffalo v Samson Cree Nation*, 2010 FCA 165 at paras 12-13 (*Buffalo*); *Johnston v Canada*, 2021 FC 20 at para 44].

[97] Pursuant to Rule 334.16(2), the Court is to consider all relevant matters in making a determination as to whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether:

1. The questions of law or fact common to the class members predominate over any questions affecting only individual members;

2. A significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

3. The class proceeding would involve claims that are or have been the subject of any other proceeding;

4. Other means of resolving the claims are less practical or less efficient; and

5. The administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[98] As a general statement of the objectives of class action legislation, Chief Justice McLachlin (as she then was) provided the following explanation in *Hollick v Toronto (City)*, 2001 SCC 68 at para 15 (*Hollick*):

> The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. ... [Emphasis added].

[99] When interpreting class action legislation and applying it to a certification motion, the Court should construe the legislation generously in order to achieve its objectives of judicial economy, access to justice and behaviour modification [see *Condon v Canada*, 2015 FCA 159 at para 10].

[100] Other than the first requirement of Rule 334.16(1) - that the pleadings disclose a reasonable cause of action - the threshold for meeting the requirements for certification is the establishment of "some basis in fact" to support the certification order. The law is clear that the "some basis in fact" threshold is low. It does not require that the party seeking certification establish the certification requirements on a balance of probabilities. Indeed, this standard does not require that the Court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that, at the certification stage, the Court is ill-equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight [see *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 101-102 (*Pro-Sys*); *Gottfriedson v Canada*, 2015 FC 706 at para 24].

[101] That said, while a certification motion is not a merits-based screening intended to determine the actual viability and strength of the contemplated class action, it must nonetheless operate as a meaningful screening device and not be reduced to a mere formality [see *Pro-Sys, supra* at para 103; *Desjardins Financial Services Firm Inc v Asselin*, 2020 SCC 30 at para 74].

B. *First Requirement - Do the Pleadings Disclose a Reasonable Cause of Action?*

[102] The test applied to this requirement is the same as on a motion to strike pursuant to Rule 221(1)(a) of the *Federal Courts Rules* (other than in relation to the party that bears the burden of proof) – namely, whether it is plain and obvious that the pleading discloses no reasonable cause of action [see *Le Corre v Canada (Attorney General)*, 2005 FCA 127 at para 8 (*Le Corre*)].

[103] In making that assessment, the material facts pleaded must be taken as true, unless the allegations are based on assumption and speculation. If a statement of claim contains bare

assertions without material facts upon which to base those assertions, then it discloses no cause of action. However, if there is any doubt as to whether a cause of action can succeed, the matter should be left for a decision of the trial judge [see *Operation Dismantle Inc v The Queen*, [1985] 1 SCR 441 at paras 7-8, 27; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17].

[104] It is fundamental to the trial process, and a requirement of Rule 174 of the *Federal Courts Rules*, that the Plaintiffs' pleading contains a concise statement of the material facts on which the Plaintiffs rely to support their claims and the relief sought. Rule 181 further requires that every pleading contain particulars of every allegation contained therein.

[105] In order to disclose a reasonable cause of action, a statement of claim must plead each constituent element of every cause of action with sufficient particularity and each allegation must be supported by material facts. Pleadings play an important role in providing notice and defining the issues to be tried, so as to inform the defendant "who, when, where, how and what gave rise to its liability". 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. Viewing the pleadings as a whole and considering all the circumstances, the Court must ensure that the issues are defined with sufficient precision to make the proceedings "manageable and fair" [see *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paras 16-17, 19 (*Mancuso*); *Al Omani v Canada*, 2017 FC 786 at para 17; *Simon v Canada*, 2011 FCA 6 at para 18; *Enercorp Sand Solutions Inc v Specialized Desanders Inc*, 2018 FCA 215 at paras. 36-37 (*Enercorp*)].

[106] The Federal Court of Appeal recognized at paragraph 17 of *Mancuso, supra* that:

> The latter part of this requirement – sufficient material facts – is the foundation of a proper pleading. If a court allowed 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. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial. [Emphasis added]

[107] In essence, the pleading must define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair [see *Mancuso, supra* at para 18]. In deciding whether the pleadings are manageable and fair, the Court should consider the whole of the circumstances, including the relative knowledge and means of knowledge of the parties [see *Enercorp, supra* at para 36].

[108] Allegations of material facts cannot be simply constituted of bald assertions of conclusions, as this does not support a cause of action [see *Canada v John Doe*, 2016 FCA 191 at para 23].

[109] The requirement for adequate material facts to be pleaded is mandatory [see *Mancuso, supra* at para 20].

[110] The Federal Court of Appeal has confirmed that there are no separate rules of pleadings for *Charter* cases. The requirement of materials facts applies to pleadings of *Charter* infringement as it does to causes of action rooted in the common law. The substantive content of each *Charter* right has been clearly defined by the decisions of the Supreme Court of Canada and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provisions in question. This is not a technicality, but rather is essential to the proper presentation of *Charter* issues [see *Mancuso, supra* at para 25; *MacKay v Manitoba*, [1989] 2 SCR 357].

[111] The "reasonable cause of action" analysis is not to be conducted based on evidence submitted by the parties, but rather based solely by reference to the pleadings [see *Condon v Canada*, *supra* at paras 11-13; *Le Corre, supra* at paras 15-25].

[112] The Plaintiffs assert that they have advanced three reasonable causes of action: (i) negligence; (ii) breach of section 7 of the *Charter*; and (ii) breach of section 15 of the *Charter*.

[113] The Defendant asserts that the Third Amended Statement of Claim does not disclose any reasonable cause of action, as it fails to set out the requisite elements required to establish each cause of action and fails to plead material facts.

[114] While the Defendant asserted that the Plaintiffs had also pleaded a fourth cause of action – breach of section 79.1 of the *CCRA* – the Plaintiffs confirmed in their reply written representations that they are not asserting that statutory breaches are a separate cause of action. Rather, the Plaintiffs assert that the Defendant's various breaches of its statutory obligations: (a) support the existence of a duty of care and a breach of that duty for the purpose of the negligence claim; (b) support class members' section 7 claim to a violation of the rule of law as a principle of fundamental justice; and (c) support class members' section 15 claim by way of a knowing and deliberate violation of an ameliorative or restorative statutory provision designed to address historical inequity. As such, I need not consider any claim for breach of statute.

(1) Preliminary Issue

[115] Before turning to the three causes of action asserted by the Plaintiffs, I wish to address a significant concern that I raised with the parties at the hearing of the motion.

[116] It is apparent to the Court that the Plaintiffs' theory of its case has changed at various points in time following the commencement of this action up until the hearing of the certification motion. While the Plaintiffs have taken steps to amend their pleading three times (including after the delivery of responding certification motion materials), the current pleading – the Third Amended Statement of Claim – bears little resemblance to the case advanced by the Plaintiffs on the certification motion.

[117] This is problematic, as in considering this motion, the Court must view the Plaintiffs' pleading as it has been drafted and 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 the interests of the Defendant. Counsel for the Plaintiffs described the issues raised in the proposed class action as "inordinately" and "unusually" complex and stressed to the Court the seriousness of the claims being advanced. Yet, counsel for the Plaintiffs have demonstrated a disregard for the requirements to properly plead their action before coming to the Court seeking to have it certified. Complying with the Rules regarding pleadings is not trifling or optional, but rather is mandatory and essential [see *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 40; *Johnston v Canada*, 2021 FC 20 at para 20].

[118] The failure of the Plaintiffs to come before the Court on this motion with a pleading that aligns with the action that they seek to have certified is puzzling, given that the Plaintiffs amended their pleading a third time after the filing of the certification motion (wherein the Plaintiffs articulated their current theory of the action), after the filing of the Defendant's responding evidence on the motion and after completion of the cross-examinations. Thus, even though the

Plaintiffs were well aware of their theory of their case when they filed the Third Amended Statement of Claim, they failed to take any steps to amend their pleading to reflect that theory.

[119] An example of a fundamental problem with the Plaintiffs' pleading is the manner in which the classes and subclasses are pleaded. The classes pleaded in the Third Amended Pleading do not even remotely resemble the class and subclasses proposed on the certification motion. The Third Amended Statement of Claim proposes the following four classes and no subclasses:

1. Female Indigenous inmates in custody in medium security or maximum security federal correctional facilities whose security classification was determined by means of the CRS.

2. Female inmates in medium security or maximum security federal correctional facilities whose security classification was determined by means of the CRS.

3. Indigenous inmates in medium security or maximum security federal correctional facilities whose security classification was determined by means of the CRS.

4. Inmates in medium security or maximum security federal correctional facilities whose security classification was determined by means of the CRS.

[120] However, on the certification motion, the Plaintiffs now ask the Court to certify one class defined as "all female Indigenous inmates in the custody of the Correctional Service of Canada commencing January 1, 1991" and the following five subclasses:

1. All female Indigenous inmates in the custody of CSC whose incarceration commenced after January 1, 2005 [Subclass 1].

2. All female Indigenous inmates in the custody of CSC whose incarceration commenced after January 1, 2005 and who were placed in medium or maximum security facilities [Subclass 2].

3. All female Indigenous inmates whose incarceration commenced after January 1, 2005 and whose Custody Rating Scale scores were: (i) a Public Safety score above 63 and an Institutional Adjustment score of below 86; or (ii) a Public Safety score above 133 and an Institutional Adjustment score of below 95 [Subclass 3].

4. All female Indigenous inmates who were, as a matter of CSC discretion, placed in medium security despite receiving a CRS minimum recommendation or were placed in maximum security despite receiving a CRS medium recommendation [Subclass 4].

5. All female Indigenous inmates who were placed in medium or maximum security after June 21, 2019, which was the date of enactment of section 79.1 of the *CCRA* [Subclass 5].

[121] The differences between the classes/subclasses as pleaded versus as proposed on this motion are not immaterial:

1. The proposed class and subclasses no longer includes male inmates, no longer includes non-Indigenous inmates and no longer is limited to inmates in medium security or maximum security federal correctional facilities whose security classification was determined by means of the CRS.

2. Three different temporal limitations have been proposed – one for the class and two in relation to different subclasses.

3. Female Indigenous inmates in minimum security are now included in the class.

4. Subclass 3 depends on the female Indigenous inmates' specific threshold CRS scores for Public Safety and Institutional Adjustment, with no reference to such threshold scores anywhere in the pleading.

5. Subclass 4 is not focused on CSC's use of the CRS in assessing the inmate's security level, but rather on CSC's failure to use to the CRS score and instead exercise their discretion, with no reference to such exercise of discretion anywhere in the pleading.

[122] The Plaintiffs suggested at the hearing of the motion, without any authority, that there is no obligation on the Plaintiffs to define the class or the subclasses in their pleading and that in any event, the Defendant was on notice of the proposed class and subclasses when responding to the certification motion, so there is no resulting prejudice to the Defendant in the proposed class and subclasses not appearing in the pleading.

[123] I reject this assertion. I find that it is illogical to suggest that a plaintiff in a proposed class proceeding has no obligation to define the proposed classes and subclasses in their pleading, as that would undermine the important role played by pleadings. Moreover, the Court's consideration of the first criterion on a certification motion is to be based solely on the pleading itself. It would be highly problematic for the Court to consider the reasonableness of the various causes of action advanced by a plaintiff without a clear understanding of the class and subclass members that the plaintiff asserts that they represent and the required material facts relevant to class/subclass members vis-à-vis each asserted cause of action. As will be addressed in more detail below, this has proven to be problematic in this case, as there is an absence of required material facts for many of the subclasses. The absence of a defined class/subclass in the pleading is also problematic to the Court's consideration of the suitability of any proposed representative plaintiff. Accordingly, I find that the Plaintiffs' pleading is deficient in that it fails to define the class and subclasses now proposed for certification [see *CHS v Alberta (Director of Child Welfare*, 2006 ABQB 528 at paras 18-19, aff'd 2006 ABCA 355].

[124] As will be more fully addressed below, the Plaintiffs' failure to amend their pleading to properly describe the proposed class and subclasses is symptomatic of the Plaintiffs' general approach to the certification of this proceeding, which was accurately described by Justice Abrioux in *Monaco v Coquitlam (City)*, 2015 BCSC 2421 at para 71, as a "grant certification now and we'll cross that bridge when we get to it" approach. To proceed in such a manner would be to abdicate the Court's gate-keeping function, which I am not prepared to do.

[125] Plaintiffs coming to the Court seeking certification of a class proceeding should not do so until such time as their theory of their case is crystalized, their pleading is in order (i.e. aligns with

their theory of their case as articulated on the certification motion) and they have an adequate litigation plan that will enable any certified action to proceed in a manageable and fair manner. To proceed otherwise places an undue burden on a defendant and renders the certification motion unwieldy. As noted by the Federal Court of Appeal in *Buffalo*, *supra* at paragraph 14, "it is for those seeking certification under Rule 334.16, not the motions judge, to grapple with the substance of the matter and to meet the substantive certification requirements under Rule 334.16, including the requirement that they be capable of 'adequately represent[ing] the interests of the class'".

(2) Negligence

[126] A properly pleaded tort claim identifies the particular nominate tort alleged and sets out the material facts needed to satisfy the elements of that tort [see *Mancuso, supra* at para 26]. The tort of negligence requires the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and damages that flow from the breach of duty [see *Jost, supra* at para 61].

[127] The Plaintiffs assert that they have pleaded the tort of negligence. However, nowhere in the pleading do the words "negligence", "duty of care" or "breach of the duty of care" appear. While I appreciate that a plaintiff need not plead the particular label associated with a cause of action and that the Court's focus should be on whether the allegations of material facts in the claim, construed generously, give rise to the asserted cause of action [see *Paradis Honey Ltd v Canada*, 2015 FCA 89 at paras 113-114], I am not satisfied that the Plaintiffs have pleaded the required material facts for a claim of negligence. Moreover, the Plaintiffs have not attempted to demonstrate, with reference to their pleading, where the Court would find all of the necessary material facts to make out a properly pleaded negligence claim.

[128] The Plaintiffs have asserted that the various "statutory obligations and breaches of those statutory obligations support the existence of a duty of care and breach of that duty". However, I note that the Federal Court of Appeal has affirmed that a pleading that a defendant has not complied with a statutory obligation does not constitute a plea of negligence [see *Apotex Inc v Syntex Pharmaceuticals International Ltd*, 2005 FCA 424 at paras 15-16].

[129] Moreover, in the absence of a clear pleading of the constituent elements of the negligence claim, the Court is unable to assess whether the negligence being asserted is in the policy realm or the operational realm, and thus to consider whether it is plain and obvious that the negligence claim would fail on the basis of policy immunity.

[130] In the circumstances, I find that it is plain and obvious that the pleading discloses no cause of action based on negligence, yet alone a reasonable one.

(3) Section 7 Claim

[131] Section 7 of the *Charter* states:

> Everyone 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.
>
> Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[132] Section 7 of the *Charter* is breached by state action that deprives someone of the right to life, liberty or security of the person, contrary to a principle of fundamental justice [see *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 3]. Section 7 protects individual autonomy and dignity and encompasses control over one's personal dignity, free from state interference. It is engaged by state interference with an

individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering [see *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 64].

[133] In their motion materials, the Plaintiffs assert that CSC has deprived the Plaintiffs and class members of their section 7 rights by using the CRS to impose: (a) harsher sentences in a higher security setting; and (b) longer sentences resulting from lower rates of release and interim release measures and lower rates of access to rehabilitative programs. The Plaintiffs assert that it is not only the Plaintiffs' and class members' residual physical liberty that is at issue, but that CSC has violated their sense of individual autonomy as Indigenous persons by restricting access to Indigenous programs, Elder support, cultural events and culturally inflected escorted temporary absences and unescorted temporary absences that cultivate individual belonging and enhance autonomy and expand the field of personal choice by means of a sense of belonging to a respected cultural community.

[134] The Plaintiffs also assert that they rely on a breach of security of the person, as higher security settings may entail higher risk. The Plaintiffs assert that placing Indigenous women in security settings with more dangerous non-Indigenous women imposes risks on their physical well-being and that restriction and/or diminution of access to programs and supports prevents class members from taking action to protect themselves from such risks.

[135] The Plaintiffs assert that the deprivations are inconsistent with the principles of justice because "the use of CRS on Indigenous female and/or inmates is overbroad, arbitrary, discriminatory, grossly disproportionate and contrary to the rule of law". In that regard, the Plaintiffs assert that the suite of rights intended to implement and protect the right to liberty and

autonomy of the Plaintiffs and the class members (namely, sections 3, 4(c), 4(c.1), 4(c.2), 4(g), 24(1), 76, 77, 79, 80 and 81 of the *CRRA*) are violated.

[136] However, for the purpose of this criterion, the Court must assess whether there is a reasonable cause of action as pleaded in the Third Amended Statement of Claim and not as articulated in the Plaintiffs' motion materials. The relevant portions of the Plaintiffs' pleading addressing the section 7 claim (as well as, in part, the section 15 claim) are as follows:

> 4. CSC employees use the CRS to assign inmates to minimum, medium and maximum security facilities. Assignment to higher security level facilities adversely affects the living conditions of an inmate by decreasing access to sunlight, fresh air, physical exercise, social contact, rehabilitative programming, discretionary release and parole.
>
> …
>
> 5. The CRS overclassifies, and is known by CSC to overclassify, Indigenous inmates, resulting in their improper confinement in maximum and medium security facilities instead of medium and minimum security facilities. Overclassification of Indigenous inmates by CRS is, and is known by CSC to be, even more pronounced for Indigenous women. Overclassification results in deprivation of residual liberty and ineligibility for discretion release and parole. CSC's use of the CRS on Indigenous inmates results in longer and harsher prison sentences for Indigenous inmates.
>
> …
>
> 7. CSC has known since 2004 at the latest that the CRS overclassifies Indigenous inmates. An independent study commissioned in 2004 by the Commissioner of CSC from three experts, Jim Bonta, Karl Hanson and Annie Yessine (the "2004 Expert Study") concluded:
>
> > "The predictive validity of the Security Risk subscale for women, in general, is weak and non-existent for Aboriginal women";

> "[CRS] appears to be systemically biased against, and so may not be suitable for use within, the Aboriginal offender population";
>
> "Aboriginal women are rated as needing higher levels of security than Non-Aboriginal women…[yet]…[c]ompared to Non-Aboriginal women, Aboriginal women appear less likely to incur institutional infractions".

…

Statutory Breaches

…

21. CSC breaches s.4(g) of the *CCRA* because the CRS is a policy, program or practice that does not respect gender, ethnic, cultural, religious and linguistic differences and is not responsive to the special needs of women or Indigenous persons. Use of the CRS breaches ss.4(c), 4(c.1), 4(c.2) and 4(c.3), 76, 77, 79.1, 80 and 81 because it overclassifies inmates into more restrictive settings and restricts access to alternatives to custody in penitentiary, restricts access to correctional, educational, vocational training and volunteer opportunities, and fails to promote rehabilitation.

…

Section 7

29. Section 7 of the Charter provides that everyone has the right to liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

30. CSC deprived the Plaintiffs and Class Members of their security of the person, liberty and residual liberty as a result of harsher and longer sentences meted out to Class Members. The deprivations are inconsistent with the principles of fundamental justice because the use of CRS on Indigenous and/or female inmates is overbroad, arbitrary, discriminatory, grossly disproportionate and contrary to the rule of law as they infringed ss. 3, 4(c), 4(c.1), 4(c.2), 4(g), 21(1), 76, 77, 79, 80, 81 and 79.1 of the *CCRA*.

[137] With respect to the Plaintiffs, the material facts pleaded for the purpose of all causes of action are as follows:

> 14. The Plaintiff, Martha Kahnapace, is an Indigenous woman. She was convicted on September 27, 2007, of second degree murder. Her conviction was overturned by the British Columbia Court of Appeal on April 10, 2010 on the basis that the charge to the jury was erroneous. She was held in a maximum security facility in the interim, in part based on a policy that required 2 years to be served in maximum, and thereafter was held in a maximum security facility and then a medium security facility on the basis of her CRS score, which overclassified her risk. She was released from federal custody after her successful appeal pending a new trial.
>
> 15. The Plaintiff Ms. Kahnapace was again convicted of second degree murder on June 17, 2011. Her conviction was again overturned by the British Columbia Court of Appeal on January 22, 2013, on the basis that the trial judge had made errors in the jury charge that closely resembled the errors that resulted in an order for a new trial in 2010. In the interim between her second conviction and successful second appeal, the Plaintiff was held in a maximum and a medium security facility on the basis of her CRS score, which overclassified her risk. She was released from federal custody after her second successful appeal pending a new trial.
>
> 16. On her third trial, the Plaintiff Ms. Kahnapace was acquitted by a judge sitting alone without a jury of second degree murder and convicted of manslaughter. She was sentenced to time served. She had stabbed a male companion while intoxicated but had not intended to kill him.
>
> 17. The Plaintiff Aileen Michel is a former Indigenous inmate of federal correctional facilities who was overclassified by means of the CRS, SFA, DFIA-R and RP tests. She is proposed as a representative plaintiff in addition to Ms. Kahnapace. The CRS, SFA, DFIA-R and RP tests were administered on Ms. Michel on numerous occasions, including in 2002, 2008, 2013, 2015/16, 2018 and 2019, upon her admission and readmission into custody, and the test results were relied on by CSC throughout Ms. Michel's incarceration to her detriment and contrary to law as set out herein.

[138] While the Plaintiffs now assert a separate section 7 violation related to the autonomy of the Plaintiffs and class members and a security of the person violation due to safety risks associated with higher security settings, the pleading contains no such assertions. Rather, the pleading is

limited to a claim that the CRS deprives the Plaintiffs and class members of their security of the person, liberty and residual liberty as a result of harsher and longer sentences.

[139] With respect to the assertion that the CRS results in harsher and longer sentences, I am not satisfied that the Plaintiffs have pleaded the required material facts in relation to this assertion. While there is a general assertion in paragraph 4 of the pleading regarding the impact of higher security settings on offenders, the Plaintiffs have failed to plead the required material facts to link any harsher and longer sentences to the use of the CRS itself.

[140] Moreover, the Plaintiffs have pleaded no material facts regarding Ms. Kahnapace or Ms. Michel and how their sentences were either harsher or longer. For example, the pleading does not contain any material facts regarding attempts by either Ms. Kahnapace or Ms. Michel to obtain early release or escorted/unescorted temporary absences and if so, material facts linking any denial thereof due to their security classification. By way of further example, the pleading does not contain any material facts of any programming or Elder access sought by Ms. Kahnapace or Ms. Michel that was denied or limited due to their security classification. In the case of Ms. Michel, the pleading does not actually provide any particulars as to her level of security classification during her various periods of incarceration.

[141] By failing to provide the required material facts for the class as a whole and for the proposed representative plaintiffs, the Defendant is improperly required to speculate as to how the facts might be variously arranged to support the Plaintiffs' section 7 claim. This renders this aspect of the proceeding unmanageable and unfair.

[142] I note that in their written representations, the Plaintiffs propose numerous common issues related to violations of section 7, including in relation to Subclass 3 (although these common issues do not all appear in the amended notice of motion). For Subclass 3, the Plaintiffs ask that the Court certify as a common issue whether "the use of Public Safety score rather than solely the Institutional Adjustment score by CSC to classify and determine institutional placement infringe the individual right to liberty and security of the person under s.7 of the Charter of Rights and Freedoms, and is it contrary to the principles of fundamental justice of overbreadth and non-arbitrariness, non-discriminatory, gross disproportionality and the rule of law". This request highlights the problematic nature of the Plaintiffs' pleading, as referenced above. Subclass 3 appears nowhere in the pleading, nor do any material facts regarding the significance of the Public Safety and Institutional Adjustment scores to any security classification determination for the purpose of a consideration of any section 7 violation.

[143] Further, there are no material facts pleaded as to how the use of the CRS is inconsistent with the various principles of fundamental justice pleaded by the Plaintiffs (with the sole exception of the rule of law, which the Plaintiffs have linked to violations of specific statutory provisions). For example, in relation to an assertion of overbreadth, the Court must consider the purpose and the scope of the law to determine whether it goes too far by sweeping conduct into its ambit that bears no relation to its objective [see *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 112, 117]. No material facts have been pleaded regarding how the impugned conduct of CSC is not rationally connected to the various provisions of the *CCRA* at issue, including the purpose of the *CCRA*.

[144] Accordingly, I am satisfied that, as pleaded, it is plain and obvious that the pleading discloses no reasonable cause of action for breach of section 7 of the *Charter*.

(4) Section 15 Claim

[145] Section 15(1) of the *Charter* states:

> 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 race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[146] The two-step test for assessing a section 15(1) claim requires a plaintiff to demonstrate that the impugned law or state action (i) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (ii) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage [see ***R v Sharma***, 2022 SCC 39 at para 28 (***Sharma***)].

[147] The first step examines whether the impugned law or state action created or contributed to a disproportionate impact on the claimant group based on a protected ground. This necessarily entails drawing a comparison between the claimant group and other groups or the general population. In the first step, causation is a central issue – the claimant must establish a link or nexus between the impugned law or state action and the discriminatory impact [see *Sharma, supra* at paras 31, 44-49].

[148] The second step asks whether the impact imposes burdens or denies benefits in a manner that has the effect or reinforcing, perpetuating or exacerbating a disadvantage. The goal is to examine the impact of the harm caused to the affected group, which may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion [see *Sharma, supra* at paras 31, 52]. In *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 37, the Supreme Court of Canada explained that a negative impact or worsened situation was required:

> Whether the s.15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.

[149] To determine whether a distinction is discriminatory under the second step, the Court should also consider the broader legislative context [see *Sharma, supra* at para 56].

[150] In their written representations contained in their moving motion record, the Plaintiffs articulated their section 15 claim as follows:

> 45. The Plaintiff says CSC's security classification practices discriminate against Indigenous women in two distinct ways:
>
> a. Firstly, CSC by means of the CRS mechanically assigns risk scores and makes security classification and placement recommendations that result in overclassification of Indigenous women. By overclassification, the Plaintiff means <u>both</u> that Indigenous women are assigned on the basis of CRS recommendations to security settings that are unnecessarily high and do not correspond to their statistical risk of committing institutional infractions <u>and</u> that Indigenous women are assigned on the basis of CRS recommendations to security settings that are <u>relatively</u> higher than non-Indigenous women.

> b. Secondly, CSC exercises its discretion to override and underride CRS recommendations in a discriminatory way by means of test scores, recommendations and classifications produced by the SFA, DFIA-R and RP tests. The SFA, DFIA-R and RP tests mechanically assign risk scores in a way that deprives Indigenous inmates of the statutory benefit of s.79.1(2) of the *CCRA*, and further breaches the statutory sections intended to ameliorate the situation faced by Indigenous inmates in the correctional system, including ss.3, 4(c), 4(c.1), 4(c.2), 4(g), 24(1), 76, 77, 79, 80 and 81 of the *CCRA*.
>
> 46. The Plaintiff asserts that the following adverse effects arising from the mechanical application of CRS, SFA, DFIA-R and RP:
>
> a. Harsher conditions of imprisonment;
>
> b. Restricted access to programs and facilities, including restricted access to communities by means of Escorted Temporary Absences and Unescorted Temporary Absences;
>
> c. Longer sentences because it is more difficult to achieve parole from higher security settings (as reflected by elevated rates of statutory release for Indigenous inmates); and
>
> d. By perpetuation of false stereotypes of Indigenous inmates as presenting greater risk, being less manageable, being less trustworthy and requiring greater monitoring.

[151] Again, the Court must assess whether there is a reasonable cause of action based on the Third Amended Statement of Claim itself and not as articulated in the Plaintiffs' motion materials. The relevant portions of the Plaintiffs' pleading (in addition to paragraphs 4, 5, 7, 14, 15, 16, 17, and 21 of the pleading as set out above) are as follows:

> **Static Factor Assessment, Dynamic Factor Identification and Analysis-Revised and Reintegration Potential Tests**
>
> 13.1 The Static Factor Assessment ("SFA") test, Dynamic Factor Identification and Analysis-Revised ("DFIA-R") test and the Reintegration Potential ("RP") test are standardized mechanical scoring tests applied to each inmate by CSC. The tests include and

rely on factors listed under s.79.1(1) of the *CCRA* to generate scores. The scores on the SFA, DFIA-R and RP influence the CSC inmate classification decision.

13.2 The higher the inmate's score on the SFA, DFIA-R and RP tests, the greater the elevation of their risk assessment. Higher risk elevation tends to produce higher security classification, higher security placement, greater restrictions on liberty, programs and community access for inmates, and ultimately increases the duration of their incarceration.

13.2 The SFA, DFIA-R and RP tests create an anti-*Gladue* effect, such that the greater the presence of colonial and post-colonial oppression, the higher the inmate's risk profile and the more lengthy and harsh their time in custody. This effect is the opposite of the legally intended effect. CSC is aware of this anti-*Gladue* effect and is aware that it is breaching s.79.1 of the *CCRA* on an ongoing basis but its use of the SFA, DFIA-R, RP and CRS tests on Indigenous inmates continues unabated.

…

Section 15

26. Section 15 of the *Canadian Charter of Rights and Freedoms* provides that every person is equal before and under the law and has a right to the equal protection and benefit of the law without discrimination based on race, ancestry, sex or gender, and in particular have the right not to be discriminated against on the basis of being Indigenous and/or women.

27. As set out in this Statement of Claim, the s.15 *Charter* rights of the Plaintiffs and Class Members who are Indigenous and/or female have been breached. Class Members were deprived of liberty and residual liberty; their sentences were longer and harsher because they were Indigenous and/or women, and CSC knew it and imposed those longer and harsher sentences consciously, deliberately and with malice.

28. Discriminatory treatment meted out to the Plaintiffs and Class Members created substantive inequality and perpetuated prejudice and fostered the stereotype that Indigenous offenders are more dangerous than non-indigenous offenders and deserve harsher and longer prison sentences.

[152] Based on the Plaintiffs' pleading, I find that the Plaintiffs have asserted that the use of the CRS, SFA, DFIA-R and RP in determining security classifications discriminated against female Indigenous inmates, as compared to non-Indigenous female inmates by: (a) depriving them of liberty and residual liberty; (b) resulting in longer and harsher sentences; and (c) perpetuating prejudice and fostering the stereotype that Indigenous female offenders are more dangerous than non-Indigenous female inmates.

[153] As noted above, causation is a central element to the first step of any section 15 claim, such that a claimant must establish a link or nexus between the impugned law or state action and the discriminatory impact. However, in this case, the Plaintiffs have not pleaded the necessary material facts as to how the CRS or other tools, which are simply one of many factors taken into account as part of the security classification determination, actually overclassify Indigenous female offenders, nor how they cause the discrimination that is alleged. I find that the pleading is replete with conclusory statements, rather than the necessary material facts, which is fatal to the section 15 claim. As with the section 7 claim, the deficiencies in the pleading render the proceeding unmanageable and unfair, as the Defendant must speculate as to how the Plaintiffs will advance the section 15 claim to trial. The Plaintiffs acknowledge that their claim is unusually complex, yet this complexity is not reflected in the pleading.

[154] Moreover, like with the section 7 claim, I find that the Plaintiffs have failed to plead the required material facts to link any harsher and longer sentences to the use of the CRS or the SFA, DFIA-R and RP tools, nor any material facts regarding how Ms. Kahnapace's or Ms. Michel's sentences were either harsher or longer. Similarly, in relation to Subclass 3, the pleading fails to contain the necessary material facts for the Court to consider as a common issue whether, as

proposed by the Plaintiffs, it was contrary to section 15 for CSC to use the Public Safety score rather than solely the Institutional Adjustment score to classify and determine institutional placements for class members.

[155] In relation to Subclass 4, there is no basis in the pleading for the Court to consider as a common issue whether, as proposed by the Plaintiffs, discretionary increases in security placements discriminated against Subclass 4 members contrary to section 15. The Third Amended Statement of Claim does not plead any material facts as to the use of scores, recommendations and classifications produced by the SFA, DFIA-R and RP tests to override or underride any CRS recommendation for class members, nor to any exercise of discretion by CSC to not follow the CRS recommendation in making a security classification decision.

[156] With respect to any anti-*Gladue* effect created by the SFA, DFIA-R and RP tests, it is not entirely clear to the Court how this is relevant to the Plaintiffs' section 15 claim, but in any event, no material facts have been pleaded regarding any *Gladue* factors relevant to Ms. Kahnapace or Ms. Michel and how CSC failed to incorporate any such factors in its decision-making regarding their security classification so as to result in discrimination contrary to section 15.

[157] Accordingly, I am satisfied that, as pleaded, it is plain and obvious that the pleading discloses no reasonable cause of action for breach of section 15 of the *Charter*.

[158] In light of my determinations above, I find that the Plaintiffs have not satisfied the reasonable cause of action requirement for certification.

(5) Leave to Amend

[159] The Plaintiffs have argued that, in the event that the Court finds that their pleading is in any way deficient, that the Court should nonetheless certify the proceeding and thereafter permit the Plaintiffs to remedy their pleading by way of further amendments. In the alternative, the Plaintiffs propose that the Court should certify the proceeding subject to satisfactory amendment to the Plaintiffs' pleading. In the further alternative, the Plaintiffs propose that the Court should deny the certification motion but permit the Plaintiffs to bring a second motion for certification, based largely on the materials already before the Court.

[160] The Plaintiffs' first two proposals are in keeping with their general approach to this proceeding that would have the Court abdicate its gate-keeping function and certify a deficient proceeding. These proposals are unacceptable.

[161] The sole proposal that I will entertain is whether I should dismiss the motion without prejudice to the right of the Plaintiffs to re-apply for certification once their pleading has been properly amended. I am satisfied that at least some of the deficiencies in the Plaintiffs' pleading could be remedied by way of amendment. In that regard, the Plaintiffs did articulate additional material facts at the hearing of the motion or in their motion materials that could be used to support their causes of action. However, the motion for certification must fail for reasons beyond those related to the Plaintiffs' pleading itself. As such, no purpose would be served by granting the Plaintiffs leave to amend their pleadings and to thereafter reapply for certification.

C. *Second Requirement - Is There an Identifiable Class of Two or More Persons?*

[162] Rule 334.16(1)(b) requires the Court to consider whether there is some basis in fact to conclude there is an identifiable class of two or more persons. The Rule 334.16(1)(b) requirement

also entails identifying an appropriate definition for the proposed class. As explained by the Supreme Court in *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 at paragraph 57:

> I agree with the courts that have found that the purpose of the class definition is to (i) identify those persons who have a potential claim for relief against the defendants; (ii) define the parameters of the lawsuit so as to identify those persons who are bound by its result; (iii) describe who is entitled to notice of the action (Lau v. Bayview Landmark Inc. (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at paras. 26 and 30; Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. (Gen. Div.)), at para. 10; Eizenga et al., at $3.31). Dutton states that "[i]t is necessary . . . that any particular person's claim to membership in the class be determinable by stated, objective criteria" (para. 38). According to Eizenga et al., "[t]he general principle is that the class must simply be defined in a way that will allow for a later determination of class membership" (§3.33).

[163] With respect to the requirement of an “identifiable class”, all that is required is some basis in fact supporting an objective class definition that bears a rational connection to the common issues and that is not dependent on the outcome of the litigation [see *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 69 (*Wenham*); *Western Canada Shopping Centres Inc v Dutton*, 2011 SCC 46 at para 38 (*Dutton*)]. The class must not be unnecessarily broad or over-inclusive [see *Paradis Honey Ltd v Canada*, 2017 FC 199 at para 24]. Changing the definition of a class at a hearing or developing a class definition is at the discretion of the Court [see *Buffalo*, *supra* at para 15].

[164] For the purpose of considering this requirement, I will use the class and five subclasses articulated in the Plaintiffs’ motion materials (and as set out in paragraph 120 above), despite them not properly having been pleaded.

[165] There is no dispute between the parties that there are at least two persons for each of the class and five subclasses. What remains in dispute is the definitions of the class and subclasses, which the Defendant asserts are, in general, overly broad. The Defendant also asserts that, given the individualistic nature of the security classification process, the definitions are also flawed as they cannot be rationally connected to issues that are capable of being heard on a common basis. I will address the Defendant's concern regarding overbreadth. The Defendant's second concern, however, is best dealt with in the third requirement below.

(1) The Class

[166] The Plaintiffs acknowledge that the definition of the class should be amended to "all female Indigenous inmates in the custody of CSC whose incarceration commenced after January 1, 2005 in respect of whom the CRS was administered as part of the offender intake assessment process". By adding this language, it similarly ensures that all members of the subclasses were individuals subject to evaluation by the CRS. This remedies one of the Defendant's objections.

[167] The Defendant also asserts that the defined class includes claims that are time-barred, as the main class stretches back more than three decades. Depending upon the applicable limitation period, which could be either two years for certain provinces or six years if the action arose "otherwise than in a province", the Defendant proposes that the following subclasses should be defined with reference to associated common questions to address limitations issues:

1. Female Indigenous offenders who had the CRS administered to them more than two years or, alternatively, six years prior to the filing of the Plaintiffs' Statement of Claim on January 11, 2021; and

2. Female Indigenous offenders who had the CRS administered to them less than two years or alternatively, less than six years prior to the filing of the Plaintiffs' Statement of Claim.

[168] At the hearing of the motion, counsel for the Plaintiffs advised that he agreed to the creation of these subclasses to address any limitation issues, but stressed that given the lack of visibility into CSC's decision-making process, it is unlikely that any claims would be limitation barred due to the application of the discoverability principle. Given the Plaintiffs' agreement, had I been prepared to certify this proceeding, I would have added the Defendant's proposed subclasses.

(2) Subclasses

[169] A concern that was raised at the hearing regarding Subclasses 1, 2 and 3 is that they are each focused on the date of the commencement of the class member's incarceration, as opposed to when the CRS was administered on them. In the case of Ms. Michel, this is problematic as her incarceration began prior to January 1, 2005, but she had the CRS administered on her after January 1, 2005. As such, the parties agree that the definition of each subclass would need to be modified to focus on the administration of the CRS after January 1, 2005, rather than on the date of commencement of incarceration.

[170] The Defendant asserts that Subclass 1 is overly broad as it includes inmates who were not over-classified as they were placed in minimum security and thus did not suffer from any alleged harm. Although the Plaintiffs did not specifically address this assertion at the hearing, I understand them to say that harm caused by the perpetuation of stereotypes applies to such inmates, even if

the resulting security classification following the administration of the CRS is minimum security. Leaving aside the deficiencies in the Plaintiffs' pleading regarding this cause of action, I am satisfied that this subclass could be certified even though they may ultimately have no or minimal financial recovery.

[171] The Defendant asserts that while Subclass 2 is identifiable through objective criteria, it is not rationally connected to a truly common issue as the subclass members' security classifications were the result of discretionary decision-making and the CRS was not determinative of their respective placements. As such, the Defendant asserts that this subclass is not connected to a common issue. The Defendant raised similar arguments regarding Subclasses 3 and 4. These arguments are tied into the third requirement for certification and will be addressed there.

[172] The Defendant asserts that Subclass 5 is not a proper subclass, but is rather a new class altogether, as it is not focused on the administration of the CRS but rather other tools (the SFA, DFIA-R and RP tools). I agree with the Defendant. Had I been prepared to certify this proceeding, I would have created a separate class for this proposed subclass. Moreover, the Defendant asserts that Subclass 5 is not rationally connected to a common issue as a class cannot be denied the protection of section 79.1 of the *CCRA* on a global basis when the assessment itself is individualistic. Again, this argument is tied into the third requirement for certification and will be addressed there.

D. *Third Requirement - Are There Common Questions of Law or Fact?*

[173] Rule 334.16(1)(c) obligates the Plaintiffs to demonstrate some basis in fact for the claims of the class members raising common questions of law or fact, regardless of whether those common questions predominate over questions affecting only individual members.

[174] In *Dutton*, *supra*, the Supreme Court of Canada addressed how to consider the commonality question, stating that the underlying question is whether allowing the action to proceed as a class action will avoid duplication of fact-finding or legal analysis. Chief Justice McLachlin directed the following approach to the commonality question (at paras 39-40), which was again endorsed by the Supreme Court of Canada in *Pro-Sys*, *supra* at para 108:

1. The commonality question should be approached purposively.

2. An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.

3. It is not essential that the class members be identically situated vis-à-vis the opposing party.

4. It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

5. Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[175] Even a significant level of difference among class members does not preclude a finding of commonality. If ultimately certified and material differences emerge, this Court can deal with them when the time comes [see *Dutton, supra* at para 54].

[176] Rule 334.18 describes factors which cannot by themselves, either singly or combined with the other factors listed, provide a sufficient basis to decline certification. These factors are: (i) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact; (ii) the relief claimed relates to separate contracts involving different class members; (iii) different remedies are sought for different class members; (iv) the precise number of class members or the identity of each class member is not known; or (v) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members. However, by using the word "solely", the provision suggests that these factors may be relevant considerations on a motion for certification, provided the overall conclusion underlying a potential refusal is based on other concerns as well [see *Lin v Airbnb, Inc*, 2019 FC 1563 at para 22; *Kenney v Canada (Attorney General)*, 2016 FC 367 at para 17 (*Kenney*)].

[177] Certification should be refused where numerous individual issues overwhelm common issues and where the issues are intrinsically individualistic. A common issue cannot be dependent upon findings of fact that have to be made with respect to each individual claimant [see *Kenney, supra* at para 37].

[178] Notwithstanding that I have found that the Plaintiffs have not pleaded any reasonable causes of action, I have considered the proposed common questions assuming that the Plaintiffs could remedy their pleading by way of amendments.

[179] The Plaintiffs' proposed common questions for the class and subclasses are set out in Schedule "A" hereto. There are numerous shortcomings with the manner in which the individual proposed common questions are drafted. However, I will not address them given my overarching concern, set out below. I would also note that it is unhelpful to the Plaintiffs' case that the Plaintiffs provided very few submissions at the hearing regarding this overarching concern, which was clearly set out in the Defendant's motion record and warranted a detailed response from the Plaintiffs.

[180] To be appropriate for certification as a class action, common issues require precise definition for inclusion in the certification order and are usually framed in the form of questions to be answered in the course of the litigation [see *Samson Cree Nation, supra* at para 89; *Jost, supra* at para 87]. The Plaintiffs did properly frame their common issues as questions. However, it is the precision that is lacking, coupled by the fact that the common questions are ultimately intrinsically individualistic.

[181] The Plaintiffs common questions improperly presume that the CRS is flawed and has no predictive validity for Indigenous female offenders. However, any class proceeding would have to start with an examination of whether the CRS actually has predictive validity for Indigenous female offenders. It would appear that the Plaintiffs may have tweaked to the flaw in the framing of their common issues, as in their reply written representations, the Plaintiffs include an additional set of proposed common questions as set out in Schedule "B" hereto, at least one of which raises this threshold issue. However, the introduction of any additional common questions in reply is improper [see *Deegan v Canada (Attorney General)*, 2019 FC 960 at para 121].

[182] While not properly before the Court, I accept that the question of whether the CRS has predictive validity for Indigenous female offenders would be common to all class members. However, the determination of that question will not advance the claims of the class members because the common questions posed by the Plaintiffs require individualized determinations.

[183] As detailed above, the CRS recommendation is just one piece of information before the Warden when making a determination regarding the offender's security classification and penitentiary placement. The CRS recommendation does not dictate an offender's security classification. Rather, the security classification is decided by the Warden after a review of all of the information gathered during the OIA process. It is a multifactorial and individualized process involving numerous assessments and pieces of information, the application of professional judgment and the exercise of the Warden's discretion. As such, it is not possible to make a determination on a class-wide basis as to the role that CRS played in each offender's security classification. Rather, each classification decision would have to be considered individually, based on the evidence that was before the Warden when the decision was made. A finding that one class member was overclassified as a result of the Warden's reliance on the CRS recommendation will not found a similar finding for another class member, as each security classification decision is dependant on a multitude of variable circumstances unique to each class members.

[184] For example, in the case of Ms. Kahnapace's first security classification determination, the evidence before the Court is that her Assessment for Decision document was four pages in length and included the following factors: Ms. Kahnapace's reflections on her behaviour since incarceration both in provincial and federal custody, her motivation with respect to programming, insight and accountability for her index offence, details about her breaches of parole conditions

while she was on remand, her criminal history, home environment, history of substance abuse, propensity to be involved in abusive relationships, her understanding of the role violence played in her past relationships, her Indigenous social history, her level of schooling and her desire to continue her education, and her children and family relationships. The RDC's decision provides a three-page rationale for why she disagreed with the recommendation of medium security and concluded that maximum security was appropriate on the basis of Ms. Kahnapace's extremely violent offence and violent history as reviewed in her psychological assessment, lengthy history of intimate partner violence, history of extensive substance abuse, inability to abide by release conditions, and her lack of insight and attitude towards her index offence. Policy 107, recommending those serving life sentences for murder be placed in maximum for the first two years of their sentence, was also in place at the relevant time and thus had an impact on this initial security classification decision.

[185] For her second security classification decision, Ms. Kahnapace again had a CRS recommendation of maximum, a medium rating for static factors, but now she had a high rating for dynamic factors and medium for RP. Policy 107 no longer applied to her. Her second Assessment for Decision is six pages long and, in recommending medium security notwithstanding her CRS maximum security recommendation, considered factors such as her institutional conduct, performance and behaviour over the last two years that she was in custody at FVI, instances of her demonstrating rude and disrespectful behaviour, institutional charges, engagement with her correctional plan (progress in treatment programs, therapy, schooling, etc.), issues with visits, and behaviour while out on bail.

[186] By way of further example, in Ms. Michel's 2017 Assessment for Decision, her case management team noted the following factors in recommending that she be classified as medium security: the circumstances of the violation of parole that led to Ms. Michel's return to custody, improvements in her maturity and progress during her time in custody, progress with her correctional plan, her community history including instances where she had breached day parole conditions or had been unlawfully at large, and details of her most recent suspension. The decision notes that "her risk in the community was assessed as unmanageable" and recommended her risk to public safety be increased from low to moderate. There is detailed consideration of her Indigenous social history, including the effects of the residential school system and abuse. The Warden concurred with this decision and classified Ms. Michel as medium security.

[187] Each of the aforementioned examples demonstrates how each security classification decision would be dependant on a multitude of variable circumstances unique to each class member.

[188] In the event that a determination were made that an offender was overclassified and that the CRS played a material role in that overclassification, I find that the issue of whether or not the offender had a harsher and longer sentence would also require an individualized determination. A finding of a *Charter* breach for one class member will not found a similar finding for another class member due to the uniqueness of their respective circumstances. The *Charter* claims are bound to raise individual issues, the resolution of which will require justification advanced for any particular action taken with respect to an individual class member.

[189] For example, in the case of Ms. Kahnapace, there is no evidence that she ever applied for any form of parole or would have been eligible to do so if she were in a lower security level. This

is not necessarily surprising given that she was in and out of federal custody repeatedly during the relevant period due to her successful appeals. The individual circumstances of her case would need to be examined to determine if her sentence was in fact longer due to her security classification. In the case of Ms. Michel, she was repeatedly granted forms of parole. Whether she would have had greater access to parole had she had a lower security classification would have to be assessed based on her unique circumstances. That said, the evidence before the Court is that Ms. Michel's parole decisions considered a large number of factors beyond her security classification, including her repeated parole violations.

[190] I find that the British Columbia Court of Appeal's analysis in *Thorburn v British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 is applicable to the circumstances of this case. In *Thorburn*, the representative plaintiff had been arrested at a protest and strip-searched in accordance with a specific policy. The plaintiff brought a class proceeding on behalf of those persons who were not remanded into pre-trial custody at the jail but who were subjected to routine strip searches. The motion judge dismissed the certification and the Court of Appeal upheld the decision. At paragraphs 41 through 42, the Court of Appeal stated:

> [41] As the litigation progressed it became apparent that the appellants could not rely merely on their claim that the policy for strip searching all new arrivals (with the exception of the SIPPS and Bylaw offenders) was unreasonable in order to establish a cause of action for the proposed class members. While a warrantless search is presumptively unreasonable, a *Charter* right is individual in nature. Individual assessments would be necessary to determine if reasonable grounds existed (based on the objectively-justifiable subjective belief of the arresting officer or staff member conducting the search) for the arrest and the search incidental to the arrest of each class member, and whether the manner of the search was reasonable in all of the circumstances unique to each proposed class member. On the basis of *Golden*, those circumstances would include a consideration of the likelihood that a detainee might be

> remanded into custody and thereby be mingling with the prison population. Each of these legal and factual determinations would require a consideration of the multifarious circumstances of each class member (e.g., the reason for the arrest, any prior criminal record or acts of violence and/or possession of weapons, and the extent of the possibility he or she might be remanded into custody). An unreasonable policy alone could not provide the foundation for determining each class member's cause of action of an unreasonable search; only an individual assessment of the relevant circumstances unique to each class member would allow a judge to determine if a cause of action had been established.
>
> [42] Both the initial Common Issues and the Supplementary Common Issues set out broadly-framed issues that include: (i) elements of the well-established legal tests for an unlawful search; (ii) settled law regarding the shift in onus for establishing a s. 8 *Charter* breach, (iii) the principles for awarding *Charter* damages (from *Ward);* and (iv) the availability of statutory defences (under the former and current legislation) and the common law defences (from *Golden* and the common law power of search incidental to arrest). The resolution of these "common issues" in practical terms resolves no "common" element of each member's cause of action (an unlawful search), as each of the elements of the cause of action (reasonable grounds for arrest, search incidental to arrest, reasonableness of the manner of the search including the likelihood of a member being placed into the prison population, and the appropriateness of *Charter* damages) requires individual findings specific to the proposed class member. Accordingly, even if the answers to the "common issues" could be said to clarify the questions they pose, they would not advance the litigation in any meaningful way as they would not avoid the duplication that would be necessary for the individual fact finding and legal analysis of each class member's claim. In other words, a finding of a s. 8 *Charter* violation as a result of an unreasonable search of one class member will not found a similar finding for another class member as a finding of an unreasonable search is dependent on a multitude of variable circumstances unique to each class member.

[191] A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each class member [see *Williams v Mutual Life Assurance Co of Canada,* [2000] OJ No 3821, 51 OR (3d) 54 at para 39 (ONSC), aff'd [2001] OJ No 4952, 17 CPC (5th) 103 (Ont Div Ct), aff'd [2003] OJ No 1160 at 1161 (ONCA); *Fehringer v Sun Media Corp,* [2002] OJ No

4110, 27 CPC (5th) 155 (ONSC), aff'd [2003] OJ No 3918 (Ont Div Ct]. I find that that is the case with respect to the common issues raised regarding the CRS and any associated *Charter* claims. The same holds true for the negligence claim (had it been pleaded), as it is not possible to deal with the negligence claim (which has not been characterized as a systemic negligence claim) on a class-wide basis when it would depend on individual, fact-based security classification decisions for each class member.

[192] With respect to Subclass 4, which involves the exercise of discretion to override the CRS recommendation and place the offender in a higher security class, I similarly find that the issues related thereto also intrinsically individualistic as they, by definition, involve individual exercises of the Warden's discretion based on the factual circumstances of the offender.

[193] With respect to the proposed common issues for Subclass 5 related to the use of the CRS, SFA, DFIA-R and RP tools in contravention of section 79.1 of the *CCRA*, I find that the proposed common issues cannot be considered divorced from their application to individual offenders, as the role that the outcome of any of these tools played in the ultimate security classification, together with the role that Indigenous social history factors played in that decision, are inherently individualistic and cannot be determined on a class-wide basis.

[194] Where questions relating to damages are proposed as common issues (which is the case here), the Plaintiffs must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis [see *Chadha v Bayer Inc*, [2003] OJ No 27, 63 OR (3d) 22 at para 52 (ONCA), leave to appeal dismissed [2003] SCCA No 106; *578115 Ontario Inc (cob McKee's Carpet Zone) v Sears Canada Inc*., 2010 ONSC 4571 at para 43]. The Plaintiffs have not even attempted to do so here.

[195] In their reply written representations, the Plaintiffs raised the argument that the CRS tool plays a greater role – if not a solo role – in a Warden's determination of the security classification for an offender at the time of the offender's initial arrival at a federal institution and before the OIA process is completed. The Third Amended Statement of Claim pleads no distinction so as to differentiate security classification decisions made upon admission to a federal institution versus at completion of the OIA process, nor did the Plaintiffs raise this distinction in their moving motion records. It is improper for the Plaintiffs to raise this issue for the first time in their reply written representations, as it deprives the Defendant of an opportunity to fully respond thereto both in terms of evidence and submissions. As such, I will not consider the submissions made by the Plaintiffs in this regard.

[196] Accordingly, I find that the Plaintiffs have not met this third requirement for certification.

E. ***Fourth Requirement - Is a Class Proceeding the Preferable Procedure?***

[197] The next requirement is that a class proceeding be the preferable procedure for the just and efficient resolution of the common questions. In assessing this requirement, the Court must consider all relevant matters, including those expressly set out in Rule 334.16(2).

[198] Preferability must be examined in reference to the three principal aims of the class action regime – namely, judicial economy, access to justice and behaviour modification [see *Pro-Sys*, *supra* at para 137].

[199] In comparing possible alternatives with the proposed class proceeding, it is important to adopt a practical cost-benefit approach to this procedural issue and to consider the impact of a class proceeding on class members, the defendant and the Court [see *Hollick*, *supra* at para 29].

[200] The difficulties faced by a defendant simply by virtue of having to respond to common and individual issues do not make a class proceeding unfair, inefficient or unmanageable if those issues will have to be dealt with by the defendant one way or another [see *Amyotrophic Lateral Sclerosis Society of Essex County v Windsor (City)*, 2015 ONCA 572 at para 65 (*Amyotrophic*)].

[201] The alternative proposed by the parties is individual actions by class members. The Plaintiffs assert that individual actions are not preferable as they would place an undue burden on the Court or alternatively, would not be brought at all (thus depriving the class members of a remedy) as the cost of litigation would be beyond the means of the class members and disproportionate to the amount of recovery available to an individual class member. The Plaintiffs assert that distributing the cost of litigation across the class would therefore promote access to justice.

[202] The Plaintiffs further assert that a class proceeding will promote behaviour modification on the part of the CSC, as the Plaintiffs assert that CSC's behaviour cannot be expected to be changed in the absence of a finding from this Court.

[203] Moreover, the Plaintiffs assert that the vulnerability of the class members (as Indigenous women who have been incarcerated in federal institutions) makes evident the preferability of a class proceeding.

[204] Notwithstanding the Plaintiffs' submissions, I am not satisfied that a class proceeding is the preferable procedure. A class proceeding would not meet the judicial economy objective given the need for an individualized assessment of each offender's claim. The creation of efficiencies and economies of scale by the class-wide determination of common issues will simply not occur

given the individualized determinations that will need to be made on issues of liability, causation and loss. To the extent that there would be any common issues that could be determined on a class-wide basis (such as whether the CRS lacks predictive validity for Indigenous female offenders), such issues are eclipsed by the weight of the individual issues that would remain to be determined. While I sympathize with the circumstances and vulnerabilities of the class members and am mindful of the cost of litigation, economic hurdles will nonetheless remain for the individual issues that would remain to be determined.

[205] I agree with the Plaintiffs that a class proceeding would promote behaviour modification but that factor on its own, when considered against the extensive problems that would be caused by the individualized nature of the issues raised in the proceeding, is insufficient on its own to find that a class proceeding is the preferable procedure. Moreover, I would note that the goal of behaviour modification for breaches of the *CCRA* could also be achieved by way of an application for judicial review.

[206] Accordingly, I am not satisfied that the Plaintiffs have met the fourth requirement for certification.

F. *Fifth Requirement - Is There a Suitable Representative Plaintiff?*

[207] The final requirement for certification is that there is a representative plaintiff who meets the following conditions prescribed by Rule 334.16(1)(e): (i) they would fairly and adequately represent the interests of the class; (ii) they have prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing; (iii) they do not have, on the common questions

of law or fact, an interest that is in conflict with the interests of other class members; and (iv) they provide a summary of any agreements respecting fees and disbursements between the representative plaintiff and the solicitor of record.

[208] A proposed representative plaintiff should be a member of the class in question [see *Jost, supra* at paras 103-110].

[209] In assessing whether the proposed representative is adequate, the Court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The Court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class [see *Dutton, supra* at para 41].

[210] In order to vigorously and capably prosecute a class proceeding, the representative plaintiff must have at least a basic understanding of the case to be advanced and her role in the proceeding [see *Horseman v Canada*, 2015 FC 1149, appeal dismissed 2016 FCA 238].

[211] The Plaintiffs have proposed two representative plaintiffs, Ms. Michel and Ms. Kahnapace, to represent the class and all five subclasses. For the purpose of considering this requirement, I will use the class and five subclasses articulated in the Plaintiffs' motion materials, despite them not properly having been pleaded.

[212] As a preliminary point, the Plaintiffs acknowledge that neither Ms. Michel nor Ms. Kahnapace fall within the definition of Subclass 4, as neither were, as a matter of CSC discretion,

placed in medium security despite receiving a CRS minimum recommendation or were placed in maximum security despite receiving a CRS medium recommendation. However, the Plaintiffs assert that this is not problematic, as there is no obligation on a plaintiff to ensure that the proposed representative plaintiffs would be members of the proposed subclasses. The Plaintiffs pointed to no authority in support of this proposition.

[213] The Federal Court of Appeal in *Jost* held that a proposed representative plaintiff who was not a member of a class cannot be a suitable representative plaintiff for that class. That finding was based on the express wording of the *Federal Courts Rules* and the absence of any express provision allowing a person who is not a member of a class to act as a representative plaintiff for that class. I find that the situation is no different when it comes to subclasses. In that regard, the language of Rule 334.16(3) dealing with subclasses contains the identical language as Rule 334.16(1)(e) dealing with the requirements for representative plaintiffs for classes. Moreover, there is no express language that would allow a person who is not a member of a subclass to act as a representative plaintiff for that subclass.

[214] I would also note that the Ontario Court of Appeal in *Amyotrophic* addressed the issue of whether a separate subclass representative was required where it was asserted that the proposed representative plaintiffs could not fairly and adequately represent the interests of the subclass. The court stated:

> 54. The appellants refer to s.5(2) of the CPA, which provides that where, in the opinion of the court, the protection of subclass members requires that they be separately represented, the court shall not certify the proceeding unless there is a representative plaintiff who would fairly and adequately represent the subclass, has produced a workable litigation plan on behalf of the subclass and

> who does not have, on the subclass common issues, a conflict of interest with the subclass.
>
> 55. I do not read this statutory requirement as precluding the class representative from representing a subclass. It is only when the representative plaintiff cannot fairly and adequately represent the subclass that the need for a separate subclass representative arises: see Pearson v. Boliden Ltd., 2001 BCSC 1054, 94 B.C.L.R. (3d) 133, at para. 73, varied on other grounds, 2002 BCCA 624, 222 D.L.R. (4th) 453; Dominguez v. Northland Properties Corporation, 2012 BCSC 328, at paras. 75-83; Anderson v. Wilson (1999), 44 O.R. (3d) 673 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 476; Caponi v. Canada Life Assurance Co. (2009), 72 C.P.C. (6th) 331 (Ont. S.C.), at para. 56.

[215] Therefore, it is permissible for one person to be both a representative plaintiff for a class and a subclass, but each subclass must have a representative plaintiff that fairly and adequately represents the interests of that subclass. In this case, there is no person put forward who can adequately and fairly represent the interests of Subclass 4. As a result, had I determined that this proceeding should be certified as a class proceeding, Subclass 4 would not have been certified as a subclass and none of its associated common issues would have been certified.

[216] The Plaintiffs also acknowledged at the hearing that Ms. Kahnapace does not meet the definition of Subclass 5. As a result, I find that she cannot adequately and fairly represent the interests of Subclass 5.

(1) Ms. Kahnapace

[217] The question then becomes whether Ms. Kahnapace would fairly and adequately represent the interests of the class and Subclasses 1 through 3.

[218] The Defendant asserts that Ms Kahnapace is not a suitable representative plaintiff on the basis that:

1. Ms. Kahnapace's circumstances differ from other offenders admitted to federal custody because her claim for *Charter* damages is presumptively time-barred (regardless of whether the limitation period is two or six years) as she was released from federal custody in June of 2012 and has not returned. As such, she may not have the same interests as offenders who do not face limitations issues.

2. Ms. Kahnapace does not have the same interests as other potential class members as any resulting changes to the CRS will not impact her as she is no longer in custody.

3. Ms. Kahnapace's initial security classification decision was driven by a policy in place at the time (Policy 107) that offenders serving a minimum life sentence for murder were to be classified as maximum security for at least the first two years of federal incarceration.

4. Ms. Kahnapace has an insufficient knowledge of the proceeding, the litigation plan and her role as representative plaintiff.

[219] I am not satisfied that the rationales articulated in sub-paragraphs 1, 2 and 3 above are a basis on which to disqualify Ms. Kahnapace. As I am not making any determination of any limitation period issue on this motion, I am not satisfied that any limitation issue should, on its own, pose an impediment to Ms. Kahnapace acting as a representative plaintiff. Moreover, while Ms. Kahnapace is no longer in federal custody, I anticipate that many other class members will also no longer be in federal custody, such that this characteristic will not differentiate Ms. Kahnapace from other class members. I also question why this factor is being raised by the

Defendant vis-à-vis Ms. Kahnapace given that Ms. Michel is also no longer in federal custody, yet the Defendant does not take issue with her capacity to serve as a representative plaintiff.

[220] With respect to sub-paragraph 3, while Ms. Kahnapace's security classification determination in the first two years of her incarceration was pursuant to a specific policy, the evidence before the Court is that Ms. Kahnapace's subsequent security classification decision in 2011 was not made pursuant to this policy. As such, I am not satisfied that this factor serves as an appropriate basis to exclude her from serving as a representative plaintiff.

[221] The Plaintiffs assert that the Court should reject the Defendant's final criticism of Ms. Kahnapace. The Plaintiff relies on this Court's decision in *Tippett v Canada*, 2019 FC 869 (*Tippett*), where Justice Southcott held that a detailed examination of the competence and circumstances of a proposed representative is not in accordance with the relatively low threshold for this requirement and that even where cross-examination of the proposed representative plaintiff demonstrated that the individual had little understanding of the litigation process, this was not sufficient to disqualify them as they had the benefit of competent counsel experienced in class action litigation. Justice Southcott concluded that a representative plaintiff should only be rejected when they will not or cannot represent a class.

[222] Having reviewed the transcripts of Ms. Kahnapace's cross-examination, I am satisfied that she has little understanding of the litigation process, what is at issue in this proceeding and her role and responsibilities as representative plaintiff. She was not familiar with the subclasses, had not read any of the expert reports filed by the parties (including her own), had not done any research or reading on the CRS, had not discussed the litigation with others who may have an interests in it nor taken any steps to find any potential class members, and was not familiar with the content of

the litigation plan or the common issues proposed to be addressed in the proceeding. It is apparent that Ms. Kahnapace has little information about this proceeding and the issues that it raises, other than as specifically communicated to her by her counsel.

[223] Moreover, while I generally agree with the comments made by Justice Southcott, the circumstances of this proceeding are different from those in *Tippett* and from those in the cases noted by Justice Southcott in his decision. Here, the Plaintiffs have not pleaded any viable cause of action, have not demonstrated that a class proceeding is the preferable procedure for the resolution of any causes of action and, as will be addressed further below, the litigation plan proposed by the Plaintiffs is inadequate.

[224] In the circumstances, I am not satisfied that Ms. Kahnapace would fairly and adequately represent the interests of the class and subclasses.

(2) Ms. Michel

[225] The Defendant does not oppose Ms. Michel as a representative plaintiff for the class and Subclasses 1, 2, 3 and 5, provided that the definition of Subclasses 1 through 3 is modified (as noted above) to ensure that she falls within the subclass definitions.

(3) The Litigation Plan

[226] In their moving motion record, the Plaintiffs included a proposed litigation plan being put forward by Ms. Kahnapace. The Defendant raised a number of concerns regarding the adequacy of the litigation plan in their responding motion materials. Notwithstanding those concerns, when the Plaintiffs served and filed their supplemental motion record seeking to add Ms. Michel as a

proposed representative plaintiff, the Plaintiffs continued to propose the identical litigation plan through Ms. Michel.

[227] I acknowledge that, at the certification stage, the litigation plan is not to be overly scrutinized as it is work in progress that may be amended as the litigation proceeds [see *Wenham, supra* at para 103]. However, the litigation plan must show that the representative plaintiffs and their counsel have thought the process through and that they grasp its complexities [see *Samson Cree Nation, supra* at para 148]. At a minimum, the litigation plan provided by the proposed representative plaintiff must allow the motions judge to determine whether the representative plaintiff should be entrusted with the responsibility of taking the claim forward on behalf of class members [see *Samson Cree Nation, supra* at para 152; *Sorotski v CNH Global NV*, 2007 SKCA 104 at para 81].

[228] While there is no Rule that details the requirements of an adequate litigation plan, the nature, scope and complexity of the particular litigation will determine how detailed a litigation plan should be and the jurisprudence has established the following non-exhaustive list of matters that should be addressed in a litigation plan:

1. The steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;

2. The collection of relevant documents from members of the class as well as others;

3. The exchange and management of documents produced by all parties;

4. Ongoing reporting to the class;

5. Mechanisms for responding to inquiries from class members;

6. Whether the discovery of individual class members is likely and if so, the intended process for conducting those discoveries;

7. The need for experts and, if needed, how those experts are going to be identified and retained;

8. If individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and

9. A plan for how damages or any other form of relief are to be assessed or determined after the common issues have been decided.

   [see *Samson Cree Nation*, *supra* at paras 150-151].

[229] At the hearing of this motion, counsel for the Plaintiffs described this case as "inordinately" and "unusually" complex, yet the litigation plan certainly does not reflect any such complexity. To the contrary, the litigation plan reads more like a template document, with minimal information specific to this proceeding added to the template, placing the heavy lifting of the proceeding on the Defendant and the Court. I find that there are numerous shortcomings with the litigation plan, which lead me to conclude that the Plaintiffs and their counsel have not thought the process through and fail to grasp the complexities of this proceeding. Specifically:

1. The litigation plan does not accurately reflect all of the proposed subclasses or Ms. Michel as a representative plaintiff, notwithstanding that the Plaintiffs had an opportunity to amend it when Ms. Michel was added to the proceeding.

2. The litigation plan places the onus on the Defendant to identify class members and their last known contact information. The plan does not address the obvious problem that the last known contact information that is in the possession of the Defendant may be outdated and how, in such circumstances, class members may be identified.

3. The litigation plan details no steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence.

4. The plan does not describe any steps related to the collection of documents from class members, which would be particularly important given that neither Ms. Kahnapace nor Ms. Michel represent all of the subclasses.

5. With respect to documentary production, the litigation plan only speaks to the production of various "comprehensive data sets" from the Defendant, whereas it is clear from the documentation produced in relation to this motion that security classification decisions rely on extensive documentation and are not limited to data sets.

6. The litigation plan does not describe how the documents produced by the parties will be managed.

7. The litigation plan does not address the intended process for conducting examination for discovery of class members.

8. The litigation plan does not provide for any mechanism for responding to inquiries from class members.

9. The litigation plan provides no meaningful consideration of how damages will be considered, referring only to the Court being asked to assess damages or aggregate damages and establish grids for damages. No consideration has been included as to how this may be done, but rather leaves it to the Court to make that determination.

10. There is no meaningful consideration as to how the individual issues would be determined, but rather leaves it to the Court to provide direction in that regard. This is particularly problematic given the complexity of the issues raised and the extent of individualistic determinations that must be made in this proceeding.

G. Potential Conflicts with Other Class Members

[230] The Defendant has not raised any potential conflicts vis-à-vis Ms. Michel.

[231] With respect to Ms. Kahnapace, the Defendant asserts that Ms. Kahnapace does not understand what a conflict is and that there is the potential for a conflict as it relates to her claim for damages and any potential time bar. However, as I have already determined that Ms. Kahnapace would not fairly and adequately represent the class and subclasses, I need not go on to consider this sub-issue.

H. Fee Agreement

[232] Ms. Michel and Ms. Kahnapace have provided a summary of their contingency fee agreement with their counsel and the Defendant has not raised any concerns in relation thereto.

I. Conclusion on Fifth Requirement

[233] Based on my findings above, I am satisfied that Ms. Michel would fairly and adequately represent the interest of the class and Subclasses 1, 2, 3 and 5 only. I am not satisfied that Ms. Kahnapace would fairly and adequately represent the interest of the class nor any of the subclasses.

[234] As there is no proposed representative plaintiff to represent the interest of Subclass 4, Subclass 4 could not otherwise be certified as a subclass.

[235] However, I am not satisfied that the Plaintiffs have prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and subclasses.

[236] Accordingly, I find that the fifth requirement has not been satisfied by the Plaintiffs.

III. Conclusion

[237] Having found that the Third Amended Statement of Claim does not disclose a reasonable cause of action, numerous individual issues overwhelm the common issues and the common issues are intrinsically individualistic, a class proceeding is not the preferable procedure for the just and efficient resolution of the common questions and the Plaintiffs have not prepared a plan for the proceeding that sets out a workable method of advancing the action, the Plaintiffs' motion to certify this proceeding as a class action shall be dismissed.

IV. Costs

With respect to the costs of this motion, I am mindful of Rule 334.39(1) of the *Federal Courts Rules* and none of the parties suggested that any of the exceptions in Rule 334.39(1)(a) through (c) applied. Accordingly, there will be no award of costs on this motion.

THIS COURT ORDERS that:

1. The Plaintiffs' motion for certification is dismissed.

2. There shall be no costs of this motion.

"Mandy Aylen"
Judge

Schedule "A" – Proposed Common Questions

Class

1. Does the use of the CRS by CSC discriminate against Indigenous female inmates contrary to section 15 of the *Charter*?

2. Does the use of the CRS by CSC for security classification and placement of Indigenous female inmates warrant a remedy pursuant to section 24(1) of the *Charter* for class members for the remedial purposes of compensation, vindication and/or deterrence, or to restrain by injunction the discriminatory conduct of CSC?

3. Does the use of the CRS by CSC for security classification and placement of Indigenous female inmates warrant a remedy pursuant to section 52 of the *Constitution Act, 1982*, or otherwise warrant a declaration that the Commissioner's Directives requiring the use of the CRS on Indigenous women are *ultra vires* section 96 of the *CCRA*?

Subclass 1

1. Did CSC know, after January 1, 2005, that it was discriminatory to use the CRS to classify and determine placement of Indigenous women?

2. Does the use of the CRS by CSC as against Indigenous female inmates, while knowing that the CRS discriminates against Indigenous female inmates, warrant a remedy pursuant to section 24(1) of the *Charter* for class members for the remedial purpose of compensation, vindication and/or deterrence?

Subclass 2

1. Did CSC know, after January 1, 2005, that it was discriminatory to use the CRS to classify and determine placement of Indigenous women?

2. Does the use of the CRS by CSC as against Indigenous female inmates, while knowing that the CRS discriminates against Indigenous female inmates, warrant a remedy pursuant to section 24(1) of the *Charter* for class members for the remedial purpose of compensation, vindication and/or deterrence?

3. Was it negligent for CSC to use the CRS to classify and determine the institutional placement of Indigenous women, knowing of the disproportionate pattern of increased security placement for Indigenous women?

4. To what quantum of damages is each class member entitled in respect of CSC's negligence?

5. To what quantum of aggravated or punitive damages is each class member entitled in respect of CSC's negligence?

Subclass 3

1. Was it contrary to section 15 of the *Charter* for CSC to use the Public Safety score rather than solely the Institutional Adjustment score to classify and determine institutional placement for class members?

2. Does the use of the Public Safety score rather than solely the Institutional Adjustment score by CSC to classify and determine institutional placement infringe the individual

right to liberty and security of the person under section 7 of the *Charter*, and is it contrary to the principles of fundamental justice of overbreadth and non-arbitrariness, non-discriminatory, gross-disproportionality and the rule of law?

3. Does the use of the Public Safety score rather than solely the Institutional Adjustment score by CSC to classify and determine the institutional placement warrant a remedy pursuant to section 24 of the *Charter* for subclass members for the remedial purposes of compensation, vindication and/or deterrence?

4. Was it negligent for CSC to continue to use Public Safety scores rather than solely the Institutional Adjustment scores produced by the CRS to classify and determine institutional placement for class members?

5. To what quantum of damages is each class member entitled in respect of CSC's negligence?

6. To what quantum of aggravated or punitive damages is each class member entitled in respect of CSC's negligence?

Subclass 4

1. When did CSC become aware that female Indigenous inmates were subject to discretionary increases in security placement at a markedly higher rate than non-Indigenous female inmates?

2. Did CSC take any steps to restrain the pattern of higher rates of discretionary increases in security placement for Indigenous women?

3. Did the discretionary increases in security placement discriminate against the subclass contrary to section 15 of the *Charter*?

4. Do discriminatory rates of discretionary increases in security placement warrant a remedy pursuant to section 24(1) of the *Charter* for subclass members for the remedial purposes of compensation, vindication and/or deterrence?

5. Is it negligent for CSC to fail to restrain the pattern of higher rates of discretionary increases in security placement for Indigenous women?

6. To what quantum of damages is each class member entitled in respect of CSC's negligence?

7. To what quantum of aggravated or punitive damages is each class member entitled in respect of CSC's negligence?

Subclass 5

1. Does the CRS take into consideration the factors listed under section 79.1(1) of the *CCRA* in assessing the risk posed by Indigenous offenders?

2. Does the CRS increase the assessed level of risk posed by Indigenous offenders when taking into consideration the factors listed under section 79.1(1)?

3. Does the SFA test take into consideration the factors listed under section 79.1(1) of the *CCRA* in assessing the risk posed by Indigenous offenders?

4. Does the SFA test increase the assessed level of risk posed by Indigenous offenders when taking into consideration the factors listed under section 79.1(1)?

5. Does the DFIA-R test take into consideration the factors listed under section 79.1(1) of the *CCRA* in assessing the risk posed by Indigenous offenders?

6. Does the DFIA-R test increase the assessed level of risk posed by Indigenous offenders when taking into consideration the factors listed under section 79.1(1)?

7. Does the RP score take into consideration the factors listed under section 79.1(1) of the *CCRA* in assessing the risk posed by Indigenous offenders?

8. Does the RP score increase the assessed level of risk posed by Indigenous offenders when taking into consideration the factors listed under section 79.1(1)?

Schedule "B" – Additional Common Issues Raised in Reply

1. Does the CRS assign a security rating to Indigenous female inmates that does not accord with the safety risk posed by the Indigenous female inmate to other inmates or guards?

2. Does CSC use the CRS on Indigenous female inmates despite knowing that it assigns a security rating that does not accord with the safety risk posed by Indigenous female inmates or guards?

3. Does the use of the CRS on Indigenous female inmates violate section 15 of the *Charter* by assigning security classification of Indigenous female inmates using a tool that is known not to accurately assess their risk?

4. Should *Charter* damages be awarded as compensation, to vindicate Indigenous women inmates' right to equality under section 15, or to deter future iniquity on the part of CSC?

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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APPEARANCES:

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