Federal Court of Appeal | Cour d'appel fédérale

Date: 20250311

Docket: A-94-23

Citation: 2025 FCA 58

CORAM: **GLEASON J.A.**
MONAGHAN J.A.
HECKMAN J.A.

BETWEEN:

AILEEN MICHEL

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on June 19, 2024.

Judgment delivered at Ottawa, Ontario, on March 11, 2025.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: MONAGHAN J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant, Aileen Michel, appeals from the order of the Federal Court in *Kahnapace v. Canada (Attorney General)*, 2023 FC 32 (*per* Aylen J.) in which the Federal Court dismissed the plaintiffs' motion to certify an action against the respondent as a class proceeding. In its reasons, the Federal Court declined to allow the plaintiffs leave to amend their Third Amended Statement of Claim (the Statement of Claim) and to reapply for certification. Given this, the order of the Federal Court is to be read as prohibiting such amendment and reapplication.

[2] Although the underlying action and motion for certification were brought by both Ms. Michel and Martha Kahnapace as proposed representative plaintiffs, only Ms. Michel is an appellant before this Court.

[3] For the reasons that follow, I would allow this appeal in part and would amend the Federal Court's order to provide the appellant with leave to serve and file a single Fresh as Amended Statement of Claim and also with leave to once reapply for certification based on the same evidentiary record that was before the Federal Court.

I. The Statement of Claim and Motion for Certification

[4] I commence by reviewing the portions of the pleadings and the evidence filed in respect of the motion for certification before the Federal Court that are relevant to this appeal.

[5] Paragraph 18 of the plaintiffs' Statement of Claim stated that their proposed class action was brought on behalf of four subclasses:

> (a) female Indigenous inmates in custody in medium or maximum security federal correctional facilities whose security classification was determined by means of a rating tool employed by Correctional Services Canada (CSC) called the Custody Rating Scale (the CRS);

> (b) female inmates in custody in medium or maximum security federal correctional facilities whose security classification was determined by means of the CRS;
>
> (c) Indigenous inmates in custody in medium or maximum security federal correctional facilities whose security classification was determined by means of the CRS; and
>
> (d) inmates in custody in medium or maximum security federal correctional facilities whose security classification was determined by means of the CRS.

[6] The plaintiffs narrowed the class definition while arguing their certification motion before the Federal Court to include only certain female Indigenous inmates and eventually proposed a class of "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" (Federal Court Reasons at para. 166).

[7] The plaintiffs also proposed during the hearing before the Federal Court the following five subclasses, which differed from those set out in their Statement of Claim:

> 1. All female Indigenous inmates in the custody of CSC [who had the CRS administered to them] after January 1, 2005 [Subclass 1];
>
> 2. All female Indigenous inmates in the custody of CSC [who had the CRS administered to them] after January 1, 2005 and who were placed in medium or maximum security facilities [Subclass 2];
>
> 3. All female Indigenous inmates [who had the CRS administered to them] after January 1, 2005 and whose [CRS] 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]; and
>
> 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 [*Corrections and Conditional Release Act*, S.C. 1992, c. 20] [Subclass 5].
>
> (Federal Court Reasons at para. 120 as modified by para. 169.)

[8] To address potential limitation period issues raised during the certification hearing, the plaintiffs consented to an amendment proposed by the defendant to create the following two subclasses of the more general amended class definition:

> 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.
>
> (Federal Court Reasons at para. 167.)

[9] It is unclear from the Federal Court's reasons how these two amended subclasses agreed to by the plaintiffs relate to the five subclasses they proposed during the hearing before the Federal Court.

[10] The Statement of Claim alleged that CSC has used the CRS since 1991 as part of the assessment process to assess the risk posed by inmates for security classification and institutional placement purposes. It further alleged that the CRS, as well as certain other tools used in the security classification process, are systemically biased against Indigenous female offenders and overclassify them as representing a higher security risk than warranted. These other impugned tools are the Static Factor Assessment (the SFA), Dynamic Factor Identification and Analysis-Revised (the DFI-A), and Reintegration Potential (RP) tools (collectively, the impugned tools).

[11] The Statement of Claim also alleged that CSC's use of the CRS breached provisions of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [the *CCRA*], was negligent, and breached both 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, c. 11 [the Charter]. It raised many of the same allegations with reference to the impugned tools.

[12] Only the claims with respect to section 15 (and more precisely, subsection 15(1)) of the Charter are relevant to this appeal since the appellant has limited her appeal to the Federal Court's findings in respect of these allegations.

[13] Section 15 of the Charter provides:

Equality Rights	**Droits à l'égalité**
Equality before and under law and equal protection and benefit of law	**Égalité devant la loi, égalité de bénéfice et protection égale de la loi**
15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit	**15 (1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même

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.	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.
Affirmative action programs	**Programmes de promotion sociale**
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**(2)** Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

[14] For ease, I refer to subsection 15(1) of the Charter as simply section 15 in the balance of these reasons to correspond to the terminology used by the parties and the Federal Court.

[15] Paragraph 1 of the Statement of Claim outlines the following relief sought with respect to the section 15 Charter claim:

> (a) an order certifying the action as a class proceeding and appointing the plaintiffs as representative plaintiffs;
>
> (b) general damages plus damages equal to the cost of administering the plan of distribution;
>
> (c) a declaration that the use of the CRS infringes section 15 of the Charter;

(d) a declaration that any Commissioner's Directive requiring the use of the CRS is of no force and effect pursuant to section 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11;

(e) "[s]uch just and appropriate remedy as may be ordered pursuant to s. 24 of the *Charter*, including damages for breach of … [section] 15 of the *Charter*"; and

(e) an interim, interlocutory, and permanent injunction preventing CSC from using the CRS and the impugned tools in respect of class members.

[16] In the subsequent paragraphs of their Statement of Claim, the plaintiffs set out particulars of the CRS and the impugned tools. They alleged that the CRS overclassifies female Indigenous offenders, on both an individual and systemic basis, and that CSC has been aware of this overclassification since 2004, when certain studies were completed that, according to the plaintiffs, demonstrate this overclassification. The plaintiffs also alleged that the use of the impugned tools produces "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" (at para. 13.2 of the Statement of Claim). The plaintiffs further alleged that this anti-*Gladue* effect violates section 79.1 of the *CCRA*, which provides as follows:

Factors to be considered	**Éléments à prendre en considération**
79.1 (1) In making decisions under this Act affecting an Indigenous offender, the Service shall take the following into consideration:	**79.1 (1)** Dans le cadre de la prise de toute décision au titre de la présente loi concernant un délinquant autochtone, le Service tient compte

	des éléments suivants :
(a) systemic and background factors affecting Indigenous peoples of Canada;	**a)** les facteurs systémiques et historiques touchant les peuples autochtones du 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	**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) the Indigenous culture and identity of the offender, including his or her family and adoption history.	**c)** l'identité et la culture autochtones du délinquant, notamment son passé familial et son historique d'adoption.
Exception — risk assessment	**Exception : évaluation du risque**
(2) 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.	**(2)** 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.

[17] The reference to *Gladue* is to *R. v. Gladue*, [1999] 1 S.C.R. 688, 1999 CanLII 679. In that case, the Supreme Court of Canada found that paragraph 718.2(e) of the *Criminal Code*, R.S.C. 1985, c. C-46 directs sentencing judges to consider the unique systemic or background factors which may have played a part in bringing an Indigenous offender before the courts and the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of their particular Indigenous heritage or connection. Paragraph 718.2(e) of the *Criminal Code* provides for the following:

Other sentencing principles	**Principes de détermination de la peine**
718.2 A court that imposes a sentence shall also take into consideration the following principles:	**718.2** Le tribunal détermine la peine à infliger compte tenu également des principes suivants :
…	[…]
(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.	**e)** l'examen, plus particulièrement en ce qui concerne les délinquants autochtones, de toutes les sanctions substitutives qui sont raisonnables dans les circonstances et qui tiennent compte du tort causé aux victimes ou à la collectivité.

[18] Paragraphs 26–28 of the Statement of Claim set out the allegations regarding the claimed breach of section 15 of the Charter. These paragraphs read as follows:

> 26. Section 15 of the *Canadian Charter of Rights and Freedoms* provides that every person is equal before and under the law and has the 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.

[19] Turning to the common questions, the plaintiffs modified the common questions they proposed for certification during the hearing before the Federal Court. As amended, their proposed common questions related to section 15 of the Charter were:

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* … ?

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?

…

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 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?

…

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?

…

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?
>
> (Schedules "A" and "B" to the Federal Court Reasons.)

[20] In support of their motion for certification, the plaintiffs filed affidavits from a staff member of the law firm representing the plaintiffs, which attached various reports relevant to CSC, the CRS, and the impugned tools. They also filed affidavits from experts as well as affidavits from the proposed representative plaintiffs. The respondent filed several affidavits, including affidavits from experts.

[21] For purposes of this appeal, it is not necessary to review the evidence in detail, and I note that it is discussed at length in the Federal Court's reasons. I mention below only those points that are relevant to this appeal.

[22] The CRS has been used by CSC since 1991 for purposes of classifying offenders' level of public and institutional risk to assist in determining the security classification of offenders and the level of the institution where they will be incarcerated. The CRS also plays a role in offenders' correctional plans and sentence planning. The CRS is administered either shortly before or shortly following an offender's entry or re-entry into the federal penitential system for a period of incarceration. The CRS consists of two subscales—the Institutional Adjustment subscale and the Security Risk subscale.

[23] The Institutional Adjustment subscale assesses five items: institutional incidents; escape history; street stability; alcohol/drug use; and age at the time of sentencing. Street stability

involves assessment of the offender's employment and education history, marital and family adjustment, previous interpersonal relationships in the community, and living arrangements. The plaintiffs alleged that, due to the history of colonization, Indigenous people will tend to score poorly on many of the foregoing items and particularly on the street stability portion of this subscale.

[24] The Security Risk subscale assesses 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.

[25] The SFA, also completed as part of CSC's inmate intake process, assesses 137 static factors related to the offender and their offence history.

[26] The DFI-A is also completed as part of CSC's intake process. It assesses seven areas, which overlap to a certain extent with the CRS, namely: employment and education; marital and family relationships; nature of associates; substance abuse; community functioning; personal and emotional skills; and attitudes.

[27] The RP is a point in time assessment of an offender's ability to reintegrate into the community. It is used for sentence planning and as part of an offender's correctional plan. The RP is arrived at via a combination of the CRS recommendation, the SFA rating, and the DFI-A rating, but may be adjusted by a parole officer.

[28] The appellant alleges that there was some basis in fact before the Federal Court to show that the CRS, the impugned tools, and/or certain components of them tend to overclassify female Indigenous inmates, both in the aggregate and in individual instances. She says that at least one of the expert reports the plaintiffs filed supports this contention. This contention was contested by the respondent's experts. However, the Federal Court made no finding on this issue, concluding that "no determination need be made … as to whether [the CRS] lacks predictive validity for the class members" (Federal Court Reasons at para. 65).

[29] The evidence before the Federal Court showed that female Indigenous inmates, collectively, are classified as higher security risks than non-Indigenous female inmates, a point that is not disputed by the respondent.

[30] The security classification that CSC applied to the plaintiffs at certain points in their carceral history differed from the results obtained through their CRS scores. Indeed, Ms. Michel was classified at certain points in her carceral history at a risk level that was lower than the result obtained from her CRS scores.

[31] The Federal Court found that CSC Wardens have the authority to determine offenders' security classifications, based upon their review of all the information obtained through the offender intake assessment process, which includes many items in addition to CRS scores and scores from the impugned tools. As noted by the Federal Court at paragraph 183 of its reasons, "the security classification is decided by the Warden after a review of all of the information gathered during the [offender intake assessment] 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 will soon become apparent, largely by reason of what it found to be an individualized process, the Federal Court dismissed the motion for certification.

II. The Federal Court's Reasons

[32] I turn next to the Federal Court's findings that are relevant to this appeal.

[33] The Federal Court commenced its analysis by correctly setting out the five requirements for certification of an action as a class proceeding under Rule 334.16 of the *Federal Courts Rules*, S.O.R./98-106 namely that:

1. the pleadings disclose a reasonable cause of action;

2. there is an identifiable class of two or more persons;

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

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

5. there is 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.

[34] Turning to the first criterion, the Federal Court correctly noted that the test for ascertaining whether the pleadings disclose a reasonable cause of action for purposes of certification is the same as on a motion to strike, namely, whether it is plain and obvious that the pleading discloses no cause of action. The Federal Court held that the Statement of Claim failed to disclose a reasonable cause of action regarding the alleged breach of section 15 of the Charter for several reasons.

[35] First, the Federal Court held that the Statement of Claim was deficient in that it failed to define the class and subclasses the plaintiffs proposed at the certification hearing (Federal Court Reasons at para. 123). I note parenthetically that this deficiency also applied to the other causes of action advanced in the Statement of Claim. According to the Federal Court, this failure was sufficient, in and of itself, to find that the pleadings failed to disclose a reasonable cause of action.

[36] Second, the Federal Court held that the Statement of Claim was deficient in describing the alleged violation of section 15 of the Charter because the plaintiffs had:

> … 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.
>
> (Federal Court Reasons at para. 153.)

[37] Third, the Federal Court held that the plaintiffs failed to plead the required material facts to link any harsher and longer sentences to the use of the CRS or the SFA and any material facts as to how the plaintiffs' sentences were longer or harsher.

[38] Fourth, as concerns Subclass 3, the Federal Court held that the Statement of Claim did not contain the necessary material facts regarding how it was 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 placements for class members.

[39] Fifth, the Federal Court held that, in relation to Subclass 4, there was no basis in the Statement of Claim "for the Court to consider as a common issue whether … discretionary increases in security placements discriminated against Subclass 4 members contrary to section 15" of the Charter. It added that the Statement of Claim did:

> … 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.
>
> (Federal Court Reasons at para. 155.)

[40] Finally, with respect to the alleged anti-*Gladue* effect, the Federal Court noted that it was unclear how this was relevant to the section 15 claim. It also found that no material facts were pleaded regarding any *Gladue* factors relevant to the plaintiffs or how CSC failed to incorporate such factors in its decision-making regarding their security classification so as to result in discrimination in violation of section 15 of the Charter.

[41] Due to the foregoing deficiencies, the Federal Court concluded that the Statement of Claim did not disclose a reasonable cause of action. That said, the Federal Court also was satisfied that at least some of these deficiencies in the Statement of Claim could have been remedied by way of amendment. However, the Federal Court declined to allow the plaintiffs leave to amend their Statement of Claim because the motion for certification would in any event fail for other reasons. The Federal Court accordingly concluded that "no purpose would be served by granting the [p]laintiffs leave to amend their pleadings and to thereafter reapply for certification" (Federal Court Reasons at para. 161).

[42] Turning to the second criterion for certification, namely, the requirement that there be an identifiable class of two or more persons, the Federal Court found that Subclass 1 could have been certified. It is unclear from the Federal Court's reasons whether the Federal Court was referring to the Subclass 1 proposed by the plaintiffs or the version proposed by the respondent to which the plaintiffs agreed. The Federal Court declined to rule on whether the other subclasses were identifiable because it determined that they in any event failed to meet the third criterion for certification.

[43] As concerns the third criterion for certification, which requires that the claims of the class members raise common questions of law or fact, the Federal Court set out the test to ascertain commonality as follows, citing *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 [*Pro-Sys*] at paragraph 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.

[44] The Federal Court added that a common question cannot be dependent on findings of fact that have to be made with respect to each individual claimant (Federal Court Reasons at para. 177).

[45] The Federal Court concluded that the set of common questions first proposed by the plaintiffs, set out as Schedule "A" to its reasons, was improper because it improperly presumed that the CRS was flawed and had no predictive value for female Indigenous offenders. While this flaw was remedied in the amended questions proposed in reply (appended as Schedule "B" to the Federal Court's reasons), the Federal Court observed that the introduction of an additional set of

common questions in reply was inappropriate. Nevertheless, it went on to consider the revised common questions.

[46] The Federal Court noted that the question of whether the CRS had appropriate predictive value for female Indigenous offenders would be common to all class members. However, the Federal Court concluded that this question would not advance class members' claims because the CRS is only one piece of information used to establish a security classification. It concluded that:

> … 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.
>
> (Federal Court Reasons at para. 183.)

[47] The Federal Court also found that even if the CRS resulted in a higher than warranted security classification in any individual case, the issue of whether an offender received a harsher and longer sentence would also require individual determination. It noted that:

> [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.
>
> (Federal Court Reasons at para. 188.)

[48] The Federal Court thus held that the alleged violation of section 15 of the Charter did not raise a common issue of law or fact.

[49] As concerns the fourth criterion for certification, which requires that a class proceeding be the preferable procedure for the just and efficient resolution of the common claims, the Federal Court held that preferability must be examined with reference to the three principal aims of class proceedings, namely, judicial economy, access to justice, and behaviour modification. It held that a class proceeding would not meet the objective of judicial economy given the need for individualized assessment of each offender's claim. It noted that "[t]o 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" (Federal Court Reasons at para. 204).

[50] The Federal Court therefore concluded that the fourth criterion for certification was not met.

[51] Finally, as concerns the fifth criterion for certification, the Federal Court accepted that Ms. Michel could have adequately and fairly represented the interests of Subclasses 1, 2, 3, and 5, but due to the inadequacies of the litigation plan the plaintiffs proposed, the fifth requirement for certification was not met. The Federal Court also found that Ms. Michel could not act as a representative plaintiff for Subclass 4 because she was not placed in a higher security classification than the CRS results recommended. It further concluded that Ms. Kahnapace was

not a suitable representative plaintiff for any of the proposed subclasses because she lacked sufficient knowledge of the proceeding and of her responsibilities as a representative plaintiff. The Federal Court thus concluded that the fifth criterion for certification was not met.

III. Alleged Errors Raised by the Appellant

[52] As noted, the appellant limits her appeal to the errors she alleges the Federal Court made with reference to the plaintiffs' claims under section 15 of the Charter.

[53] First, the appellant alleges that the Federal Court erred in finding that the Statement of Claim did not disclose a reasonable cause of action under section 15 of the Charter. She more specifically submits the class members' section 15 rights were violated because they were denied the benefit of the procedural safeguards enacted by section 79.1 of the *CCRA* through CSC's continued administration of and reliance on the CRS and the impugned tools, in addition to its failure to remove or eliminate the anti-*Gladue* propensities embedded in these tests. She also claims that, by perpetuating false stereotypes of Indigenous inmates as presenting a greater risk, being less manageable and less trustworthy, and requiring greater monitoring, CSC's use of the CRS and the impugned tools violated class members' section 15 Charter rights. The appellant further claims that the use of the CRS and the impugned tools caused class members indignity, especially when one considers the incorporation of anti-*Gladue* factors, and that CSC knew that the CRS was not statistically predictive of risk, manageability, or the need for monitoring.

[54] She adds, relying on the decision in *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364 [*Haseeb*], that to establish a violation of section 15 of the Charter, it is not necessary that all members of the class be affected in the same way. Thus, even if an individual were classified at a level lower than that indicated by the CRS, the appellant alleges that such an individual nonetheless has a valid section 15 claim if they are part of the group that is subject to the use of tools that in the aggregate adversely impact the group. This is so, according to the appellant, because all class members are subject to unwarranted stereotyping in the carceral context, which is in part the result of the CRS and the impugned tools.

[55] The appellant also contends that even if the Statement of Claim failed to plead the section 15 claim with adequate particularity, she should have been granted leave to amend it and reapply for certification.

[56] Second, and related to the first argument, the appellant says that the Federal Court erred by finding that the claims of class members were inherently individualistic. While accepting that the security classification process is an individualized process, the appellant asserts that there is much about the process that is not individualized. This includes the across-the-board application of the CRS and the impugned tools to all class members, without regard to whether their administration violates section 79.1 of the *CCRA*. The appellant adds that the use of the CRS and the impugned tools erroneously pushes more Indigenous female inmates in the aggregate into higher security classifications and placements, which propagates adverse and false stereotypes that female Indigenous inmates are more dangerous, require more supervision, and cannot be trusted.

[57] Third, the appellant submits that the Federal Court erred in declining to find that the section 15 claim raised common questions, capable of certification, because the Federal Court wrongly concluded that such issues require that liability be established on a class-wide basis. This, she says, is contrary to Rule 334.18(a), which provides:

Grounds that may not be relied on	**Motifs ne pouvant être invoqués**
334.18 A judge shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:	**334.18** Le juge ne peut invoquer uniquement un ou plusieurs des motifs ci-après pour refuser d'autoriser une instance comme recours collectif :
(a) 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;	**(a)** les réparations demandées comprennent une réclamation de dommages-intérêts qui exigerait, une fois les points de droit ou de fait communs tranchés, une évaluation individuelle;

[58] Fourth, according to the appellant, the erroneous analysis of whether there were any common questions tainted the Federal Court's analysis of the preferability criterion. She adds that the Federal Court declined to consider the mandatory factors listed in Rule 334.16(2) (b), (c), (d), and (e), which require the Court, in addition to looking at whether common questions of law or fact predominate over individual ones, to consider whether:

Matters to be considered	**Facteurs pris en compte**
(2)	**(2)**
…	[…]
(b) a significant number of the members of the class have a valid interest in individually controlling	**b)** la proportion de membres du groupe qui ont un intérêt légitime à

the prosecution of separate proceedings;	poursuivre des instances séparées;
(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;	**c)** le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;
(d) other means of resolving the claims are less practical or less efficient; and	**d)** l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.	**e)** les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[59] Finally, the appellant submits that the Federal Court erred in taking an overly technical approach to the proposed litigation plan and says that the Federal Court erred in declining certification on the basis of alleged flaws in the litigation plan.

[60] The respondent, for its part, alleges that the Federal Court did not err in law and that many of the impugned findings made by the Federal Court are reviewable under the palpable and overriding error standard. The respondent further asserts that the Federal Court made no such error.

IV. Analysis

A. *Did the Federal Court err in striking the Statement of Claim?*

[61] The first issue that arises is whether the Federal Court erred in finding that the Statement of Claim failed to disclose a viable claim for breach of section 15 of the Charter.

[62] The usual appellate standard of review applies to this issue; thus, questions of law are reviewable for correctness, whereas questions of fact and of mixed fact and law, from which a legal issue may not be extricated, are reviewable for palpable and overriding error: *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 F.C.R. 246 at para. 19; *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, 476 N.R. 219 [*Mancuso*] at para. 8, leave to appeal to SCC refused, 36889 (23 June 2016); *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89 [*Samsung*] at para. 32, leave to appeal to SCC refused, 40807 (11 January 2024); *Adelberg v. Canada*, 2024 FCA 106 [*Adelberg*] at para. 37, leave to appeal to SCC refused, 41415 (30 January 2025).

[63] A determination that a claim must be struck because it does not exist at law raises a question of law and accordingly is reviewable for correctness: *Samsung* at paras. 36–37; *Adelberg* at para. 38. Many (if not most) motions to strike are decided on this basis and therefore engage correctness review on appeal.

[64] On the other hand, where a court determines that a pleading must be struck due to the inadequacy of the material facts pleaded, such determinations are reviewable under the palpable and overriding standard of review: *Samsung* at para. 38; *Adelberg* at para. 39.

[65] Here, the Federal Court determined that the Statement of Claim should be struck because it was devoid of the necessary material facts. Its determination is therefore subject to review under the deferential standard of palpable and overriding error.

[66] I see no such error in the Federal Court's determination that the Statement of Claim failed to disclose the necessary material facts to support a claim alleging a breach of section 15 of the Charter and inadequately defined the class and subclasses that were eventually proposed in the motion materials and in argument before the Federal Court.

[67] As the above review of the pleadings demonstrates, there were significant differences between the class and subclasses set out in the Statement of Claim compared to those put forward in the motion materials and in argument before the Federal Court. However, these differences could have been readily remedied by an amendment to the Statement of Claim.

[68] As concerns the failure to plead the necessary material facts, the section 15 claim set out in the Statement of Claim is brief in the extreme and contains little more than conclusory statements alleging that CSC's use of the CRS and the impugned tools breaches section 15 of the Charter.

[69] Rule 174 of the *Federal Courts Rules* provides that "[e]very pleading shall contain a concise statement of the material facts on which the party relies". Rule 181(1) further requires that pleadings "contain particulars of every allegation contained therein". Compliance with these requirements is essential for trial fairness and the orderly management of proceedings before the Federal Court. As this Court noted in *Mancuso* at paragraphs 16–17:

> It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. As the judge noted "pleadings play an important role in providing notice and defining the issues to be tried and that 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."
>
> 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.

[70] To similar effect, this Court recently confirmed in *Brink v. Canada*, 2024 FCA 43 [*Brink*], leave to appeal to SCC refused, 41266 (10 October 2024) that the foregoing principles apply equally in Charter cases. Writing for the Court at paragraph 59, Justice Mactavish stated:

> This Court has confirmed that there are no separate rules of pleadings for Charter cases, and that the requirement of material facts applies to pleadings of Charter infringement in the same way that it does with respect to causes of action rooted in the common law. The substantive content of each Charter right—including claims under section 15 of the Charter—has been clearly defined by decisions of the Supreme Court, and plaintiffs must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is not a technicality, but is rather essential to the proper presentation of Charter issues: *Mancuso*, above at paras. 21, 25; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, [1989] S.C.J. No. 88 at 361-367.

[71] To establish a breach of section 15 of the Charter, a claimant must establish that the impugned law or state action: (1) "creates a distinction based on enumerated or analogous grounds, on its face or in its impact"; and (2) "imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage" (*R. v. Sharma*, 2022 SCC 39 [*Sharma*] at para. 28, citing *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679 at paras. 56 and 141, *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113 [*Fraser*] at para. 27, and *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at paras. 19–20).

[72] Under the first step, the claimant is required to establish a nexus between the impugned law or state action and the claimed disproportionate impact: *Sharma* at para. 43; *Weatherley v. Canada (Attorney General)*, 2021 FCA 158 at para. 42; *Power Workers' Union v. Canada (Attorney General)*, 2024 FCA 182 at para. 165. This requires the claimant to establish that the state action or impugned law to some degree caused or contributed to the claimed disproportionate impact. As noted in paragraph 45 of *Sharma*:

> Section 15(1) claimants must demonstrate that the impugned law or state action *created* or *contributed to* the disproportionate impact on the claimant group at step one …. Both terms — "created" and "contributed to" — describe cause. "Contributed to" merely recognizes that the impugned law need not be the only or the dominant cause of the disproportionate impact.
>
> (Emphasis in original.)

[73] As to the nature of the evidence required to establish the requisite nexus, to again quote from the decision of the majority of the Supreme Court in *Sharma*, this time at paragraph 49:

> To give proper effect to the promise of s. 15(1), however, a claimant's evidentiary burden cannot be unduly difficult to meet. In that regard, courts should bear in mind the following considerations:
>
> > (a) No specific form of evidence is required.
> >
> > (b) The claimant need not show the impugned law or state action was the *only* or the *dominant* cause of the disproportionate impact — they need only demonstrate that the law was *a* cause (that is, the law created *or contributed to* the disproportionate impact on a protected group).
> >
> > (c) The causal connection may be satisfied by a reasonable inference. Depending on the impugned law or state action at issue, causation may be obvious and require no evidence. Where evidence is required, courts should remain mindful that statistics may not be available. Expert testimony, case studies, or other qualitative evidence may be sufficient. In all circumstances, courts should examine evidence that purports to demonstrate a causal connection to ensure that it conforms with standards associated to its discipline.
> >
> > (d) Courts should carefully scrutinize scientific evidence [citations omitted].
> >
> > (e) If the scientific evidence is novel, courts should admit it only if it has a "reliable foundation" [citations omitted].
>
> (Emphasis in original.)

[74] Under the second step of the test for establishing a violation of section 15 of the Charter, the claimant must establish that the impugned law or state action imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the disadvantage of the group to which the claimant belongs. Factors that may be considered in this regard include whether the impugned law or state action relies on arbitrary distinctions or otherwise furthers stereotypes or prejudicial notions about the group: *Sharma* at paras. 51–53.

[75] In terms of the sort of evidence required to meet step two of the test to establish a breach of section 15 of the Charter, as noted at paragraph 55 of *Sharma*:

> (a) The claimant need not prove that the legislature *intended* to discriminate [citations omitted].
>
> (b) Judicial notice can play a role at step two. As this Court recognized in *Law*, "a court may take judicial notice of notorious and undisputed facts, or of facts which are capable of immediate and accurate demonstration, by resorting to readily accessible sources of indisputable accuracy" [citations omitted]. Of note here, the Court has taken judicial notice of the history of colonialism and how it translates into higher levels of incarceration for Indigenous peoples (*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 60).
>
> (c) Courts may *infer* that a law has the effect of reinforcing, perpetuating, or exacerbating disadvantage, where such an inference is supported by the available evidence [citations omitted]. One must bear in mind, however, that inference is not mere assertion; nor is it *a priori* reasoning.
>
> (Emphasis in original.)

[76] The foregoing elements that must be established to substantiate a violation of section 15 of the Charter inform the nature of the pleadings required in a section 15 case. While it is not necessary (and is indeed improper) to plead evidence detailing how the two elements of the section 15 test will be established, it is necessary that a claimant set out the material facts it alleges support each step of the section 15 test. As noted in paragraph 56 of *Brink* (citing *Mancuso* at paragraph 19), "[p]laintiffs must plead—in summary form but with sufficient detail—the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant the 'who, when, where, how and what' of the actions that allegedly give rise to its liability".

[77] In the instant case, the plaintiffs failed to set out the material facts in support of each part of the section 15 test and did not provide the requisite details regarding the "who, when, where, how and what" of the alleged section 15 breach. I accordingly see no error in the Federal Court's determination that the Statement of Claim should be struck for want of the necessary material

facts. However, that does not end the matter as we must also consider whether the Federal Court erred in declining to afford the plaintiffs leave to amend their Statement of Claim and to reapply for certification.

B. *Did the Federal Court err in failing to provide leave to amend the Statement of Claim?*

[78] The determination of whether to grant a party leave to amend a pleading is a discretionary one and, therefore, absent an error of law or principle, reviewable for palpable and overriding error: *Brink* at para. 41; *McMillan v. Canada*, 2024 FCA 199 at para. 106; *Ramos v. Canada (Attorney General)*, 2019 FCA 205 at para. 21; *Conway v. The Law Society of Upper Canada*, 2016 ONCA 72 at para. 16.

[79] As a matter of principle and as a general rule, if there is a justiciable claim that can be advanced by a party, they should be granted leave to amend their pleadings to make such a claim in the event their pleading is struck for want of necessary material facts unless they have already been granted so many chances to amend that the court concludes they are unable to plead the required material facts, as occurred in *Heli Tech Services (Canada) Ltd. v. Weyerhaeuser Company Limited*, 2011 FCA 193.

[80] In terms of the general principle, in *Enercorp Sand Solutions Inc. v. Specialized Desanders Inc.*, 2018 FCA 215, Justice Pelletier, writing for this Court, noted at paragraph 27 that:

> It has long been the policy of the law that meritorious claims should not be defeated on the basis of inadequate pleadings. In that spirit, when a pleading is struck, leave to amend should be granted unless it is plain and obvious that the defect cannot be cured by an amendment: see *Simon v. Canada*, 2011 FCA 6 at para. 15, 410 N.R. 374. A defect may be incurable if, for example, the Court lacks jurisdiction or if there are no facts which would disclose a cause of action: see *Spatling v. Canada (Solicitor General)*, 2003 FCT 445 at paras 7-8, [2003] F.C.J. No. 621, *Canada (Minister of Citizenship and Immigration) v. Seifert*, 2002 FCT 859 at para.12, [2003] 2 F.C. 83.

[81] Applying these principles in the context of class proceedings, this Court in *Brink* at paragraph 133, and in *Canada (Attorney General) v. Jost*, 2020 FCA 212 [*Jost*] at paragraph 49, held that leave to amend a statement of claim in a proposed class proceeding should only be denied in the clearest cases. These will be limited to situations where it is "plain and obvious that no tenable cause of action is possible on the facts as alleged, and there is no reason to suppose that the party could improve his or her case by an amendment" (*Jost* at para. 49).

[82] Here, as noted, the Federal Court found that the plaintiffs' failure to plead the necessary material facts to support the alleged breach of section 15 of the Charter could have been remedied, at least in some instances, by amending the Statement of Claim. The Court did not conclude that the appellants could not plead the necessary material facts. Rather, the Federal Court concluded that amendments would be futile because the section 15 claims raised no common questions. It thus becomes necessary to address whether the Federal Court erred in determining that the plaintiffs could not raise a section 15 claim that encompassed questions of law or fact capable of determination in common.

C. *Did the Federal Court err in determining that the plaintiffs could not raise a section 15 claim that encompassed questions of law or fact capable of determination in common?*

[83] In examining this issue, I commence by noting that it was likely premature for the Federal Court to have assessed whether the plaintiffs raised common questions in respect of their section 15 claims in the absence of an amended Statement of Claim that properly pleaded the section 15 claims. Often, a court cannot appreciate the nature of the questions flowing from a statement of claim until the pleadings are fleshed out.

[84] In her oral submissions and memorandum of fact and law, the appellant more fully detailed the nature of the section 15 claims she wishes to make if granted leave to amend the Statement of Claim. She alleges that she made similar submissions to the Federal Court when detailing why she submits she ought to have been granted leave to amend the Statement of Claim.

[85] More specifically, as noted, the appellant says that she principally sought and seeks to advance a claim that centres on the fact that the CRS and the impugned tools (or parts of them) in the aggregate overclassify the risk that female Indigenous offenders pose. She submits that a breach of section 15 of the Charter may be established via proof of such overclassification in the aggregate, which she alleges she may establish via proof that the impugned tools and the CRS systemically discriminate against female Indigenous offenders. She accordingly submits that it matters not what security classification individual members of the class were given, as all members of the class may advance a section 15 claim by reason of the overclassification in the aggregate of class members caused by the CRS and the impugned tools.

[86] It seems to me that these assertions are not so clearly without merit that the plaintiffs should have been forestalled from being granted leave to amend their Statement of Claim to seek to make them.

[87] To establish a breach of section 15 of the Charter, it is not necessary that all members of a protected group be negatively impacted by the impugned law or government practice or be affected by them in the same way at step one of the section 15 test.

[88] The Supreme Court has recognized that so-called "partial discrimination" satisfies section 15. The relevant underlying jurisprudence was summarized relatively recently by Justice Abella in paragraphs 72–75 of *Fraser*, where she noted that "claimants need not show that the criteria, characteristics or other factors used in the impugned law affect all members of a protected group in the same way" (at para. 72). As noted by Justice Abella in *Fraser*, this principle is rooted in two seminal cases from human rights jurisprudence, *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 1989 CanLII 96 [*Brooks*] and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, 1989 CanLII 97 [*Janzen*].

[89] In *Brooks*, the Supreme Court held that "[t]he fact that discrimination is only partial does not convert it into non-discrimination" (at 1248, quoting James MacPherson, "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade" (1980) 1 C.H.R.R. C/7 at C/11). The Court there found that a plan that denied benefits to pregnant women was discrimination against women more generally, stating (at 1247) that it was:

> … not persuaded by the argument that discrimination on the basis of pregnancy cannot amount to sex discrimination because not all women are pregnant at any one time. While pregnancy-based discrimination only affects part of an identifiable group, it does not affect anyone who is not a member of the group.

[90] To similar effect, in *Janzen*, the Supreme Court held that the sexual harassment of two female employees was discrimination on the basis of sex. The Court rejected the employer's argument that sex discrimination had not occurred because only some of the female employees had been sexually harassed. Chief Justice Dickson held that discrimination need not be equal across the class (at 1288–89):

> While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically. In nearly every instance of discrimination the discriminatory action is composed of various ingredients with the result that some members of the pertinent group are not adversely affected, at least in a direct sense, by the discriminatory action. To deny a finding of discrimination in the circumstances of this appeal is to deny the existence of discrimination in any situation where discriminatory practices are less than perfectly inclusive. It is to argue, for example, that an employer who will only hire a woman if she has twice the qualifications required of a man is not guilty of sex discrimination if, despite this policy, the employer nevertheless manages to hire some women.

[91] These concepts were imported into the Charter context in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504. There, the Supreme Court, citing the above human rights jurisprudence, stated "that differential treatment can occur on the

basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated" (at para. 76).

[92] The fact that partial discrimination may violate section 15 of the Charter has also been recognized by several appellate courts: see, *e.g.*, *Stadler v. Director, St Boniface/St Vital*, 2020 MBCA 46 at para. 75, leave to appeal to SCC refused, 39269 (26 November 2020); *Jacob v. Canada (Attorney General)*, 2024 ONCA 648 at para. 104; *Haseeb* at paras. 67–68; *Brink* at para. 84.

[93] Thus, the fact that not all members of the class the appellant seeks to certify may have been assessed as posing the same risk as that indicated by the scores from the CRS and the impugned tools would not necessarily forestall a claim that the CRS and these tools systemically discriminate against class members.

[94] Another related point bears mention. There is some support in the case law for a finding that a member of a protected group that is subject to systemic discrimination may be awarded a remedy even if they are not personally adversely impacted by the impugned policy.

[95] In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 1997 CanLII 327, three deaf individuals launched a section 15 claim against the provincial government alleging its failure to provide funding for sign language interpreters for deaf persons when they receive medical services resulted in deaf persons receiving medical services of lesser quality. In

the context of finding a breach of section 15 and outlining an "effective communication" standard, Justice La Forest, writing for the Court, explained at paragraph 83 that:

> … it is not in strictness necessary to decide whether, according to this standard, the appellants' s. 15(1) rights were breached. This Court has held that if claimants prove that the equality rights of members of the group to which they belong have been infringed, they need not establish a violation of their own particular rights.

[96] In support of this principle, Justice La Forest cited his earlier decision in *Egan v. Canada*, [1995] 2 S.C.R. 513, 1995 CanLII 98 at 531, which disposed of an argument that a homosexual couple could not challenge legislation on the grounds that the couple was not negatively affected by the denial of a spousal allowance because the analysis centered on homosexual couples generally:

> In this case, however, the respondent contends that the appellants have suffered no prejudice because by being treated as individuals they have received considerably more in combined federal and provincial benefits than they would have received had they been treated as "spouses". I would simply dispose of this argument on the ground that, <u>while this may be true in this specific instance, there is nothing to show that this is generally the case with homosexual couples, which is the point the respondent must establish</u>.
>
> (Emphasis added.)

[97] Justice Cory, dissenting but not on this point, similarly stated, at pages 591–92 in *Egan*, that the focus of the analysis remained on homosexual couples generally rather than the couple in question:

> First, the relief sought in this action is a finding pursuant to s. 52(1) of the *Constitution Act, 1982* that a portion of the Act is unconstitutional. Section 52(1)

> operates to invalidate all or a part of any Act when it is found to be inconsistent with the Constitution. The appellants are not alleging that the discrimination is unique or particular to their personal situation but, rather, that the Act discriminates against all homosexual common law couples who are living in a state which is comparable to heterosexual common law couples. It follows that the appellants must demonstrate that homosexual couples in general are denied equal benefit of the law, not that they themselves are suffering a particular or unique denial of a benefit. The precise mathematical calculation of benefits which could be paid to couples either as individuals or as a couple is of little assistance as it will inevitably vary from case to case depending upon the particular economic circumstances of each couple and each member of that couple. Rather, a reading of the legislation reveals that it denies the spousal allowance to all homosexual common law couples and thus, it is established that the Act has denied equal benefit of the law.
>
> (Emphasis in original.)

[98] More recently, these principles were applied in *King & Dawson v. Government of PEI*, 2019 PESC 27 [*King PESC*], aff'd 2020 PECA 13 [*King PECA*] in a class action context. There, the class action alleged that a disability support program violated section 15 by excluding those with mental disabilities, and the plaintiffs sought a declaration confirming the Charter breach, an amendment of the legislation, and damages pursuant to subsection 24(1) of the Charter.

[99] The lower court certified the class action. The certified class was "All living persons currently or formerly resident of Prince Edward Island between October 1, 2001 to the present who claim to suffer, or to have suffered, from a mental disability" (*King PESC* at para. 36). The Court rejected concerns for the size of the class and the possibility that certain class members' claims would fail, finding that such concerns were not for the certification stage (*King PESC* at paras. 38, 45–48).

[100] The lower court's commonality analysis similarly disposed of concerns that all class members would not succeed on an individual basis. The defendant argued that the claim for discrimination should not be prosecuted by class action as the class members did not have the same stake in the issue as it relates to the occurrence of discrimination and the appropriate remedy under subsection 24(1). The Court relied on *Eldridge* to dismiss both of these concerns.

[101] The Court of Appeal upheld the certification order. It explicitly rejected a class definition that included as an element that the member was denied supports under the program because of their mental illness, which would require the Court to prematurely judge the merits of the members' claims (King PECA at paras. 49, 52–53). The Court of Appeal also showed deference to the certification judge's reliance on Eldridge in dismissing concerns at the certification stage for the different stakes of each class member in the discrimination claim (King PECA at paras. 63–67, 80).

[102] In light of the foregoing, it is not plain and obvious in the instant case that a claim for a violation of section 15 of the Charter based on the alleged systemic discrimination suffered by class members by reason of the CRS and the impugned tools discloses no cause of action. Thus, the plaintiffs should have been provided leave to advance such a claim unless the Federal Court did not err in finding that there were no common questions related to the section 15 claim for which a class proceeding was the preferable procedure.

[103] In conducting its commonality and preferability analysis, the Federal Court did not consider the class members' claims for a declaration and damages based on systemic

discrimination by reason only of being subjected to the CRS and the impugned tools regardless of whether class members were individually classified at the same risk level as determined via the CRS and the impugned tools. The fact that the Federal Court did not consider this aspect of the plaintiffs' section 15 claim is not surprising since most of the Statement of Claim was focussed on the class members' section 7 claims, which, the appellant concedes, are individual in nature.

[104] It seems to me that whether the CRS and the impugned tools discriminate against class members, in the aggregate, is a question that may be answered in common as it concerns the overall effect of the impugned tools on all class members. Moreover, I agree with the appellant that, to be a common question meriting certification, it is not necessary that the question establish liability for any class member.

[105] Determining whether a proposed class proceeding displays the requisite commonality to justify certification is to be approached purposively to ascertain whether the common issue(s) are essential element(s) of each class member's claim and whether addressing them commonly will avoid duplication of fact-finding or legal analysis. It is not necessary that the common issues predominate over individual issues, that answers to them settle liability, or that class members be identically situated in respect of the common issues. Rather, the requisite commonality will exist if the common issue will meaningfully advance class members' claims, which may be said to be the case unless individual issues are overwhelmingly more significant: *Pro-Sys* at para. 108; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 38–40; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3 at paras. 44–46;

Brake v. Canada (Attorney General), 2019 FCA 274, [2020] 2 F.C.R. 638 at para. 76; *Canada v. Greenwood*, 2021 FCA 186, [2021] 4 F.C.R. 635 at para. 180, leave to appeal to SCC refused, 39885 (17 March 2022).

[106] In the absence of an amended Statement of Claim and a fresh notice of motion setting out the questions proposed for certification that are alleged to flow from the amended pleadings, it is not appropriate to say more about the commonality of reframed questions regarding the alleged breach of section 15 of the Charter that might flow from an amended Statement of Claim. Likewise, the issues of whether a class proceeding would be the preferable procedure for their resolution and of whether the appellant is a suitable representative plaintiff may only be ascertained once the pleadings are amended and the amended proposed common questions are stated. These matters must therefore be remitted to the Federal Court for redetermination after the appellant serves and files a Fresh as Amended Statement of Claim and another motion for certification. As the appellant has already amended the Statement of Claim several times, I would allow her only one more opportunity to serve and file a Fresh as Amended Statement of Claim that raises the section 15 issue discussed in these reasons and would also provide her with only a single opportunity to reapply for certification.

V. Proposed Disposition

[107] In light of the foregoing, I would allow this appeal in part and would amend the order of the Federal Court to provide the appellant leave to amend the Statement of Claim only one more time to plead the section 15 claim discussed in these reasons and to reapply for certification, also only one more time, based on the same evidentiary record that was before the Federal Court.

"Mary J.L. Gleason"
J.A.

"I agree.
K. A. Siobhan Monaghan J.A."

"I agree.
Gerald Heckman J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-94-23
STYLE OF CAUSE:	AILEEN MICHEL v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 19, 2024
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	MONAGHAN J.A. HECKMAN J.A.
DATED:	MARCH 11, 2025

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