

Federal Court of Appeal



Cour d'appel fédérale

Date: 20251105

Docket: A-41-24

Citation: 2025 FCA 199

**CORAM: WOODS J.A.
 BIRINGER J.A.
 WALKER J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

B.W.

Respondent

Heard at Edmonton, Alberta, on May 7, 2025.
Post-hearing submissions dated July 18, July 28, and August 1, 2025.

Judgment delivered at Ottawa, Ontario, on November 5, 2025.

REASONS FOR JUDGMENT BY:

BIRINGER J.A.

CONCURRED IN BY:

**WOODS J.A.
WALKER J.A.**

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REASONS FOR JUDGMENT

BIRINGER J.A.

I. Introduction

[1] The respondent, B.W., sought certification of a class proceeding as the representative plaintiff. The proceeding was brought on behalf of inmates over the age of 50 (Older Inmates) incarcerated in institutions operated by the Correctional Service of Canada (CSC). The

respondent claims that Older Inmates were harmed by the systemic negligence of CSC resulting in abuse and/or the inability to access healthcare. The respondent also alleges breaches of section 7 and subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter). The Federal Court (*per* Fothergill J.) applied the criteria in Rule 334.16(1) of the *Federal Courts Rules*, S.O.R./98-106 and certified the class proceeding: 2024 FC 77 (Reasons).

[2] The appellant challenges the Federal Court's determination on all certification criteria other than suitability of the representative plaintiff. According to the appellant, the motion judge unduly relied on the certified class proceedings in *Nasogaluak v. Canada (Attorney General)*, 2021 FC 656 [*Nasogaluak FC*], var'd 2023 FCA 61 [*Nasogaluak FCA*], leave to appeal refused, 2023 CanLII 118472 (S.C.C.) [collectively, *Nasogaluak*] and *Araya v. Canada (Attorney General)*, 2023 FC 1688 [*Araya*]. The appellant says that the motion judge's analysis of the action at hand was superficial, resulting in multiple errors which tainted the certification order. The appellant says that the motion judge did not fulfill the required gatekeeping role and certified an unmanageable and confusing class proceeding.

[3] The respondent says that the class proceeding was properly certified and urges deference to the motion judge's weighing of evidence and exercise of discretion. They also say the appellant has not identified any legal error or established that the Federal Court made a palpable and overriding error.

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

II. Background

[5] The respondent on appeal, B.W., is the representative plaintiff in the proposed class action. He is incarcerated in Mission Institution, a federal penitentiary operated by CSC. B.W., born in 1961, is an Older Inmate. Older Inmates comprised approximately 25% of CSC's custodial population, or about 3500 people, as of 2019.

[6] The Class in the proposed proceeding consists of Older Inmates incarcerated in CSC facilities who allege that they were subjected to physical, emotional or psychological abuse (Abuse); or that they suffered harm because they could not access or pay for healthcare services, equipment or supplies (Inability to Access Healthcare): Reasons at paras. 78, 79, 107.

[7] The appellant, the Attorney General of Canada, is the defendant in the proposed class action. According to the respondent's pleadings, CSC is responsible for the treatment of Older Inmates because it funds, oversees, operates, supervises, controls, maintains and supports CSC's staff and facilities. The pleadings claim that Older Inmates, because of their age, are regularly subjected to physical, emotional and psychological abuse by CSC staff and younger inmates. The pleadings assert that Older Inmates are regularly denied access to healthcare services and medically necessary equipment and supplies. The pleadings allege that CSC has known for decades that these events occur in CSC facilities but failed to prevent or address them.

[8] At the certification hearing, the respondent relied on facts from his affidavit and the affidavits of two other Older Inmates incarcerated in other CSC facilities: Reasons at paras. 9-24.

The affidavits recount their experiences as Older Inmates in CSC custody, including personal medical issues and barriers to accessing healthcare. Expert evidence was provided by two professors of gerontological nursing. One addressed the increased risks and medical needs associated with aging; the other, the acceleration of aging and death in the prison setting. A former Correctional Investigator of Canada who had investigated the situation of Older Inmates in custody gave evidence on the impact of prison conditions on aging inmates: Reasons at paras. 25-38.

[9] The respondent also submitted documentary evidence, including numerous reports of the Office of the Correctional Investigator (OCI) cited by the experts: Reasons at para. 39. According to the OCI reports and other public documents, Older Inmates are commonly subjected to assault, intimidation, bullying and a disproportionate use of force. They have a greater need for health services, medical equipment and supplies due to their advancing age, and are denied timely access, sometimes due to a lack of personal funds.

[10] The appellant submitted affidavits of three CSC officials providing information on various CSC policies and procedures, including alternative dispute resolution, descriptions of various CSC facilities, individualized correctional plans and the provision of healthcare. Redacted copies of B.W.'s medical records and information about the inmate grievance process were also attached to an affidavit submitted by a paralegal with the Department of Justice: Reasons at paras. 40-68.

[11] The motion judge's reasons frequently refer to the pleadings in *Araya* and *Nasogaluak* and rely on the reasons of the Federal Court and the Federal Court of Appeal in those cases. In *Nasogaluak FC*, the Federal Court (*per* McVeigh J.) certified a class proceeding on behalf of Aboriginal persons who alleged they were assaulted while held in custody or detained by RCMP officers in the territories. The claims were for systemic negligence in the funding, oversight, operation, supervision, control, maintenance and support ("top-down management") of the RCMP officers who committed the assaults, and for violations of section 7 and subsection 15(1) of the Charter. The Federal Court of Appeal allowed the appeal in part, striking the claims for breach of fiduciary duty and remitting the certification order to the Federal Court to be amended in accordance with the Court's reasons. An amended certification order was issued on June 2, 2023.

[12] In *Araya*, the Federal Court (*per* Fothergill J.) certified a class proceeding brought on behalf of CSC inmates who identify as Black, alleging physical, emotional and/or psychological abuse while incarcerated. The claims were for systemic negligence and violations of section 7 and subsection 15(1) of the Charter. A claim for breach of fiduciary duty was withdrawn following the release of *Nasogaluak FCA*. The B.W. proposed class action bears many factual and legal similarities to *Araya*. The same motion judge granted certification in *Araya* approximately one month before granting certification in the current proceeding. The certification order in *Araya* was not appealed.

III. Certification Criteria

[13] Rule 334.16(1) of the *Federal Courts Rules* sets out the conditions that must be met for a class proceeding to be certified:

- a. First, the pleadings must disclose a reasonable cause of action;
- b. Second, there must be an identifiable class of two or more persons;
- c. Third, the claims of the class members must raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
- d. Fourth, a class proceeding must be the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
- e. Fifth, there must be a suitable representative plaintiff or applicant who satisfies the criteria in Rule 334.16(1)(e).

[14] The motion judge determined that all five conditions had been met and granted certification. On appeal, the appellant challenges the motion judge's determination on the first four criteria. The appellant does not challenge the motion judge's determination on the fifth criterion.

IV. Issues

[15] This appeal raises the following questions:

- a. Were the motion judge's reasons insufficient?
- b. Did the motion judge err in finding that the pleadings disclose reasonable causes of action in systemic negligence and breaches of section 7 and subsection 15(1) of the Charter?

- c. Did the motion judge err in finding that there is an identifiable class of two or more persons?
- d. Did the motion judge err in finding that the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members?
- e. Did the motion judge err in finding that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact?

V. Standard of Review

[16] The appellate standard of review applies to an order certifying a class action: *Greenwood v. Canada*, 2021 FCA 186 [*Greenwood FCA*] at para. 89; *Canada (Attorney General) v. Jost*, 2020 FCA 212 [*Jost*] at paras. 20-21. Errors of law are reviewable for correctness and errors of fact or of mixed fact and law, absent an extricable question of law, are reviewable for palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.

[17] Determining whether the necessary elements of a cause of action have been pleaded or whether the cause of action is cognizable are questions of law. Accordingly, where a motion judge makes these determinations in considering whether there is a reasonable cause of action, the standard of review is correctness: *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 57; *Adelberg v. Canada*, 2024 FCA 106 [*Adelberg*] at para. 38, citing *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89 [*Jensen*], at paras. 32-36.

[18] Determining whether sufficient material facts have been pleaded to support the elements of a claimed cause of action is a question of mixed fact and law, reviewable on a standard of palpable and overriding error: *McQuade v. Canada (Attorney General)*, 2025 FCA 173 at para. 43; *Lochan v. Binance Holdings Limited*, 2025 ONCA 221 at para. 29; *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606 at para. 36; *Michel v. Canada (Attorney General)*, 2025 FCA 58 at paras. 64-65; *Adelberg* at para. 39; *Jensen* at para. 42. A “palpable” error is one that is obvious; an “overriding” error is one that affects the core of the outcome: *Benhaim v. St Germain*, 2016 SCC 48 at para. 38, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46.

[19] The remaining certification criteria involve questions of fact or mixed fact and law, reviewable on a standard of palpable and overriding error, absent an extricable question of law: *Nasogaluak FCA* at para. 22, citing *Jost* at para. 21, citing *Canada v. John Doe*, 2016 FCA 191 [John Doe] at paras. 27-32. A motion judge’s determinations on these criteria are entitled to substantial deference because they require weighing of the evidence and “field-sensitivity” to the management of the case: *John Doe* at para. 29, citing *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215 at para. 36; see also *AIC Limited v. Fischer*, 2013 SCC 69 [Fischer] at para. 65 and *Canada v. Whaling*, 2022 FCA 37 at para. 20.

VI. Sufficiency of Reasons

[20] The appellant submits that the motion judge relied excessively on *Araya* and *Nasogaluak* and failed to analyze the B.W. proposed class action, rendering the Federal Court's reasons insufficient.

[21] The functional and contextual approach to the sufficiency of reasons was established by the Supreme Court of Canada in *R. v. Sheppard*, 2002 SCC 26 [*Sheppard 2002*] and *R. v. R.E.M.*, 2008 SCC 51 [*R.E.M.*]. The same principles apply in both criminal and civil cases: see e.g. *Manitoba Métis Federation Inc. v. Canada (Energy Regulator)*, 2023 FCA 24 at para. 197; *Canada v. Long Plain First Nation*, 2015 FCA 177 at para. 143.

[22] Functional review means that reasons must fulfill the purposes they serve—critically, in the context of an appeal, by providing a meaningful basis for appellate review: *R. v. Sheppard*, 2025 SCC 29 [*Sheppard 2025*] at para. 45, citing *Sheppard 2002* at para. 42; *Greenwood FCA* at para. 101. Contextual review means that reasons must be read together with the evidence, the submissions of counsel, the live issues and the history of the case: *Sheppard 2025* at para. 46, citing *R.E.M.* at para. 17; *Dnow Canada ULC v. Grenke Estate*, 2020 FCA 61 at para. 21.

[23] Read in light of the surrounding context, if the reasons provide a meaningful basis for appellate review, they are adequate, despite any shortcomings: *Sheppard 2025* at paras. 47-48, citing *Sheppard 2002* at para. 28; *R. v. G.F.*, 2021 SCC 20 at paras. 71, 108; *R.E.M.* at para. 17. To allow for appellate review, reasons must be intelligible, or capable of being made out. There

need not be an encyclopedic description of every piece of evidence, or every argument made by each party: *Hennessey v. Canada*, 2016 FCA 180 at para. 10. However, the logical connection between “what” was decided and “why” it was decided must be apparent: *R.E.M.* at para. 17.

[24] Here, the motion judge’s reasons were sufficient. On some issues the reasons are terse and could have benefitted from further explanation with reference to material facts. On certain issues there is reliance on the reasons in *Araya* and *Nasogaluak FCA*, even cross-referencing entire sections of the reasons in *Araya*, a practice I do not endorse. Nonetheless, as explored further below, I conclude that on all issues, having regard to the pleadings and the record, it is discernible why the conclusions were drawn. I see no basis for this Court to intervene based on the inadequacy of the motion judge’s reasons. Thus, for each of the certification criteria, I focus on whether the motion judge’s decision was made in error, including whether reliance on the reasons in *Araya* and/or *Nasogaluak FCA* was justified.

VII. Reasonable Cause of Action

[25] A plaintiff will satisfy the reasonable cause of action requirement in Rule 334.16(1)(a) unless, assuming all facts pleaded are true, it is “plain and obvious” that the claim has no reasonable prospect of success: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys Consultants*] at para. 63; *Nasogaluak FCA* at para. 18. The applicable principles are the same as those on a motion to strike: *Greenwood FCA* at para. 91; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 14. A defendant bears an “onerous” burden in defeating a

certification motion on the basis that no reasonable cause of action was pleaded: *Nasogaluak FCA* at para. 19, citing *Greenwood FCA* at para. 144.

[26] The facts alleged in the statement of claim are presumed to be true, and generally no evidence may be considered on this issue. The pleading must be read generously: *Nasogaluak FCA* at para. 19. Nonetheless, material facts must be stated in sufficient detail to support the claim and relief sought, a requirement that is fundamental to the trial process: *Federal Courts Rules*, r. 174; *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*] at paras. 16-20. Compliance with the rules of pleading is mandatory, as the launch of a class proceeding is a serious matter, potentially affecting many class members' rights and defendants' interests and liabilities: *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 40.

[27] The statements of claim in both *Araya* and this proceeding were amended to reflect the pleadings endorsed by the Federal Court of Appeal in *Nasogaluak FCA*. Indeed, portions of the statement of claim in *Araya* and this matter were taken almost word-for-word from the pleadings in *Nasogaluak*: Reasons at paras. 76, 85; *Araya* at para. 89.

[28] At the certification hearing in the Federal Court, B.W. submitted an Amended Amended Statement of Claim (Further Amended Statement of Claim) which was considered by the motion judge on consent of the Attorney General: Appeal Book, Vol. I, pp. 124-62. The Further Amended Statement of Claim was not filed. All references to the pleadings in these reasons are to the Further Amended Statement of Claim.

[29] The passages in the Further Amended Statement of Claim relating to the causes of action and harm and damages are substantially similar to those in the pleadings in *Araya* and *Nasogaluak*: Further Amended Statement of Claim at paras. 67, 71-78 (Negligence); paras. 83-92 (Charter Breaches); para. 95 (Harm and Damages). However, the sections describing the nature of the action, the experience of B.W. and the CSC institutional structure alleged to give rise to systemic negligence and Charter breaches are specific to the within proceeding. These include the descriptions of Abuse of Older Inmates and Inability to Access Healthcare:

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

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

...

49. As pleaded above, Older Inmates experience, as a group, greater need for Healthcare Services Items than younger inmates as a result of their advanced age and greater propensity for developing physical and mental ailments. However, Older Inmates frequently encounter delays, refusals, or an inability to access Healthcare Services Items as a result of conduct by CSC, since (the “Inability to Access Healthcare”):

- a)CSC frequently delays or refuses to provide Healthcare Services Items to Older Inmates, despite that a healthcare professional has prescribed or otherwise indicated that those Healthcare Services Items are required by Class members, including where the Healthcare Services Items are designated as “approved” in the National Essential Health Services Framework, or are specially-authorized for the Class member;

b)CSC expects Class members to self-fund Healthcare Services Items required by Older Inmates but which are not designated by CSC as “approved” in the National Essential Health Services Framework; and

c)Since 1981 CSC has restricted Inmate earnings to a maximum of \$6.90 per day. As CSC does not provide accommodated employment for Older Inmates, unemployment among Class members is common, which limits their income to \$2.50 per day. Due to CSC-imposed impoverishment, Older Inmates cannot access the Healthcare Services Items they require, for instance by purchasing services which are not designated as “approved,” or by obtaining services for themselves when CSC delays or refuses to provide Healthcare Services Items.

(Further Amended Statement of Claim at paras. 47, 49.)

[30] The pleadings further allege that at all material times, the appellant knew about the Abuse of Older Inmates and the Inability to Access Healthcare, and that this knowledge was reflected in reports issued by the CSC research branch. The pleadings also allege that CSC developed a strategy in 2001 for mitigating harm against Older Inmates that was not implemented, and that the OCI subsequently issued many further reports on the need to protect Older Inmates that CSC ignored: Further Amended Statement of Claim at paras. 51-57.

[31] The motion judge found that the pleadings disclosed a reasonable cause of action in systemic negligence and breaches of section 7 and subsection 15(1) of the Charter. The motion judge acknowledged the substantial similarities between the Further Amended Statement of Claim and the pleadings in *Nasogaluak* and *Araya* and cross-referenced his own reasons on the issues in *Araya*: Reasons at paras. 85-87, 89-92, 94; citing *Araya* at paras. 81-93, 95-105.

[32] The cross-referenced reasons in *Araya* (which, in turn, refer to passages from the reasons in *Nasogaluak FCA*) are essential to the motion judge’s conclusion that the necessary elements

of the pleaded causes of action were made out. Recall that *Araya* involved claims of systemic negligence and breaches of section 7 and subsection 15(1) of the Charter by CSC inmates alleging abuse while incarcerated. In *Nasogaluak*, the claims were also for systemic negligence and breaches of section 7 and subsection 15(1) of the Charter, although the setting was RCMP custody in the territories. In this proceeding, the motion judge found, applying the analysis in *Araya* and *Nasogaluak FCA*, that the necessary elements of causes of action in negligence and section 7 and subsection 15(1) of the Charter were pleaded. The appellant does not challenge this conclusion, and I agree with it.

[33] What the appellant argues is that the respondent failed to plead sufficient material facts and that the motion judge erred by relying on duplicated text from the pleadings in *Nasogaluak*. The appellant also says that the motion judge improperly relied on affidavit evidence.

[34] The appellant characterizes these alleged errors as errors of law, but I am not persuaded. The appellant's argument is about whether sufficient material facts were pleaded to satisfy the requirements of the claims which, as addressed above, is a question of mixed fact and law. The standard of review is palpable and overriding error.

[35] Of course, each action must be assessed on its own pleadings, but the appellant has failed to establish why the motion judge's partial reliance on similarly framed actions is problematic. I agree with the motion judge that the alleged systemic wrongdoing is similar to the claims made in *Araya* and *Nasogaluak*: Reasons at paras. 90-92. It stands to reason that there would be a high degree of overlap between the pleadings in these cases relating to the claims and damages.

[36] However, the motion judge did not fail to consider differences among the proceedings when assessing the adequacy of the pleaded facts. The motion judge observed that the pleadings submitted by B.W. were not carbon copies of those in *Nasogaluak*. Rather, they had been amended to reflect the circumstances of the proceedings and contained material facts arising from B.W.'s experience while incarcerated which were extrapolated to the proposed Class: Reasons at paras. 84-86, 92. Both the "Nature of the Action" and "Plaintiff's Experiences" sections of the Further Amended Statement of Claim contain pleaded facts distinct from the pleadings in *Nasogaluak*.

[37] While a more detailed analysis of the pleaded facts and comparison of the different proceedings would have been beneficial, there was a solid basis for the motion judge to conclude that sufficient material facts were pleaded. The pleaded facts support the existence of a duty of care towards class members, breach of the duty of care and breaches of the Charter.

[38] First, the existence of a common law duty of care towards Class members as incarcerated persons was explicitly pleaded, as was the fact that CSC exercises custody and control of Older Inmates, which is the basis for that duty: Further Amended Statement of Claim at paras. 30-31, 67-69; see also *MacLean v. R.*, [1973] S.C.R. 2 (S.C.C.) and *Nasogaluak FCA* at paras. 45-49. The pleadings also refer to specific statutory duties and principles applicable to the CSC setting which may inform the duty of care and its discharge, citing the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, the *Corrections and Conditional Release Regulations*, S.O.R. 92/620, and *Commissioner's Directive 567-1 – Use of Force*: see Further Amended Statement of Claim at paras. 8(o), 23-24, 26-27, 32-37, 78-79.

[39] Second, the Further Amended Statement of Claim pleads material facts in support of the allegations that CSC violated its common law duty of care along with section 7 and subsection 15(1) of the Charter: Further Amended Statement of Claim at paras. 74-78, 84-92.

[40] The pleadings describe elements of CSC operational conduct inherent in “top-down” decision-making—with national headquarters performing overall planning, policy and development, and regional facilities overseeing local operations. The statement of claim pleads that CSC controls many aspects of inmates’ lives and caused harm to Older Inmates through systemic failures specific to them, including that CSC knew about the special vulnerability to violence and healthcare needs of Older Inmates and that CSC failed to adopt oversight strategies for their protection, despite recommendations of the OCI, the Senate Standing Committee on Human Rights and CSC’s own internal research branch: see Further Amended Statement of Claim at paras. 6, 25, 30-31, 38, 40, 45, 47-49, 51-57, 72-76, 102.

[41] The pleadings also include material facts supporting the claim that Older Inmates suffer and are denied access to adequate healthcare in CSC facilities. The statement of claim pleads that common incidents of ill-treatment include CSC staff beating, hitting, pepper-spraying and otherwise applying force to Older Inmates; directing abuse and slurs at Older Inmates; placing Older Inmates in situations where they are vulnerable to assault or abuse by younger inmates; and failing to intervene when younger inmates assault or abuse Older Inmates: Further Amended Statement of Claim at para. 47. The statement of claim also pleads that Older Inmates are frequently unable to access healthcare, including because of CSC’s delay or refusal to provide medical supplies and equipment to Older Inmates, and because CSC limits inmates’ earning

potential while incarcerated, meaning that they cannot afford these items: Further Amended Statement of Claim at para. 49.

[42] The motion judge also relied on material facts arising from B.W.'s claimed experience: Reasons at para. 86. These included multiple batteries (one of them recent and severe) and assaults by younger inmates placed within his living unit; unheeded requests to CSC staff for supervision, protection and separation from younger inmates; and increased aggression, intimidation and threats from younger inmates after reporting the incidents. B.W. claimed that because of these experiences, he endures serious and prolonged mental suffering, for which he was refused counselling: Further Amended Statement of Claim at paras. 11-12, 59-66.

[43] Third, the pleadings allege material facts specific to the claimed Charter violations. Regarding section 7, the pleadings state that the frequency, duration and severity of the CSC conduct, including the widespread use of excessive and disproportionate force, engage the Charter rights of life, liberty and security of the person: Further Amended Statement of Claim at paras. 83-86. Regarding subsection 15(1), the pleadings allege differentiated treatment of Older Inmates when compared to younger inmates, engaging the Charter right of equal protection, equal benefit and non-discrimination based on age: Further Amended Statement of Claim at paras. 89-92.

[44] For these reasons, I am satisfied that the motion judge did not err in finding that material facts were pleaded. The Further Amended Statement of Claim reveals the "who, when, where,

how and what” of the actions that gave rise to the alleged harms: *Brink v. Canada*, 2024 FCA 43 [Brink] at para. 56, citing *Mancuso* at para. 19.

[45] The appellant also submits that the motion judge improperly relied on OCI reports to “fill in blanks” in the pleadings. The appellant relies on *Bigeagle v. Canada*, 2023 FCA 128 [Bigeagle] at para. 44, where this Court stated that public reports “may be used on a certification motion to help put uncontentious facts into context, to determine whether the references made in the statement of claim are accurately reflected and to assist in discharging the ‘some basis in fact’ burden”, but cannot be used “to fill in the existing gaps or blanks in the pleadings”.

[46] I do not accept the appellant’s characterization of the motion judge’s analysis. The motion judge did not rely on the contents of the reports as if they were pleaded facts, nor did he “comb through the reports” to “particularize” allegations which might support the pleaded causes of action: *Bigeagle* at para. 44. Rather, the motion judge referred to the reports in support of the uncontentious claim that these reports were issued, what they said (and therefore what CSC allegedly knew) and the allegation that CSC failed to respond to the reports to further prevent or mitigate the harms alleged: see Reasons at paras. 2-3, 44, 110. These are all pleaded facts.

[47] Finally, the appellant has not established that the motion judge improperly relied on B.W.’s affidavit evidence to bolster deficiencies in the pleadings: see *Brink* at para. 58. Instead, the motion judge concluded that the statement of claim pleads material facts arising from B.W.’s personal experience, a conclusion that was justified. The motion judge simply observed that any further particulars contained in B.W.’s affidavit could be added to an amended pleading:

Reasons at para. 86. I also note that the respondent submitted proposed amendments to the Further Amended Statement of Claim in an appendix to their memorandum of law in this appeal. The proposed amendments provide further particulars on B.W.'s personal experience and that of another Older Inmate. While not strictly relevant to this Court's review of the Federal Court's findings, the proposed amendments support the motion judge's conclusion that perceived deficiencies in the statement of claim could be rectified: *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89 at para. 80.

[48] Appropriately relying in part on the precedents of *Araya*, *Nasogaluak FCA* and *Greenwood*, the motion judge concluded that it was not plain and obvious that the pleadings failed to disclose reasonable causes of action in systemic negligence and section 7 and subsection 15(1) of the Charter: Reasons at paras. 86, 89, 94.

[49] There is no basis for this Court to intervene.

VIII. Identifiable Class

[50] To satisfy the "identifiable class" criterion in Rule 334.16(1)(b), the evidence must show "some basis in fact" for "an objective class definition that bears a rational connection to the litigation and that is not dependent on the outcome of the litigation": *Nasogaluak FCA* at para. 84, citing *Greenwood FCA* at para. 168; *Wenham v. Canada (Attorney General)* 2018 FCA 199 [Wenham] at para. 69, citing *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC

46 [*Western Canadian Shopping Centres*] at para. 38 and *Hollick v. Toronto (City)* 2001 SCC 68 [*Hollick*] at paras. 19, 25.

[51] The motion judge found that the respondent satisfied this criterion for the Class, defined (at para. 107 of the Reasons) as:

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

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

This definition differed from the one proposed in the Further Amended Statement of Claim, which did not specify that the healthcare services, equipment or supplies must have been prescribed or recommended by a healthcare professional. Before the Federal Court, B.W.'s counsel acknowledged that the Class definition should be amended to include this specification, and the motion judge's certification order reflects this revision: Reasons at paras. 106-07.

[52] The Federal Court determined that the Class Period commenced on April 17, 1985 (the date that subsection 15(1) of the Charter came into effect) and continued until the date of the Federal Court's certification order.

[53] On appeal, the appellant advances many of the same arguments as it did in the Federal Court. Before this Court, the appellant submits that the Class encompasses multiple classes. The appellant also says the Class definition is unnecessarily broad and insufficiently objective to allow Older Inmates to determine whether they are Class members. The appellant also claims that the Class Period was improperly defined by the motion judge. While the appellant seeks to characterize these as errors in law, I disagree. The appellant's concerns engage questions of mixed fact and law or questions of fact, reviewable on the standard of palpable and overriding error.

[54] First, the appellant claims that the Class endorsed by the motion judge is a jumbled colossus composed of as many as eight classes, each based on various incidents. They say that this is problematic because the identifiable class criterion requires a single overriding class with issues common to all members.

[55] Yet the Federal Court determined that such an overriding class existed, and this determination is owed deference. As addressed further below in the context of the preferable procedure criterion, the Federal Court recognized that the proposed Class consists of people who allege different wrongs in various institutional settings over a long period of time. Nevertheless, the motion judge found that the common questions relating to alleged CSC conduct permeated all claims of the proposed Class, justifying a collective proceeding: Reasons at para. 121.

[56] The nature of the alleged wrongs means there will be variability in how individual class members experienced harm. However, the claim that CSC systemically facilitated the Abuse of

Older Inmates and denied them access to healthcare is an overriding common issue. Variance in how this claim manifested for different Class members does not undermine the commonality of the issue or prevent certification: *Rumley v. British Columbia*, 2001 SCC 69 at paras. 29-30; *Carcillo v. Ontario Major Junior Hockey League*, 2025 ONCA 652 at paras. 42, 47. As the motion judge observed, only if it is determined that there was such systemic behaviour by CSC can it be determined whether a particular inmate was a victim of this system: Reasons at para. 100.

[57] The appellant’s arguments on the complexity and manageability of the action are addressed below under the preferable procedure criterion.

[58] Second, the appellant submits that the claims of abuse in the Class definition are more subjective and vague than the claims of assault in the Class definition in *Nasogaluak*. They say that an “assault” that occurs in police detention is considerably clearer and more defined than “abuse” that occurs within a CSC institution over the course of the inmate’s confinement. They say that, accordingly, the motion judge erred in relying on *Nasogaluak*.

[59] The motion judge was right to look to *Nasogaluak* for guidance. In *Nasogaluak FCA*, this Court accepted a claim-based class definition and rejected the argument that the class was too subjectively defined: *Nasogaluak FCA* at para. 93. Relying on the Court of Appeal for Saskatchewan’s decision in *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 [*Wuttunee*], leave to appeal refused, 2009 CanLII 57570 (S.C.C.), and subsequent decisions applying *Wuttunee*, this Court held that claims-based class definitions were permitted if they were

sufficiently objective and certain; for example, by being related to an objective and verifiable fact or event. The Court concluded that a class definition based on claims of assault was sufficiently objective: *Nasogaluak FCA* at paras. 90-93.

[60] The motion judge did not err in coming to the same conclusion here. “Abuse” may encompass a broader scope of action than “assault”. However, this does not make the analysis in *Nasogaluak FCA* irrelevant or lead to the conclusion that “abuse” is necessarily subjective. The motion judge acknowledged this difference but ultimately found that the term was sufficiently clear—Class members would be likely to understand what “Abuse” and “Inability to Access Healthcare” meant: Reasons at para. 101. There is no palpable and overriding error displacing this finding or the motion judge’s conclusion that the identifiable class criterion was satisfied.

[61] Third, the appellant challenges the Class Period. They say that the period for the (b) and (c) sub-definitions of the Class, which are based on alleged Inability to Access Healthcare, should commence as of July 23, 2015 because the CSC National Essential Health Services Framework came into effect on that date, and that there is no evidence of denial of access to healthcare prior to 2015. The appellant also submits that there was no evidence of abuse before B.W.’s alleged battery in 2017.

[62] The Class definition proposed in the Further Amended Statement of Claim included the term “Inability to Access Healthcare”, which was defined by reference to the CSC National Essential Health Services Framework: see Further Amended Statement of Claim at paras. 8(j), 49. However, the Class definition certified by the motion judge did not rely on the Framework.

Instead, the definition includes all those who were denied or could not afford “approved or specially-authorized health services, medical equipment, and/or supplies that a healthcare professional prescribed or indicated were required”: Reasons at para. 106-07. Accordingly, the motion judge did not err by failing to start the Class Period on July 23, 2015.

[63] Additionally, a class period need not begin with the first alleged incident experienced by a representative plaintiff and the evidence suggests that the period before B.W.’s alleged battery in 2017 and the Framework in 2015 may be relevant. As the motion judge observed, much of the prison infrastructure alleged to underlie the harms claimed predates the Charter: Reasons at para. 102. There was expert evidence before the Federal Court that CSC was aware of the problems facing Older Inmates by the 1990s. In 1994, the CSC internal research branch reported on the needs of older offenders in relation to medical care service and potential violence, issuing a series of recommendations to address the aging population in Canada’s federal prisons. Many similar reports were issued in subsequent years: Appeal Book, Volume V, Expert Opinion of Howard Sapers, pp. 2002-10. This evidence was sufficient to form “some basis in fact” for the Class Period approved by the motion judge: see *Greenwood FCA* at paras. 96-97.

IX. Common Questions

[64] The common questions requirement in Rule 334.16(1)(c) involves asking “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”. The common issues

need not predominate over individual issues, as long as the common issues meaningfully advance class members' claims: *Greenwood FCA* at para. 180; *Nasogaluak FCA* at para. 100.

[65] The motion judge certified the following common questions:

1. By its operation or management of the CSC, did the Defendant permit, perpetuate, cause, or contribute to the Abuse of Older Inmates and/or the Inability to Access Healthcare?
2. By its operation or management of CSC, did the Defendant breach a duty of care it owed to the Class to protect them from actionable physical or psychological harm?
3. By its operation or management of CSC, did the Defendant breach the right to life, liberty and security of the person of the Class under section 7 of the Charter?
4. If the answer to common issue 3 is yes, did the Defendant's actions breach the rights of the Class in a manner contrary to the interests of fundamental justice under section 7 of the Charter?
5. Did the actions of the Defendant breach the right of the Class to the equal protection and equal benefits of the law without discrimination based on "age" and "mental or physical disability" under section 15 of the Charter?
6. If the answer to common issue 3, 4, or 5 is "yes", were the Defendant's actions saved by section 1 of the Charter, and if so, to what extent and for what time period?
7. If the answer to common issue 3, 4, or 5 is "yes", and the answer to common issue 6 is "no", do those breaches make damages an appropriate and just remedy under section 24 of the Charter?
8. Does the Defendant's conduct justify an award of punitive damages?
9. If the answer to common issue 8 is "yes", what amount of punitive damages ought to be awarded against the Defendant?

(Reasons at para. 131.)

[66] The motion judge noted that the proposed common questions were modelled on those approved in *Nasogaluak* and *Araya* and referred to this Court's observation in *Nasogaluak FCA*

at para. 106 that similar systemic claims in other cases, therein cited, were found to meet the common issues criterion: Reasons at para. 111. The motion judge concluded, “applying the precedents of *Nasogaluak FCA* and *Araya*”, that the proposed common issues would avoid duplication of fact-finding and legal analysis. Therefore, the common questions criterion was satisfied: Reasons at para. 112.

[67] According to the appellant, the motion judge erred in law by failing to provide adequate reasons and by failing to engage with the test for commonality. The appellant says the motion judge’s analysis was “so cursory as to be superficial” and that if the proper test had been applied it would have been clear that the certified questions lack a substantial common ingredient: Appellant’s Memorandum of Law at para. 67. The appellant submits that on certain common questions, a conclusion was reached without any basis in fact.

[68] While the motion judge’s analysis is brief, the basis for the conclusion is discernible—that the proposed common questions are capable of meaningfully advancing class members’ claims. The reliance on precedent is justified in demonstrating that claims involving broad, systemic harm—whether in systemic negligence or alleging breach of Charter rights—can have meaningful common elements. A fair reading of the reasons and the pleadings shows engagement with the test for commonality and reveals *why* the decision was made: Reasons at paras. 87, 100, 108-112, 119, 121.

[69] The pleadings here, as in *Nasogaluak* and *Araya*, allege a “top-down” system of wrongdoing that, in this case, permitted and facilitated the Abuse of Older Inmates and their

Inability to Access Healthcare. The Further Amended Statement of Claim includes several pleaded facts common to all class members, including how CSC controls the inmates' daily routine and access to healthcare, and that CSC had identified Older Inmates as a growing population with unique needs requiring accommodation. There is also alleged commonality of experience of Class members because of their pre-existing disadvantages, owing to older age and associated vulnerability: Further Amended Statement of Claim at paras. 3, 30, 31, 40, 41. The allegation is not only that the Class members suffered harm while incarcerated, but that they suffered atypical harm because of their age and resulting vulnerability.

[70] CSC's knowledge and system-wide conduct can be determined first, for the benefit of the Class, without reference to the circumstances of any individual: *Nasogaluak FCA* at paras. 102-106; *Greenwood FCA* at paras. 180-184. This will avoid duplication of fact-finding and analysis on the duty of care owed to all class members and the conduct underlying the alleged Charter breaches: *Western Canadian Shopping Centres* at para. 39.

[71] The appellant's arguments relating to specific common questions also fail. Whether there is some basis in fact for proposed common issues to be certified is a question of mixed fact and law. The appellant has not established any palpable and overriding error.

[72] The motion judge did not certify common questions #1 and #2 without sufficient evidence of commonality, as the appellant alleges. It is important to recall that the evidentiary threshold for this determination is "some basis in fact": *Greenwood FCA* at para. 94, citing *Hollick* at para. 25 and *Pro-Sys Consultants* at para. 99. This threshold is lower than the civil

standard of balance of probabilities as certification is not the appropriate stage to determine an issue on its merits or resolve conflicts in the evidence: *Greenwood FCA* at para. 94, citing *Fischer* at para. 40.

[73] The evidence before the motion judge supported more than a series of individual breaches requiring disparate fact-finding. Rather, the evidence supported commonality, similar to that established in *Greenwood* and *Nasogaluak*, based on the conduct of a single agency, managed under a unified hierarchical structure, subject to a single statute and accompanying regulations, and governed by common national policies and procedures: see Further Amended Statement of Claim at paras. 6, 19, 25, 30-31, 80; Appeal Book, Volume XIV, Transcript of Cross-Examination of Katherine Belhumeur at pp. 5510, 5638, qq. 43-46, 684-87; *Corrections and Conditional Release Act*; *Corrections and Conditional Release Regulations*.

[74] The evidence also supported the claim that CSC's alleged institutional failures were shared across prisons. There was evidence before the motion judge that prisons differ in terms of physical infrastructure and security level, and that prisons may enact institution-specific policies: Appeal Book, Volume III, Affidavit of Katherine Belhumeur at pp. 479-84, paras. 13-29. However, there was also evidence that these institution-specific policies had to comply with national directives issued by the CSC Commissioner, and that all CSC institutions were subject to the direction of CSC leadership: Appeal Book, Volume III, Affidavit of Katherine Belhumeur at p. 640, paras. 10-11; Appeal Book, Volume XIV, Transcript of Cross-Examination of Kathrine Belhumeur at p. 5510, qq. 42-47. Therefore, the motion judge had some basis in fact to conclude that the institutional failures alleged by the respondent were common between CSC facilities.

[75] There was also evidence before the motion judge supporting the claim that Older Inmates are subjected to assault, intimidation and bullying and the disproportionate use of force and are denied access to health services for which they have a greater need because of their age, and that CSC was aware of these issues: Appeal Book, Volume V, Expert Opinion of Howard Sapers, pp. 2002-10, 2013-14; Appeal Book, Volume V, Expert Opinion of Elaine Gallagher, pp. 1911-14. I am satisfied that the motion judge had some basis in fact for finding commonality in common questions #1 and #2.

[76] The appellant also submits that the motion judge erred by certifying the common questions regarding punitive damages (#8 and #9) without evidence: see Reasons at para. 110. I disagree. In addition to the public reports cited by the motion judge, there was evidence before the Federal Court supporting the grounds for an award of punitive damages, including expert evidence and affidavits sworn by inmates: Appeal Book, Volume V, Expert Opinion of Howard Sapers, pp. 2002-10; Appeal Book, Volume V, First Affidavit of Calvin Conley, pp. 1770-72, 1774, paras. 15-33, 45-52; Appeal Book, Volume V, First Affidavit of Blake Wright, pp. 1726-29, 1731-36, paras. 8-28, 41-68; see also *Greenwood FCA* at paras. 96-97. The record sufficiently supports the allegation that CSC was aware of deficiencies in their systems to protect Older Inmates and failed to take steps to address these concerns.

[77] Ultimately, the motion judge's conclusion on the common questions was supported by precedent, a voluminous evidentiary record and sufficient—if brief—reasons. The appellant has not established that the motion judge made a palpable and overriding error.

X. Preferable Procedure

[78] To satisfy the preferable procedure requirement in Rule 334.16(1)(d), a representative plaintiff must establish some basis in fact that a class proceeding would be a fair, efficient and manageable means of advancing the common issues that is preferable to any other reasonably available means of resolving the class members' claims. This analysis must be conducted through the lens of the three principal goals of class proceedings, namely, access to justice, judicial economy and behaviour modification: *Fischer* at paras. 22-23; *Brake v. Canada (Attorney General)*, 2019 FCA 274 at paras. 85-86; *Greenwood FCA* at para. 200; *Voltage Pictures, LLC v. Salna*, 2025 FCA 131 at paras. 126-127.

[79] Rule 334.16(2) provides that “all relevant matters” shall be considered in determining the preferable procedure for the just and efficient resolution of the common questions, including specific listed considerations:

Matters to be considered	Facteurs pris en compte
(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether	2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :
(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;	a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;
(b) a significant number of the members of the class have a valid interest in individually controlling the	b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

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

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) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[80] The appellant claims that the motion judge made two errors in law while conducting the preferability analysis. First, the appellant submits that they were required to satisfy the Court that there was a “better proceeding”, improperly reversing the onus. Second, the appellant claims that the motion judge failed to consider whether individual issues predominated over the common questions. The appellant relies in part on *Canada v. Stonechild*, 2025 FCA 105 [*Stonechild*], where this Court overturned the Federal Court’s certification of a class proceeding. *Stonechild* involved claims against Canada for placing Indigenous children living off-reserve in the care of a non-Indigenous family, resulting in alleged harms from loss of Indigenous identity. The claims were for systemic negligence and violations of section 7 and subsection 15(1) of the Charter. In *Stonechild*, this Court concluded that the motion judge reversed the onus, improperly requiring the Attorney General to disprove bare assertions of the plaintiffs and prove that the proposed class proceeding was unmanageable: *Stonechild* at para. 11.

[81] That is not what happened here. The motion judge did not oblige the appellant to prove that there was a better procedure, but was responding to the appellant's central argument on this issue: that the class proceeding is unwieldy because it is really "three class actions in one"—one relating to the excessive use of force by CSC staff against Older Inmates, the second concerning the failure by CSC staff to prevent the assault of Older Inmates and the third concerning the Inability to Access Healthcare: Reasons at para. 117.

[82] The motion judge rejected the appellant's argument. Although noting the challenges presented by a class action involving numerous acts and omissions in various institutional settings over a long period of time, the motion judge determined that these difficulties were surmountable. The motion judge was not persuaded that efficiencies would be gained by certifying three class actions instead of one: Reasons at paras. 121-22. There is no basis to interfere with this conclusion. While the claims for Abuse are in many respects distinct from the claims regarding the Inability to Access Healthcare, the allegation is that both stem from a common systemic disregard for the needs and circumstances of Older Inmates.

[83] The motion judge also relied on the vulnerability of the Older Inmate population and unlikelihood of other redress being sought if the class proceeding was not certified: Reasons at para. 123. The motion judge noted that Canada did not submit that the inmate grievance process or a complaint under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 was a preferable procedure: Reasons at para. 116. There was no direct evidence about Older Inmates' financial inability to individually marshal their own proceedings. However, it is uncontroversial that their income-earning potential is extremely limited, and there was evidence before the motion judge

regarding the low pay available to inmates: Appeal Book, Volume V, First Affidavit of Blake Wright, pp. 1735-36, paras. 60-68; Appeal Book, Volume V, Expert Opinion of Howard Sapers, p. 2005; see also *Guérin v. Canada (Attorney General)*, 2019 FCA 272 at paras. 3-15. By distributing litigation costs among class members, class proceedings improve access to justice for those with limited financial resources: *Wenham* at paras. 86-87; *Hollick* at para. 15. Therefore, the motion judge's conclusion that the class proceeding was preferable because it provided improved access to justice was not in error.

[84] The appellant also submits that the motion judge failed to consider the predominance of individual issues requiring separate factual determinations, and that the motion judge's acknowledgement of likely problems illustrates the unmanageability of the class proceeding. Again, the appellant relies on *Stonechild*.

[85] In *Stonechild*, this Court found that the Federal Court failed to consider whether the common issues predominated over questions affecting individual members. The certification judge had simply stated that the commonality of the questions was enhanced by there being only one defendant: *Stonechild* at para. 35. Not only was this analysis insufficient, the very premise of the Federal Court's conclusion on preferable procedure—Canada as the sole defendant—was found to be misguided. This Court concluded that since the alleged breaches arose from a gap between provincial government policies and federal legislation, the preferable procedure was to pursue multiple proceedings before the superior courts that could compel the participation of provinces responsible for placing the children: *Stonechild* at paras. 33-36, 40-41, 46.

[86] The appellant’s reliance on *Stonechild* is misplaced, and the balance of their submissions on preferable procedure overlap with their submissions regarding the common issues. I reject them for similar reasons.

[87] The motion judge here considered the individual and the common issues. The reasons demonstrate awareness of the challenges posed by the distinct individual experiences and factual scenarios which may arise and included some of the ways to address them: Reasons at paras. 119-120, 122. This included a recognition that the *Federal Courts Rules* provide mechanisms to resolve individual issues within a class proceeding, such as Rule 334.16(3) regarding the creation of individual subclasses and Rule 334.26 regarding individual questions: Reasons at para. 120.

[88] Notwithstanding the challenges presented by the claims against CSC, the motion judge concluded that the individual issues did not bar certification, because the common questions relating to CSC conduct “permeate all aspects of the proposed class proceeding”: Reasons at para. 121. The motion judge appropriately referred to similar challenges in *Nasogaluak* and *Greenwood*—involving potentially numerous acts and omissions by different perpetrators in different institutional settings over a lengthy period—that did not preclude certification: *Nasogaluak FC* at paras. 107-119, aff’d *Nasogaluak FCA* at paras. 106, 116-122; *Greenwood v. Canada*, 2020 FC 119 at paras. 59-70, 73, aff’d *Greenwood FCA* at paras. 183-184.

[89] The motion judge concluded that the “top-down” theory of the case meant that whether there was a system created or permitted by CSC to facilitate Abuse of Older Inmates and restrict

Access to Healthcare had to be determined first. Doing so would avoid duplication of fact-finding and legal analysis and made practical sense: Reasons at para. 121.

[90] This conclusion was well founded and fully consistent with the goals of a class proceeding, including judicial economy. Rule 334.16(2)(a) prescribes that in determining whether a class procedure is preferable, whether common questions predominate over questions only affecting individual members must be *considered*. The common issues need not predominate: *Hollick* at para. 30; *Wenham* at para. 77.

[91] Contrary to the appellant's submission, *Stonechild* does not say that the need to address numerous individual issues defeats the purpose of a class proceeding. Nor does that accurately reflect the law. A class proceeding may be preferable even where there are substantial individual issues, provided the determination of the common issues will significantly advance the claims: *Jost* at para. 92; *Wenham* at para. 77; *Hollick* at paras. 27-31.

[92] The Federal Court's findings on preferable procedure are consistent with the test prescribed by Rule 334.16(2) and the caselaw interpreting it. The appellant has failed to demonstrate a reversible error in the motion judge's reasons.

XI. Disposition

[93] The appellant has not identified an error in the Federal Court’s reasons warranting this Court’s intervention. Accordingly, I would dismiss the appeal. Neither party requested costs and in accordance with Rule 334.39(1), I would not award costs.

“Monica Biringer”

J.A.

“I agree.

Judith Woods J.A.”

“I agree.

Elizabeth Walker J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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