

CERTIFICATION: FIRST STEP TO ACCESS TO JUSTICE FOR IMMIGRATION DETAINEES

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The recent decision of the Ontario Superior Court of Justice in *Richard v The Attorney General of Canada* illustrates that the amendments to the preferable procedure requirements in the Ontario *Class Proceedings Act, 1992* are no impediment to *Charter* breach claims asserted by vulnerable class members. The court certified the class proceeding on behalf of all persons who were detained for immigration purposes in a provincial or territorial correctional facility since May 16, 2016, including a subclass of individuals with a mental health condition. The claim asserts causes of action for *Charter* breaches and in negligence.

Immigrants can be detained in specified circumstances. This action does not challenge that legislation, which has already been found to be constitutional. Rather, the complaint is that the detention is meant to be administrative, and cannot be punitive in nature. Despite this legal imperative, Canada has a longstanding practice of incarcerating immigration detainees in provincial prisons. While imprisoned, immigration detainees are subjected to the same rules, conditions and treatment as the general criminal population. This is punitive, the claim alleges. The Plaintiffs allege that this practice is contrary to ss. 7, 9, 12 and 15 of the *Charter* and a breach of a duty of care owed by Canada to the immigration detainees. Based on statistics maintained by Canada, 8,360 people were detained in a provincial prison between the start of the class period until July 18, 2023. The practice continues, so the numbers continue to grow.

The causes of action

On the certification motion, Canada objected to every element of the test for certification, and it lost on every objection that it raised. The Court found that the causes of action were properly pleaded, and that there was some basis in fact for every other part of the certification test.

Section 7 of the *Charter* protects the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The

Court said the right to liberty and security of person was engaged by the detention of Immigration Detainees and noted that the pleadings included material facts to support an infringement on the right to security of person on the basis that restraints and strip searches are used. The Court said the pleadings supported a finding that the administrative nature of immigration detention and the penal nature of imprisonment were not rationally connected and constituted an overbroad consequence and grossly disproportionate conditions, and the decision-making process supported a violation of natural justice.

To comply with s. 9 of the *Charter*, (i) a detention must be authorized by law, (ii) the authorizing law itself must not be arbitrary, and (iii) the manner in which the detention is carried out must be reasonable. The Court said the Plaintiffs sufficiently pled that prison incarceration for immigration purposes is not authorized by the *Immigration and Refugee Protection Act*, its regulations, or international law, and therefore incarcerating any immigration detainee in a provincial prison for any circumstance is an arbitrary detention not carried out in a manner consistent with fundamental principle of justice and proportionality.

Section 12 is engaged if (i) punishment is grossly disproportionate to what would have been appropriate or (ii) the punishment is cruel and unusual by nature because it is intrinsically incompatible with human dignity. The plaintiffs alleged that the practice of incarcerating administrative detainees in a penal institution was punitive treatment which was grossly disproportionate to the administrative purpose of detention. As detainees in a prison, the immigrants were subjected to strip searches, use of restraints such as handcuffs and leg shackles, application of strict and restrictive prison rules and punishment, restrictions on communication and interaction with the outside world, and compliance with prison rules.

The plaintiffs pled a breach of s. 15 both on the grounds of citizenship for all immigration detainees and mental disability for the subclass. For the first, the Court said the fact that only non-citizens are faced with the risk of being placed in a prison for administrative reasons was a sufficient distinction to disclose a cause of action based on citizenship. The Court also stated it was beyond a doubt that the pleadings disclosed a distinction on mental disability.

The Court said there was a recognized duty of care owed to persons in custody, and that a determination on whether the CBSA practice was an operational or policy decision would depend on evidence led at a common issues trial. It was not plain and obvious that the decision to detain in a prison was a core policy decision immune from liability. The cause of action in negligence was therefore certified. In deciding that the action raised common issues, the court adopted the analysis of Perell J. in *Price* which set general principles for commonality. In particular, “for an issue to be a common issue, it must be substantial ingredient of each class member’s claim and its resolution must be necessary to the resolution of each class member’s

claim”. Common issues do not require an identical outcome for all members of the class, but all class members “must benefit from the successful prosecution of the action, although not necessarily to the same extent”.

Here, the court noted that the core commonality was whether the use of provincial prisons for immigration detention was unlawful as alleged. The answer to this question is a substantial ingredient to each class member’s claim. The court also noted that there was some basis in fact that all class members suffered some damage solely by being detained in a provincial prison.

The expanded test for preferability under s. 5(1.1)

In 2020, amendments to the *CPA* introduced a higher threshold test to meet the preferable procedure criterion. The plaintiff must now demonstrate that the class proceeding to be superior to all reasonably available means to provide relief or address the impugned conduct of the defendant, and the common issues must predominate over individual issues.

The Court adopted the analysis set out by Perell J in [Banman](#), which says the preferable procedure analysis requires a rigorous comparison of the advantages and disadvantages of the alternatives to a class proceeding, analyzed through the lens of judicial economy, behaviour modification, and access to justice. The Court considered the following factors: (a) whether the design of the class action is manageable as a class action; (b) whether there are reasonable alternatives; (c) whether the common issues predominate over the individual issues; and (d) whether the proposed class action is superior (better) to the alternatives.

In considering whether the design of the class action is manageable under factor (a), the court noted that the core common issue of the use of provincial prisons for immigration detention was a “bright line” best managed as a class action. The Court rejected Canada’s submission that different laws would apply to detainees in different provinces, noting that *Charter* claims would be the same, and there is no material difference in the law of negligence across the country. The Court noted that the availability of *Charter*, punitive, base level, and aggregate damages further supported the manageability of a class proceeding, and in particular the consideration of deterrence and vindication when determining *Charter* damages as set out in [Ward](#).

The only proposed alternative method of addressing the class members’ claims was judicial review. the Court concluded that judicial review was not a reasonable alternative since, among other things, there would be no class-wide determination or resolution f and judicial review would not provide damages for torts or *Charter* breaches. The Court also rejected individual

actions, joinder or consolidation and test cases given the significant costs and the vulnerabilities facing Immigration Detainees.

The court said “[t]his is a case where access to justice concerns in respect of the vulnerability and lack of financial resources of the class strongly support preferability as a class action.” The court noted the financial barriers to individual actions or applications for judicial review, compared to the availability of the Class Proceedings Fund for this class action. The court also said the goal of behavioural modification is best addressed by a single determination rather than individual trials or judicial review and through aggregate damages.

While the court recognized that class members may seek individual compensatory damage above a base amount, those individual circumstances were contemplated in the plaintiffs’ proposed litigation plan and manageable under the *CPA*.

Conclusion

The court certified every cause of action and common issue proposed by the plaintiffs. While the amendments to the *Class Proceedings Act, 1992* have arguably raised the bar for certification, as the plaintiff must establish that a class action is superior to other potential methods of resolving the claim, and they must also establish that the common issues predominate, in a case like this, which involves allegations of systemic breaches of *Charter* rights, the court will readily find that the bar is cleared.