IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ewert v. Canada (Attorney General),* 2025 BCSC 1521

Date: 20250808
Docket: S120095
Registry: Vancouver

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Between:

Jeffrey Ewert

Plaintiff

And:

The Attorney General of Canada

Defendant

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for Plaintiff:	D. Honeyman T. Grace
Counsel for Defendant:	F. Paradis V. Broughton A. Baboi
Place and Dates of Hearing:	Vancouver, B.C. November 29-30 and December 1, 2023
Place and Date of Judgment:	Vancouver, B.C. August 8, 2025

I. Introduction

[1] In a decision dated April 7, 2022, the Court of Appeal set aside an order certifying this matter under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] and remitted the case to this Court for a "fresh determination of preferability in respect of the common issues on misfeasance in public office, and for consideration of any further applications" the plaintiff might bring: *Ewert v. Canada* (Attorney General), 2022 BCCA 131 [*Ewert C.A.*] at para. 92.

[2] The plaintiff, having now amended both his pleadings and proposed common issues, re-applies for certification on all causes of action within his claim.

[3] The defendant opposes the application, arguing that the plaintiff's claims continue to lack the commonality necessary for certification as a class action.

II. Background

[4] This action arises out of a prison lockdown that occurred at Kent Institution between January 7, 2010 and January 18, 2010 (the "Lockdown"). The plaintiff alleges that the Lockdown was actionable or unlawful in various ways and seeks to have these issues determined on behalf of all affected inmates by way of a class action.

[5] A more detailed factual background is summarized in an earlier decision, found at 2016 BCSC 962 [*Ewert 2016*]:

> [4] Kent Institution is a maximum security penitentiary located in Agassiz, British Columbia. At the time of the events in question it housed approximately 215 inmates in four units (general population, protective custody, segregation, and alternative housing for lower functioning or vulnerable inmates). The Lockdown came about as a result of an anonymous report to CSC that a "zip gun", or improvised handgun, had been introduced into the confines of the prison. During the Lockdown inmates were confined to their cells and all programs and prison visits were suspended.
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> [5] Two separate "exceptional" searches were conducted. An "exceptional" search is a frisk search or strip search of inmates performed where the head of the institution is satisfied there is "a clear and substantial danger to human life or safety or to the security of the penitentiary": s. 53 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [*CCRA*]. The searches were

> carried out by removing inmates from their cells and taking them to a common area, where they were strip-searched.
>
> [6] Members of the regional Emergency Response Team ("ERT"), comprised of both Riot and Tactical Team ("TAC") members, played a central role in the searches, particularly the second search. A first exceptional search was conducted from January 7 to 10, 2010. A second exceptional search was conducted from January 12 to 17, 2010 as a result of information indicating that the first search had been deficient. Although the deployment of ERT/TAC members was only authorized for certain areas such as entrance areas, the plaintiff alleges that heavily-armed ERT/TAC members were, without authorization, deployed in the living areas and directly involved in the removal of inmates from their cells (a process called "cell extraction"). The plaintiff alleges that cell extractions were carried out by ERT/TAC members by pointing automatic weapons at inmates, even those inmates who were compliant. The pointing of a firearm at an inmate is considered to be a "use of force" intervention and it is subject to strict guidelines and post-event reporting requirements. According to the plaintiff, those guidelines and reporting requirements were not complied with.
>
> [7] In addition to the various deprivations associated with being confined to cells for an extended period of time, the plaintiff alleges that the inmates were subjected to verbal and physical threats by ERT/TAC members (including the pointing of firearms), they were not provided with necessary medications, and the strip searches were conducted without adequate privacy barriers and in some cases with female officers present.

III. Litigation History

[6] This matter has a long and substantial litigation history. The following is a brief review.

Proceedings from Commencement to Certification Order

[7] This action was commenced on January 6, 2012 through the filing of a notice of civil claim. An amended notice of civil claim was filed on April 19, 2012.

[8] The causes of action pleaded by the plaintiff were unlawful imprisonment (arising out of alleged deprivations of residual liberty), negligence, misfeasance in public office, assault, and breaches of rights under ss. 7, 8 and 12 of the *Charter*.

[9] The defendant unsuccessfully applied to strike the plaintiff's claim in late April 2012. The reasons for that ruling may be found at 2012 BCSC 621. The filing of a similar claim by another law firm resulted in an extended carriage application, which

resulted in the carriage of the litigation being granted to plaintiff's counsel in February 2014; those reasons are indexed as 2014 BCSC 215.

[10] Several certification and related applications ensued as pleadings were amended, common issues reformulated and sub-classes created: see *Ewert 2016* and 2017 BCSC 279.

[11] The action was certified as a class proceeding on January 31, 2018, the reasons for which may be found at 2018 BCSC 147. That decision was appealed.

Court of Appeal

[12] While accepting that the plaintiff's claims address "common experiences and happenings at Kent Institution that are capable of generating common issues within the meaning of s. 4(1)(c) of the [*CPA*]", the Court of Appeal nonetheless found that "with the exception of the claim for misfeasance in public office, the common issues… are unacceptably entangled with factual matters requiring individualized investigation ": *Ewert C.A.* at para. 6.

[13] More specifically, the Court of Appeal held that:

a) individual investigation would be inevitable on the issues pertaining to unlawful imprisonment, negligence of the prison administrators and *Charter* breaches (paras. 52–53, 56, 62–63, 86);

b) the issues pertaining to negligence of the ERT/TAC members either had no factual basis in the pleadings or would also inevitably lead to individualized investigation, and therefore they failed to meet s. 4(1)(c) of the *CPA* (paras. 65–66); and

c) the claims of misfeasance in public office were matters attracting sufficient commonality to all putative class members, but these had not been subjected to a preferability analysis and so the trial court was directed to address that issue (para. 90).

[14] The Court of Appeal also recognized that the plaintiff might choose to recast some of his claims to remedy commonality deficiencies, and if these were found to now satisfy the commonality requirement, a fresh preferability analysis would have to be conducted for those causes of action as well (at paras. 6 and 91).

IV. Amended Pleadings

[15] The plaintiff availed himself of the opportunity granted by the Court of Appeal by filing a second further amended notice of civil claim on November 16, 2022 (the "current NOCC") along with a revised list of proposed common issues. The defendant filed its response to civil claim on January 4, 2023. This was the first response to civil claim filed by the defendant in the lengthy history of this litigation.

[16] The current NOCC pleads the following causes of action:

a) unlawful imprisonment;

b) negligence on the part of:

i. prison administrators;

ii. correctional staff who carried out a search under s. 53 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [*CCRA*];

iii. ERT/TAC leadership;

c) misfeasance in public office by ERT/TAC leadership; and

d) breaches of the proposed class members' ss. 7, 8 and 12 *Charter* rights.

[17] The revised list of proposed common issues is attached as Schedule A to these reasons.

[18] Accordingly, a fresh analysis must also be conducted on the class action issues pertaining to those causes of action.

V. New Materials and Evidence

[19] The plaintiff has an updated litigation plan that updates the prior version and reflects revisions to the proposed common issues. The updated litigation plan also reflects the removal of the "out of province" subclasses, which are no longer necessary following amendments made to the *CPA*.

[20] The plaintiff's evidence is contained in 14 affidavits, four of which are new. There are now affidavits from inmates on each of the institution's cell blocks during the relevant time.

[21] The defendant filed four new affidavits. One affidavit merely provided updated and more accurate information on inmate numbers, now determined to be 223. The other new affidavits are from: (1) Harold Massey, who was the warden at the time; (2) an ERT/TAC team member during the Lockdown; and (3) an institutional nurse who was on duty during the Lockdown. The defendant also filed an affidavit from a legal assistant who tracked the changes to the current NOCC and prepared an exhibit showing those changes.

VI. Positions of the Parties

A. Plaintiff

[22] The plaintiff submits the action meets the certification criteria set out in the *CPA*. The plaintiff organized his written submissions by referencing the defence responses to the certification issues. I summarize these in the following paragraphs.

Causes of Action – s. 4(1)(a)

[23] The plaintiff notes that with the exception of the reformulated claim under s. 8 of the *Charter*, which has not yet been considered, this Court has previously concluded that all other pleaded causes of action were properly made out. Although the plaintiff argued this issue is therefore *res judicata*, he nonetheless made submissions on the viability of the causes of action.

[24] In answer to the defendant's objection that there has been a failure to plead "compensable harm" in the context of the claims in negligence, misfeasance in public office and the *Charter* claims, the plaintiff points to his having pleaded harm caused by the both the deprivations of the inmates' residual liberty and acts causing psychological and emotional harm. The plaintiff says that, in any event, whether the claims fall above or below the threshold for compensable harm is a matter for trial.

[25] In answer to the defendant's allegations of deficient pleadings in the negligence claims against the prison administrators and ERT/TAC teams, the plaintiff says all necessary elements are pleaded. The plaintiff similarly argues that his claim of unlawful imprisonment is properly pleaded, noting that this was also the conclusion of this Court in *Ewert 2016*.

[26] As for the *Charter* claims, and the ss. 7 and 12 claims in particular, the plaintiff submits the defendant has provided no reasonable argument that the Court should revisit its prior determination that the pleadings do disclose causes of action.

[27] As for the plaintiff's claim based on s. 8 of the *Charter*, the plaintiff notes he has amended this claim. Formerly, this claim was grounded on the manner in which correctional staff carried out strip searches, which the Court of Appeal found was bound to devolve into individual investigations into specific encounters between ERT/TAC members and class members. Now, the plaintiff says, the claim focuses on the *order* made for a second s. 53 search, which arose only because of the defendant's failure to plan and/or execute the first s. 53 search. While accepting this may be a novel claim, the plaintiff urges the Court to exercise restraint when considering it, as the Supreme Court of Canada has repeatedly emphasized that courts must take a generous approach and err on the side of allowing novel but arguable claims to proceed.

[28] Finally, in answer to the defence objection that there are no material facts justifying an award of punitive damages to the proposed class, the plaintiff points to the several assertions within the current NOCC that he says provide proper grounds for an award of punitive damages.

Identifiable Class – s. 4(1)(b)

[29] The plaintiff argues this issue was decided in his favour in *Ewert 2016* and there is no reason to come to any other conclusion as there has been no substantive change to the class definition. The only change made was to remove the out-of-province subclasses, as these are no longer required by the *CPA*.

[30] The plaintiff notes the defendant now submits each cell block must have subclasses, an argument it did not make before. The plaintiff says that even if that turns out to be so, this ought not to stand in the way of a certification order because s. 7 of the *CPA* provides that a court must not refuse certification merely because a class includes a subclass whose members have claims that raise common issues not shared by all class members.

Common Issues – s. 4(1)(c) – Psychological Harm

[31] The plaintiff says liability can be established in all of the proposed causes of action by looking to the defendant's conduct alone which, in itself, shows that the liability issues are common issues. The plaintiff also notes that s. 7(a) of the *CPA* provides that the court cannot refuse certification on the basis that the assessment of damages must be done individually.

[32] The plaintiff argues that he has provided a proper evidentiary basis for his claims of common psychological harm. He submits that he is only under an evidentiary burden to provide some basis in fact for the commonality, across class members, of the proposed common issues.

[33] Further, the plaintiff notes the defendant has not challenged the evidentiary basis for the allegation that there was a common loss of liberty. So even if there is an insufficient evidentiary basis for the existence of common psychological harm, there are common issues concerning damages for that common loss of liberty.

Common Issues – s. 4(1)(c) – Allegedly Differing Cellblock Conditions

[34] As noted earlier, the plaintiff observes that the defendant did not raise this issue during the lengthy course of the earlier certification proceedings, but adds that

this is not an issue for the common issues criterion as, at most, differing conditions might give rise to a need for further subclasses. Certification is not to be refused merely because further subclasses may be required.

Common Issues – s. 4(1)(c) – Punitive Damages

[35] The plaintiff repeats its earlier submissions on the matter of punitive damages.

Preferable Procedure – s. 4(1)(d)

[36] The plaintiff addressed this criterion by referring to the factors set out in s. (4)(2) of the *CPA*. The plaintiff submits:

a) questions of fact or law common to the class members predominate over questions affecting only individual class members;

b) individual proceedings brought by members of the proposed class would create a risk of inconsistent adjudications, in multiple jurisdictions, with respect to individual members of the class;

c) individual proceedings would overwhelm the court system as 118 members of the putative class have registered their wish to join the proposed class proceeding;

d) the only current individual action relating to the subject events has been stayed pending the resolution of this class proceeding;

e) individual litigation *en masse* would be administratively very difficult given the challenging practical circumstances of many of the individual class members as federal inmates. Communicating with counsel is often very difficult for an inmate. A class proceeding would make communications much more practical and efficient; and

f) this proceeding will benefit the goal of behavioural modification as it will address systemic, institution-wide conduct of the correctional authority in relation to these lockdowns, and bring a level of accountability.

[37] The plaintiff disputes the defendant's suggestion that a common issues trial would be "marginally useful at best" due to the need for individual damages assessments. The plaintiff answers this by noting: (1) each of the common issues can be determined by looking at the defendant's conduct alone; (2) not all damages issues are individual; (3) s. 7(a) of the *CPA* says the court must not refuse to certify a proceeding as a class proceeding merely because damages will require individual assessment after determination of the common issues; (4) even if there is just one common issue, it will be easy to show a class action is both preferable and manageable: *O'Brien v. Bard Canada Inc.*, 2015 ONSC 2470 at para. 227; and (5) even if the common issues are relatively unimportant, the fact that there are common issues will be sufficient to satisfy the commonality requirement: *Hay v. Mundi 910 Victoria Enterprises Ltd.*, 2022 BCSC 2127 at para. 71.

Suitable Representative Plaintiff and Workable Litigation Plan – s. 4(1)(e)

[38] While the defendant does not take issue with Mr. Ewert in terms of being a suitable representative plaintiff, it does take issue with the plaintiff's litigation plan. The plaintiff says the current litigation plan is essentially just an update of the previously approved plan. In any event, the litigation plan can be amended as needed as the matter progresses.

Evidentiary Issues

[39] The plaintiff responded to the defence evidentiary criticisms by noting that the plaintiff's burden is to show only "some basis in fact", not to prove the point outright. He submits that the defendant's attempt to challenge the plaintiff's certification application by pointing to other evidence is both irrelevant and impermissible.

[40] The plaintiff referred to the determination in *Ewert 2016* that the 2011 report of the Office of the Correctional Investigator (OCI), which reported on the events that are the subject of these proceedings, was admissible only for the purpose of "placing

otherwise asserted facts in context": *Ewert 2016* at para. 39. The plaintiff says that authorities decided since *Ewert 2016* establish that OCI report is admissible for its truth under either the "public documents" exception to the hearsay rule or the principled exception to the hearsay rule.

B. Defendant

[41] The defendant says the certification application ought to be dismissed because the amended claim does not meet the certification criteria. The defendant argues that the current application fails to set out the facts necessary to disclose a reasonable cause of action or guide the proceeding to an effective common issues trial. The defendant says, in particular, that the amendments to the claim do not remedy the fundamental lack of common issues at the heart of the matter and, moreover, they are pleaded to fulfil the commonality requirement at the cost of adequately pleading material facts supporting the reasonable cause of action criterion.

[42] The defendant also submits:

a) the revised pleaded claims are not subject to *res judicata* as they are new pleadings which must be assessed anew in terms of the certification criteria;

b) the revised pleadings do not establish some basis in fact that the claims have common issues that justify certification. In particular, the pleadings do not demonstrate that compensable harm and causation can be assessed on a class-wide basis;

c) given the absence of common issues as a substantial ingredient of the proceeding, a common issues trial would not advance the claims of the class and would be overwhelmed by individual issues. Certification as a class action would ultimately not serve the objectives of access to justice and judicial economy, and is not the preferable procedure; and

d) the history of this proceeding, with its many amendments, demonstrates that the claim cannot meet the certification criteria. It is time to conclude that this cannot be done, that further amendments would not remediate the claim and that the claim is not appropriate for certification.

Causes of Action – s. 4(1)(a)

[43] The defendant describes the pleadings amendments as having narrowed the number and severity of common experiences while generalizing the claimed common harms. This, the defendant says, leaves the claims of compensable harm without the necessary supporting material facts as they are either mere generalized experiences ("loss of residual liberty") or vague harms ("pain and suffering, including psychological and emotional harm"). The facts said to support the former do not meet the threshold for compensable psychological injury, and the mere lack of time out of cells during a lockdown does not comprise a loss of residual liberty.

[44] The defendant notes that compensable harm is a required element for all but two causes of action, meaning it must be shown for the causes of action in negligence, misfeasance in public office and for compensatory *Charter* damages.

[45] Continuing with pleadings issues, the defendant says:

a) the negligence pleadings lack material facts concerning any breach of the standard of care or causation;

b) the claim pursuant to s. 7 of the *Charter* does not set out material facts capable of establishing any deprivation of liberty inconsistent with the principles of natural justice;

c) the claim pursuant to s. 8 of the *Charter* does not include facts which would establish a violation of a personal right to privacy grounded in a reasonable expectation of privacy;

d) the claim pursuant to s. 12 of the *Charter* does not plead facts which would establish grossly disproportionate or inherently cruel and unusual treatment; and

e) the current NOCC does not plead material facts that support a claim for punitive damages for the class as a whole.

Identifiable Class – s. 4(1)(b)

[46] The defendant submits this requirement has not been met because the proposed subclasses are defined by living unit, and these contain inmates who experienced different restrictions at different times. On this point, the defendant maintains that the lockdowns and modified routines varied by cellblock, not living unit. As each cellblock search was completed, the cellblock would gradually return to a regular routine.

[47] This leaves the prospect that each subclass will have to be further divided into sub-subclasses by living unit. This demonstrates that this lawsuit will break down into individual issues and underscores the conclusion that a class proceeding is not a preferable procedure.

Common Issues – s. 4(1)(c) – General

[48] The defendant submits the current NOCC does not meet this criterion "as many of the proposed common issues require individual assessments". The defendant says a common issues trial based on these questions would break down into individual assessments and become unmanageable. The defendant says this is the case even with the misfeasance claim, which the Court of Appeal concluded met the common issues criterion: *Ewert C.A.* at para. 73.

Common Issues –s. 4(1)(c) – Psychological Injury

[49] On this point, the defendant reiterates its submission that except for the causes of action for unlawful imprisonment and under the *Charter* for vindication and deterrence, the causes of action advanced in the current NOCC all require causation of compensable harm. Here, the defendant says, the pleadings are deficient in

terms of material facts and the plaintiff has failed to show some basis in fact of a common level of harm, or of causation. Accordingly, in order to establish liability each class member would have to establish that he suffered a compensable level of psychological harm, meaning serious and prolonged injury.

[50] The defendant says the central common experience contained in the current NOCC is that all inmates were subjected to cell extractions where TAC members, with firearms drawn, accompanied the ERT members onto the ranges, were present at the cell doors during extractions and escorted the inmates down the ranges to be strip-searched. The defendant notes that the current NOCC pleads that this, and other things, caused "extreme harm" including psychological injury, and also notes that individualized harms are also pleaded. This means the issue of causation will necessarily involve an individualized investigation or inquiry.

Common Issues –s. 4(1)(c) – Lockdown Conditions

[51] Similarly, the defendant argues that the negligence and *Charter* claims involve differing effects from the Lockdown. Every inmate has a different usual routine. Some inmates might not have needed ready access to counsel, medication or other amenities, and 40 inmates – those on methadone treatment – were allowed out of their cells for short periods. This again highlights the individualized nature of any damages inquiry.

Common Issues – s. 4(1)(c) – Negligence

[52] The defendant submits that despite the amendments to the pleadings, the alleged breaches of the standard of care will necessarily require the Court to examine the interactions between class members and correctional personnel.

Common Issues – s. 4(1)(c) – Misfeasance

[53] The defendant notes that the plaintiff's claim in misfeasance in public office is premised on an allegedly unlawful common command that was contrary to action plans known as "SMEAC" plans. The defendant notes there were multiple SMEAC plans which applied to different units or blocks at various times. Any determination

as to whether a common command was both given and unauthorized under a SMEAC would necessarily involve an examination of each of these plans.

Common Issues – s. 4(1)(c) – Punitive Damages

[54] The defendant reiterates its submission that the current NOCC does not set out any basis for class-wide entitlement to punitive damages.

Preferable Procedure – s. 4(1)(d)

[55] The defendant submits a class action would disproportionately costly and time-consuming compared to individual actions by inmates and is not the preferable procedure. Where, as here, individual issues are at the heart of the controversy, a class action is not preferable.

[56] Certification is not appropriate here because there are more individual issues than common ones, the individual issues are more significant, and where each inmate's claim requires a separate analysis of loss and causation such that resolution of any common issues would not significantly advance their claims. Certification would not serve the objectives of judicial economy, access to justice and behaviour modification.

Suitable Representative Plaintiff and Workable Litigation Plan – s. 4(1)(e)

[57] The defendant says the plaintiff has not prepared a workable litigation plan. The defendant alleges deficiencies in ensuring the suitability of the inmate liaisons in each institution; addressing document production, examinations for discovery and expert evidence; and the process for the individual and common issues trials.

Evidentiary Issues

[58] The defendant denies that its evidence is focused on the substantive merits of the plaintiff's claims, arguing that it was instead focusing on such issues as lack of commonality.

[59] The defendant takes issue with the admissibility of the 2011 OCI report, arguing that the plaintiff has not established how it meets the test for the public

documents exception or why it comes within the principled exception to the hearsay rule. The plaintiff says that, in any event, the OCI report does not establish any common harm or harms.

C. Plaintiff's Reply

[60] The plaintiff made the following points in reply:

a) Defence evidence challenging the evidence underlying the pleaded facts is impermissible. The plaintiff's burden is merely to show "some basis in fact". If that burden is met then opposing facts go only to the ultimate weighing of facts, an impermissible purpose.

   As an example, the plaintiff points to the 2023 affidavit of Harold Massey, the warden of the institution at the time, who deposes that he authorized the deployment of armed TAC members in the living areas. This is contrary to the findings in the March 2011 OCI report, which reported that "this degree and deployment of lethal force was never contemplated, much less authorized, by the Warden": OCI report at p. 62-63. The plaintiff says this challenge to these factual underpinnings – the "some basis in fact" of the plaintiff's claim – is impermissible as this would be a matter for trial.

b) Some defence evidence actually provides further "basis in fact" for the plaintiff's claim. An affidavit from a TAC team member confirms that TAC members performed extractions at each cell, with one TAC member at the front, deploying a ballistic shield at the window, and with armed TAC members on each side of the door using a "high ready" or "low ready" positioning of their firearms. Importantly, the TAC member also deposes that this cell extraction process was "performed essentially the same way throughout", which the plaintiff says demonstrates the commonality of the inmate experience.

c) The defence objections to the misfeasance in public office claim cannot stand in light of the decision in *Ewert C.A.*, where the court held that this was an appropriate claim, subject only to a preferability analysis.

d) In reply to the defence objection that there is no proof the restrictions (or "imprisonment") was unlawful, the plaintiff says the allegation here is not that the Lockdown orders and s. 53 searches were unlawful but instead it is that the implementation was carried out in an unlawful manner. Like the preceding issue, this was determined in the plaintiff's favour in *Ewert C.A*.

e) In reply to the defence submission that occasional lockdowns are an ordinary feature of prison life such that it is plain and obvious the inmates suffered no deprivation of their residual liberty, the plaintiff submits these lockdowns were "unique in their severity".

   The plaintiff says the Lockdown involved restrictions more severe than those used in the defendant's former administrative segregation regime, which were declared unconstitutional in 2019. The plaintiff recognizes that this comparison was found to be inapt in *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, but notes *Ogiamien* was a decision on the merits of a *Charter* claim, not on the pleadings. The plaintiff says it is not plain and obvious this claim will fail.

f) In reply to the defence submission that the plaintiff has failed to plead how the alleged negligence of prison administrators caused the alleged harms, the plaintiff says a connection is in fact pleaded, as the plaintiff alleges that the failure of prison administrators to properly supervise the first s. 53 search led to the carrying out of the second s. 53 search.

VII. Discussion

A. *Res Judicata*

[61] Because the plaintiff has recast his claims in the current NOCC, it is necessary that I consider anew all of the statutory certification requirements.

[62] The plaintiff says some of the defendant's objections are barred because they are *res judicata*, having been the subject of earlier judicial determinations in these proceedings. While that is possible, the difficulty here is that the plaintiff has substantially rewritten the NOCC, and while that pleading appears to say much the same thing, though in a different way, it is very difficult to assess whether the matter is pleaded in such a similar way that *res judicata* applies. Furthermore, both the plaintiff and defendant filed new affidavits for this application, which further complicates any attempt to ascertain whether the issues and facts are effectively the same as before. Finally, and perhaps for the reasons just mentioned, neither party argued the potential *res judicata* issues in a manner that would allow them to be fully and properly considered. For that reason, I have considered the certification criteria anew, though with due regard for the earlier decisions in this case.

B. Evidentiary Issue

[63] One of the issues before the Court in *Ewert 2016* was the evidentiary status of the March 2011 OCI report, which reported the findings from the OCI investigation of the Lockdown. In *Ewert 2016* I held:

> [39] For these reasons I conclude that the OCI Report is not admissible for proof of the facts stated in it, although it is helpful, in the sense described in Harrison, in placing otherwise asserted facts in context. It is helpful as well in understanding why a class action may be necessary to encourage a modification in CSC behaviour.

[64] There have been developments in the relevant law since that time, and I am now satisfied that the OCI report may be admitted for the purpose of demonstrating "some basis in fact" to support the certification order sought: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25. I rely in particular on *R. v. A.P.*, 1996 CanLII 871, [1996] O.J. No. 2986 (C.A.), *Yahey v. British Columbia*, 2021 BCSC 1287 at paras. 827-833; *Pantusa v. Parkland Fuel Corporation*, 2022 BCSC 322 at paras. 71-88; and *British Columbia v. Apotex Inc.*, 2025 BCSC 92 at para. 202.

[65] In brief, I am persuaded by the reasoning in *Pantusa* which, in turn, relied on *A.P.* and *Yahey*, that the OCI report is admissible under both the "public documents" exception and the principled approach to the admission of hearsay evidence.

[66] The test for the “public documents” exception was set out in *A.P.* as follows:

> [15] A "public document" means "... a document that is made for the purpose of the public making use of it, and being able to refer to it." *Sturla v. Freccia* (1880), 5 App. Cas. 623 (H.L.) at 643. English and Canadian cases have generally prescribed four criteria for the admissibility of a public document without proof.
>
> (i) the document must have been made by a public official, that is a person on whom a duty has been imposed by the public;
>
> (ii) the public official must have made the document in the discharge of a public duty or function;
>
> (iii) the document must have been made with the intention that it serve as a permanent record, and
>
> (iv) the document must be available for public inspection.

[67] Each of those criteria have been satisfied here. The OCI report was prepared under the authority of the *CCRA* by a public official having both the power and discretion to conduct investigations, together with a duty to report adverse findings. The report was made public, and it is obvious it was made with the intention that it serve as a permanent record.

[68] I am also satisfied the OCI report is admissible under the principled exception to the hearsay rule. It meets the necessity criterion because the plaintiff does not have access to the evidence of correctional officials either as affidavit witnesses or through discovery, given that discovery does not take place prior to certification. I am also satisfied it meets the reliability criterion insofar as it has circumstantial guarantees of trustworthiness by reason of those matters referenced above in relation to the “public documents” exception.

The *CPA* Criteria

[69] The requirements for certification are set out in s. 4 of the *CPA*:

> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
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> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;

> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[70] I deal with the requirements of s. 4(1) of the *CPA* under the headings that follow.

(a) Whether the Pleadings Disclose Causes of Action

[71] Although the onus is on the plaintiff to show that he has adequately pleaded a cause or causes of action as well as the elements of the causes of action asserted, the bar is otherwise a fairly low one: *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465, 48 B.C.L.R. (3d) 90 (C.A.) at para. 7. The question is, assuming all pleaded facts are true, whether it is "plain and obvious" that the claim cannot succeed: *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at para. 37, leave to appeal to SCC ref'd, 40479 (4 May 2023).

[72] I now turn to the individual causes of action.

Unlawful Imprisonment

[73] The elements of unlawful imprisonment are confinement of another within fixed boundaries, together with an intention to confine: *Ewert C.A.* at para. 44. As with its previous pleading, the plaintiff says this cause of action is made out, based on an intentional deprivation of the class members' residual liberty: *Hill v. British Columbia*, 1997 CanLII 4136, 36 B.C.L.R. (3d) 211 (C.A.).

[74] The defendant repeats its prior objection that the material facts pleaded by the plaintiff amount to deprivations of amenities such as access to laundry facilities, rather than to residual liberty. The defendant also submits the plaintiff has failed to plead facts supporting the allegation that the confinement was unlawful.

[75] I am satisfied the plaintiff has adequately pleaded a cause of action in unlawful imprisonment. The current NOCC pleads that the defendant: (1) "deprived the Plaintiff and members of the Class of their residual liberty by subjecting to [sic] them to a manner of imprisonment that was significantly different from and a more severe deprivation than ordinary imprisonment"; (2) there was "no justification for the Defendant's conduct"; and (3) the "Defendant acted without authority". This is adequate to plead unlawful imprisonment.

[76] The defendant argues that some of the facts referred to in this section of the current NOCC do not support a conclusion that the confinement was unlawful. I agree with the plaintiff's submission that even if *some* of the material facts pleaded go to correctional treatment or conditions, there are other material facts pleaded that properly disclose a cause of action in unlawful imprisonment.

[77] In brief, I am satisfied that the plaintiff has adequately pleaded a cause of action in unlawful imprisonment.

Negligence

[78] The plaintiff makes separate claims in negligence against correctional staff, prison administrators and ERT/TAC leadership.

[79] The defendant raises an objection to all of these negligence claims, arguing that the plaintiff has failed to plead material facts supporting compensable harm, a necessary element in negligence. The defendant raises the same objection, based on the same alleged flaw, to those other causes of action that the defendant says similarly require there to be compensable harm to complete the cause of action, those being misfeasance in public office and the claims for compensatory damages

(as distinct from damages for vindication and deterrence) for the ss. 7, 8 and 12 *Charter* claims.

[80] As noted earlier, the defendant submits the current NOCC narrows the number and severity of common experiences while generalizing the claimed common harms. The defendant says this leaves the plaintiff's claims of compensable harm without the necessary supporting material facts as they are either allegations of mere generalized experiences ("loss of residual liberty") or of vague harms ("pain and suffering, including psychological and emotional harm"). The defendant says the facts said to support the former do not meet the threshold for compensable psychological injury, and the fact that inmates have been deprived of time out of cells during a lockdown does not comprise a loss of residual liberty.

[81] I am satisfied the plaintiff has adequately pleaded compensable harm. Whether some of the pleaded harms rise to the level of compensable injury is a matter of degree and, as such, is a matter for trial.

[82] Moreover, the defendant's argument that compensable harm has not been adequately pleaded ignores the fact that the plaintiff pleads the reasonably concrete claim for the loss of residual liberty allegedly caused by the defendant's negligent search during the first lockdown and exceptional search, which gave rise to the need for a second lockdown and exceptional search. This also answers the defendant's objection that the plaintiff has pleaded no common or generalized harms but only individual ones, given that the second lockdown was common to all inmates.

[83] I do perceive a flaw in the compensable harm component of the negligence claims concerning the ERT/TAC teams, but this is not a flaw in pleadings but instead is an issue with commonality. I will deal with this later.

[84] Finally on the "compensable harm" issue, the defendant submits that a lawful lockdown cannot be said to deprive inmates of their residual liberty because occasional lockdowns are a feature of prison life. I accept that proposition, but here the plaintiff says the negligence of prison staff *created* the need for a second

lockdown. Arguably at least, lockdowns that are made necessary only because the correctional authorities have been negligent are not ordinary features of prison life. For that reason, I conclude this is sufficient to meet the relatively minimal pleadings burden; in other words, it is not plain and obvious this claim cannot succeed.

[85] In *Ewert C.A.*, the Court of Appeal found fault with the pleading of the claims against the ERT/TAC leadership because the plaintiff advanced a common issue relating to an alleged common order, but failed to plead that claim in the NOCC. In his revised and current pleading, the plaintiff alleges that there was a "common command" that put the ERT/TAC teams into the living areas or ranges, not just at the heads of the ranges, "contrary to the Warden's SMEAC plans". I conclude that the pleadings flaw identified by the Court of Appeal has now been rectified.

[86] I will briefly deal with the defendant's remaining objections to the negligence pleadings. First, I am satisfied the pleadings draw a causal link between the allegedly negligent first search and the resulting need for second lockdown and its associated claimed common harms. Second, concerning the claims against the ERT/TAC leadership, while it is true that the plaintiff pleads both *negligent* actions in directing teams to act in contradiction to the warden's "use of force" action plans (known by the acronym "SMEACs") and also *wilful or deliberate* actions in terms of claims for misfeasance in public office, I am satisfied it is sufficiently clear these are alternative claims and do not amount to a pleading of inconsistent claims.

Misfeasance in Public Office

[87] As already noted, this claim alleges that members of the ERT/TAC leadership acted unlawfully and in excess of their powers, including those set out in the various SMEACs that were issued over the course of the Lockdown.

[88] The defendant says this is a tort that requires compensable harm to complete the cause of action. In *Ewert C.A.*, the Court of Appeal noted that this proposition was "unclear on the authorities" (para. 75). Nonetheless, the Court of Appeal found the damages issues to have "sufficient commonality" to satisfy the *CPA*. While this conclusion was not elaborated upon, I took this to refer implicitly to the principle that

a claim that raises a novel point, or potentially novel point (here, as to the need for compensable harm), ought not to be dismissed at the pleadings stage.

[89] In any event, in a subsequent case, *British Columbia v. Greengen Holdings Ltd.*, 2025 BCCA 115, the Court of Appeal said (at para. 46) that the tort of misfeasance in public office requires that the injury be "compensable in tort law", thus indicating compensable harm is in fact an element of the tort of misfeasance in public office.

[90] Further, in Lewis N. Klar et al., *Remedies in Tort* (Toronto: Thomson Reuters Canada, 2025) (loose leaf updated 2025, release 7) at 27:30 and 27:32, the authors state:

> The tort of misfeasance in public office is not actionable *per se*. It requires proof of material damage. General damages awarded for intentional torts resulting in damage to feelings, self-esteem, reputation and emotional wellbeing are damages "at large". Such damages are a matter of impression; they include consideration of a host of circumstances involving both the particular plaintiff and the particular defendant, and are likely to be unique in each case. In the case of a corporate plaintiff, the risk of loss of goodwill is compensable.
>
> [Footnotes omitted.]

[91] For the reasons given earlier, I am satisfied the plaintiff has adequately pleaded compensable harm. It does give rise to an issue or possible issue of commonality, which I will discuss later.

[92] Accordingly, I cannot say this claim is bound to fail.

Charter Breaches – ss. 7, 8 and 12

[93] For these claims, the defendant repeats the objections concerning compensable harm that I have already addressed. The defendant also repeats the argument that cell confinement during a lockdown is insufficient to constitute either a deprivation of residual liberty under s. 7 of the *Charter* or cruel and unusual punishment under s. 12 of the *Charter*, citing *Ogiamien*.

[94] The plaintiff notes that *Ogiamien* was a decision on the merits and not one that was made at the pleadings stage. He argues that the harms allegedly caused are sufficiently pleaded, and the issue of whether these achieve the degree or seriousness required to make out these claims is a matter for trial.

[95] I accept that the principles from *Ogiamien* will be a substantial barrier for the plaintiff to overcome, but I cannot say that it is insurmountable such that the *Charter* claims ought to fail on the pleadings. The court in *Ogiamien* made it clear that the s. 12 issue on which the case focused (see para. 7) was a matter of degree:

> [57] I accept that the effect of lockdowns in a correctional facility can give rise to cruel and unusual treatment. And I accept that though some lockdowns are inevitable in a maximum security facility, while Ogiamien and Nguyen were at Maplehurst lockdowns occurred more often than they should have. Had I agreed with the application judge's findings on frequency, duration and impact I might well have deferred to his conclusion. But it seems to me that the lockdowns that did affect Ogiamien and Nguyen did not occur with such frequency or last so long or have such an adverse impact to give rise to cruel and unusual treatment. The treatment of Ogiamien and Nguyen under lockdowns compared to their treatment under ordinary conditions may have been excessive or disproportionate, but it was not grossly disproportionate. Thus their treatment did not meet the high bar required to establish a s.12 violation.

[96] Similarly, for the s. 7 claims the court said "the frequency, duration and impact of the lockdowns affecting [the plaintiffs] caused a change in their conditions of incarceration at Maplehurst, but not a substantial change": *Ogiamien* at para. 81.

[97] I also note that there are features that might distinguish this case from *Ogiamien* because in that case lockdowns were used as an inmate control measure due to chronic staff shortages, meaning that during lockdowns the prison staff tried their best to maintain access to essential services and programs, including medical services and visits with their lawyer: para. 43. In this case, the plaintiff alleges the Lockdown severely restricted activities and essential services, and, unlike the situation in *Ogiamien*, these two lockdowns involved extraordinary searches using armed ERT/TAC personnel who, the plaintiff claims, were deployed into the living units contrary to the warden's orders and caused inmates to be subjected to successive strip searches.

[98] The defendant argues that the plaintiff has failed to plead material facts supporting a conclusion that prison authorities did not act in accordance with principles of fundamental justice as per the language of s. 7 and, specifically, the plaintiff has failed to plead material facts supporting allegations of arbitrariness, overbreadth or gross disproportionality. Again, I conclude there are matters pleaded that could lead to a finding of gross disproportionality, depending on the evidence.

[99] This also answers the defendant's objection to sufficiency of pleadings for the plaintiff's s. 12 claim. I also repeat my discussion of the *Charter* claims from *Ewert 2016* at paras. 63-70.

[100] I turn to the plaintiff's s. 8 claim, which was not the subject of comment by the Court of Appeal in *Ewert C.A.* as those claims were not certified due to their individualized nature: see *Ewert 2016* at para. 99. The plaintiff has now re-cast his s. 8 claims and no longer relies on actions or events that differed between inmates.

[101] In the current NOCC, the plaintiff focuses on the second s. 53 search, which involved inmates being extracted from their cells, the cells being searched and the inmates being strip-searched. The plaintiff alleges the second search was "unreasonable and entirely avoidable" as the decision to conduct the second search was the result of the defendant's failure to properly plan and execute the first search.

[102] A claim under s. 8 of the *Charter* requires a plaintiff to establish that his personal right to privacy, grounded in a reasonable expectation of privacy, has been violated: *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45; *Sandhu v. Surrey (City)*, 2021 BCSC 2519 at paras. 29-32. Once again, it is important to note that the plaintiff does not challenge the legality of the searches, including the second s. 53 search that is the subject of the s. 8 claim. He does not assert that he had an expectation of privacy for the subject search – and he could not rightly make that assertion, given that it was a lawful search – and instead asserts the search was unnecessary. In my view, this is insufficient. This claim is bound to fail.

[103] In summary, I conclude that the plaintiff's s. 8 claim does not disclose a viable cause of action, but he has shown his pleadings disclose reasonable causes of action under ss. 7 and 12 of the *Charter*. However, I will have more to say about those claims when I discuss the "common issues" criterion.

(b) Identifiable Class of Two or More Persons

[104] This criterion is satisfied. The only issue appears to be whether the class should be divided into subclasses based on living units or cellblocks.

[105] There appears to have been a miscommunication between counsel on this matter, as plaintiff's counsel had understood the defendant to have agreed that living units were the correct bases for the subclasses.

[106] The current evidence indicates that in January 2010, Kent Institution had 10 two-tier cellblocks contained within four living units. One living unit was not searched in the first lockdown, but was searched in the second. Each cellblock completed modified routine phases at different times.

[107] From this, I conclude that the overall class is appropriately divided into subclasses based on cellblocks.

(c) Common Issues

[108] This criterion, together with the preferability criterion, are the real issues here, as it was on these issues that the Court of Appeal found the certification application to be deficient.

[109] At this point, it is convenient to refer to the Court of Appeal's discussion of the principles relating to common issues in certification cases, as set out in *Ewert C.A.*:

> [23] In *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480, this court observed that "[r]esolution of the common issues is the heart of a class proceeding".
>
> [24] Identification of common issues is not always easy. Justice Rothstein explained the common issues requirement in *Pro-Sys*, relying upon *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46:

> [108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> (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.

[25] I take from the authorities that for an issue to be common, it must be susceptible to an affirmative or negative conclusion without individualized investigation, and that class members cannot have opposing interests.

[26] The threshold for establishing commonality is low: *Thorburn* at para. 38. The question, often a difficult one, is to what degree the issue may be framed generally while still meeting the criterion of commonality. This issue is addressed in *Rumley v. British Columbia*, 2001 SCC 69.

[27] As in this case, *Rumley* involved an institutional defendant called to account for events alleged to have occurred. This institution was a residential school for deaf children in a position of responsibility for the students' welfare, and the putative class members had the common characteristic of having been in a circumstance of dependency. The claim before the certification judge was primarily in negligence and misrepresentation, and addressed allegations of various wrongs to the children including sexual abuse. Wider claims of educational issues, sometimes referred to as education malpractice, were also advanced. Certification was refused initially. On appeal, this court described the essence of the claim as systemic negligence and stated a common issue of negligence – failure to take reasonable measures in the management and operation of the school to protect the children from misconduct. In doing so, the court recognized that an affirmative answer may well leave individual issues to be resolved later.

[28] On further appeal to the Supreme Court of Canada, the court agreed that a common issue had been identified, and that all class members had an interest in whether the school had breached its duty of care to the children. The school contended that liability would turn on the breach of the standard of care in respect of each student, not breach in the abstract. In her reasons for judgment for the court upholding the certification, Chief Justice McLachlin wrote:

> [29] There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres*, supra, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.
>
> [30] I cannot agree, however, that such are the circumstances here. As Mackenzie J.A. noted, the respondents' argument is based on an allegation of "systemic" negligence – "the failure to have in place management and operations procedures that would reasonably have prevented the abuse" ... It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; ... As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so".

[29] Two cases applying these principles featured in the parties' submissions, *Thorburn and Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div. Ct.).

[30] In *Thorburn*, this court dismissed an appeal from an order declining to certify a class proceeding claiming damages for routine strip searches performed at the Vancouver city jail of persons who were not then remanded into custody. The claim was for damages under s. 24(1) of the *Charter* for breach of the detainees' s. 8 right. This court referred to *Rumley*, and addressed the prospect of individual enquiries, rejecting certification for the reason that answering the "common issues" would not advance the litigation in a meaningful way:

> [42] Both the initial Common Issues and the Supplementary Common Issues set out broadly-framed issues that include: (i) elements of the well-established legal tests for an unlawful search; (ii) settled law regarding the shift in onus for establishing a s. 8 *Charter* breach, (iii) the principles for awarding *Charter* damages (from [*Vancouver (City) v. Ward*, 2010 SCC 27]); and (iv) the availability of statutory defences (under the former and current legislation) and the common law defences (from [*R. v. Golden*, 2001 SCC 83]) and the common law power of search incidental to arrest). The resolution of these "common issues" in practical terms resolves no "common" element of each member's cause of action (an unlawful search), as each of the elements of the cause of action (reasonable grounds for arrest, search incidental to arrest, reasonableness of the manner of the search including the likelihood of a member being placed into the prison population, and the appropriateness of *Charter* damages) requires individual findings specific to the proposed class member. Accordingly, even if the answers to the "common issues" could be said to clarify the questions they pose, they would not advance

> the litigation in any meaningful way as they would not avoid the duplication that would be necessary for the individual fact finding and legal analysis of each class member's claim. In other words, a finding of a s. 8 *Charter* violation as a result of an unreasonable search of one class member will not found a similar finding for another class member as a finding of an unreasonable search is dependent on a multitude of variable circumstances unique to each class member.

[31] In contrast, the court in *Good* certified a claim for *Charter* damages for arbitrary detention of protesters during the 2010 G20 summit in Toronto, said to be a breach of s. 9 of the *Charter*. The common issues approved focused on an allegation of a common command order from Toronto police to detain protesters, described by the judge as an allegation of an order to detain first and consider engagement in criminal activity later. The court found there was evidence to support the central allegation that a command had issued directing across-the-board treatment on arrest, and held that the allegations of such a command raised a common issue sufficient to support certification. The court said:

> [61] The evidence proffered by the appellant clearly establishes some basis in fact for the proposition that the members of the location-based subclasses were arbitrarily detained and/or arrested and that consequently that they were falsely imprisoned at common law and/or their rights under s. 9 of the *Charter* were violated. Proposed common issue #1 is therefore a suitable common issue for certification purposes.

[110] The plaintiff grouped the common issues according to cause of action and then by categories of damages, and so my analysis will follow the same format.

Unlawful Imprisonment

[111] For this cause of action, the plaintiff's proposed common issues are as follows:

> a. Considering each Subclass in turn, did the deprivation of Time Out of Cell during the Lockdown Period constitute a deprivation of the Subclass Members' residual liberty?
>
> b. If so, was this deprivation of the Subclass Members' residual liberty lawful?

[112] Several issues arise here. First, these proposed common issues do not align well with the plaintiff's current NOCC. In that pleading, the plaintiff alleges the defendant's acts and omissions:

> … constitute an unlawful imprisonment because the Defendant unlawfully deprived the Plaintiff and members of the Class of their residual liberty by subjecting to [sic] them to a manner of imprisonment that was significantly

> different from and a more severe deprivation than ordinary imprisonment. The Plaintiff relies on the facts as stated in paragraph 15 of Part 1 [which details various forms of alleged deprivations].

[113] In other words, the current NOCC relies not just on the assertions that inmates had their out-of-cell time restricted, as noted in the first of the two proposed issues, but also on the *manner* of their imprisonment and other forms of deprivation.

[114] Second, although the proposed common issues do not expressly refer to the deprivations and the manner of imprisonment, the second proposed issue poses the question whether the deprivation was unlawful. But what makes it unlawful? In my view, this question reverts the analysis back to the various forms of alleged hardship and deprivations that varied between inmates or, in other words, to an individualized analysis.

[115] In submissions, the plaintiff confirmed he does not allege the Lockdown and associated s. 53 searches were themselves unlawful, but instead asserts they were unlawful because they were unusually severe events, not ordinary ones, thus distinguishing this case from those cases that have suggested periodic lockdowns are an ordinary feature of prison life: see e.g., *Ogiamien* at para. 81 (a *Charter* case); *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237 at para. 41; and *Alam v. Matsqui Institution (Warden)*, 2023 BCCA 12 at para. 26.

[116] I appreciate that the plaintiff is on the horns of a dilemma in his attempt to formulate a true common issue suitable for certification in circumstances where he needs to invoke numerous alleged deprivations that varied from inmate to inmate in order to demonstrate the unlawfulness of the denial of residual liberty. However, in my view, this simply illustrates that the variable nature of the inmates' alleged experiences means a suitable common issue is not possible here.

[117] The comments of the Court of Appeal in *Ewert C.A.* at paras. 45-54 continue to apply to this claim. For these reasons, I conclude the claim of unlawful imprisonment does not meet the requirements of s. 4(1)(c) of the *CPA*.

Negligence of Prison Administrators

[118] The proposed common issues for this cause of action are:

> a. Did Kent Institution management owe the Class Members a duty of care?
>
> b. If so, what is the nature of that duty?
>
> c. Did Kent Institution management breach a duty of care by:
>
> i. Failing to reasonably plan the First Search to ensure it would not need to be repeated?
>
> ii. Failing to adequately train correctional staff responsible for executing s. 53 searches to conduct the searches in a manner that minimized the likelihood the search would need to be repeated?
>
> iii. [etc.]
>
> …
>
> vii. Failing to monitor and/or supervise the ERT/TAC team during the Lockdown Period and Searches to ensure compliance with the SMEAC plans and CSC policy, in respect of the use of force?
>
> d. If so, was there harm caused by the breach/es of the duty of care that was common to all Class Members or Subclass members?

[119] The “etc.” section in that quote carries on with a list of alleged further failures such as failing to ensure sufficient time out of cell, reasonable access to showers, laundry and telephone, and access to counsel; inmates not being kept informed; and inmates not having three meals a day or sufficient nourishment. These matters will vary by individual and by each individual’s needs and circumstances.

[120] It was the cluttering of the greater issues with individualized matters that prompted the Court of Appeal in *Ewert C.A.* to find this claim did not meet the requirements of s. 4(1)(c) of the *CPA*.

[121] However, items i, ii and vii above appear to be viable common issues.

[122] In my view, the two events involving issues and experiences common to all inmates are:

> a) the allegedly flawed first search, which made a second search necessary and resulted in the inmates being put through a second lockdown and search; and

b) the deployment of the ERT/TAC teams in the living areas, allegedly in breach of the SMEAC plan or plans.

[123] As pleaded, all inmates were subjected to a further lockdown and exceptional search, and all inmates went through the experience of having armed ERT/TAC personnel present in their living areas and assisting with the cell extractions.

[124] I recognize that there may also be individual issues relating to the activities of the ERT/TAC teams, as where an inmate has alleged a firearm was pointed at him. However, the fact that there may be individual issues does not detract from the allegation that there was an overall experience common to all inmates of having armed personnel present in living areas and assisting extractions when they were not authorized to be there.

[125] Although I conclude these two matters raise viable issues, I do not endorse the manner in which the questions have been drafted. It would be much more straightforward to draft the questions so that they identify the duty alleged; for example, in terms of the first proposed common issue: Did Kent Institution management owe the Class Members a duty of care to reasonably plan and supervise the First Search to ensure it would not need to be repeated? If so, did Kent Institution management breach that duty? And similarly for items ii and vii. For item vii, the more appropriate question would be along the lines of: Did Kent Institution management owe the Class Members a duty of care to monitor and/or supervise the ERT/TAC team during the Lockdown Period and searches to ensure compliance with the SMEAC plans and CSC policy concerning the use of force?

[126] I now turn to the compensable harm element of the negligence causes of action.

[127] Those claims having to do with the allegedly negligent first search have an associated identifiable and common claim of compensable harm, as it is alleged that the negligent acts led to a second period of lockdown and a second s. 53 search, an

experience common to all inmates. The alleged loss is a loss of residual liberty or, in other words, a loss of a legal right. I conclude this is a compensable harm.

[128] However, the compensable harm component remains problematic in the case of the claims against prison administrators arising out of the actions of the ERT/TAC teams. As I have already noted, this claim concerns the deployment of the ERT/TAC teams in the living areas, allegedly in breach of the SMEAC plan or plans. This does not involve alleged deprivations of residual liberty but instead relates to the *manner* in which the searches were carried out and, as such, gives rise to a common issue problem. While the plaintiff can plead that there was compensable harm caused to all members of the class arising out of the allegedly unauthorized presence of ERT/TAC members in the living areas, demonstrating that harm will necessarily require individual assessment in order to show that inmates suffered a compensable level of psychological disturbance, that is, an injury beyond psychological upset or "upset, disgust, anxiety, agitation or other mental states that fall short of injury": *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, 2008 SCC 27, at para. 9.

[129] As a result, I find the claims alleging negligence against the prison administrators concerning the first search to have common issues that satisfy the common issues criterion of the CPA, but the negligence claim against the administrators concerning the deployment of the ERT/TAC team does not.

Negligence of Correctional Staff

[130] The analysis of the proposed common issues for this claim is essentially the same. Here, the allegation is that correctional staff were negligent in carrying out the first s. 53 search, which resulted in all inmates being locked down and searched a second time.

[131] For the reasons expressed earlier, I conclude this is a viable common issue. Again, the questions ought to be reframed in the manner already noted.

Negligence of ERT/TAC Leadership

[132] For this claim, the plaintiff frames the common issues in terms of: (a) a duty of care on the leadership not to direct ERT/TAC members to be on the prison ranges, present at cell doors during extractions and escorting prisoners down the ranges to be searched; and (b) alternatively, a duty of care to monitor and/or supervise the ERT/TAC members to ensure they carried out cell extractions in accordance with SMEAC plans.

[133] In *Ewert C.A.*, the Court of Appeal noted that this issue had the potential to be a common issue, but the plaintiff had not pleaded, for example, any common instruction given by ERT/TAC leadership, and instead had pleaded a duty of care owed by each team member and a series of deficiencies that did not relate to any common instruction. The earlier pleading also alleged interactions "that would foreseeably result in harm", which the Court of Appeal concluded "is bound to break into investigations of individual interactions" (para. 66).

[134] The common issues have now been framed in a manner that focuses on alleged leadership negligence in either directing the ERT/TAC teams onto the range and, in the alternative, alleged leadership negligence in failing to ensure the teams carried out cell extractions in accordance with SMEAC plans. These are matters that affected the class members as a whole. However, as with the negligence claims against the prison administrators regarding the deployment of the ERT/TAC team, the plaintiff's burden of showing psychological disturbance to a level of compensable harm means that this will devolve into individual assessments. For that reason, this claim does not comply with s. 4(1)(c) of the *CPA*.

Misfeasance in Public Office of ERT/TAC Leadership

[135] The proposed common issues for this claim begin with the following question:

> Was there a decision within the leadership of the ERT/TAC team to effect the s. 53 Searches unlawfully?

[136] The use of the word "unlawfully" is problematic because it begs the question about what "unlawfully" means. I appreciate that this usage may derive from my

own suggested wording from *Ewert 2016* at para. 95, but it gives rise to the same problems identified in *Ewert C.A.*, where in the course of analysing the negligence claims that raised numerous alleged inmate deprivations, the court said:

> [61] This issue of breach of standard of care (issue (b)) is further complicated because it alleges the "failures" were unlawful. Determination of unlawfulness invites exploration of reasons for an alleged failure in respect of a particular inmate.

[137] As noted in the preceding section of these reasons, the plaintiff now attempts to avoid the prospect of that kind of individualized inquiry by posing the question in terms of a breach of the SMEAC plan or plans. However, and as noted earlier, I am satisfied that the tort of misfeasance in public office is not actionable *per se* but instead requires proof of compensable harm. The essence of the plaintiff's claim is that the ERT/TAC leadership deliberately ignored the SMEAC deployment limits and deployed their forces inside the living units of the prison. Unlike the claims in negligence where it is alleged the negligent first search led to an otherwise needless second lockdown, this deployment did not, in itself, result in a deprivation of residual liberty. Instead, the alleged harm is psychological in nature and will thus require individualized assessments and proof of actual psychological injury.

[138] I appreciate this conclusion will appear to be inconsistent with the Court of Appeal's finding that the common issues raised by the plaintiff for misfeasance in public office satisfied s. 4(1)(c) of the *CPA*. To this I would respond that the Court of Appeal's conclusion in *Ewert C.A.* appears to have been based on its conclusion (at para. 69) that it was "not clear" whether damages were an element of the tort. Other authorities, and most importantly the subsequent Court of Appeal decision in *Greengen*, make it clear that compensable harm is in fact an element of the tort of misfeasance in public office.

[139] For these reasons, I conclude that the claims of misfeasance in public office do not meet the commonality criterion set out in s. 4(1)(c) of the *CPA*.

Charter Breaches

[140] For these claims, I reproduce the plaintiff's proposed common issues in full:

Section 7

a. Considering each Subclass in turn, did the deprivation of Time Out of Cell during the Lockdown Period amount to a deprivation of the Subclass Members' liberty under s.7 of the *Charter*?

b. Considering each Subclass in turn, did the following, whether individually or in any combination, amount to a deprivation of the Subclass Members' security of the person under s.7 of the *Charter*?

    i. the deprivation of Time Out of Cell?

    ii. the deprivation of visits and phone calls?

    iii. the deprivation of showers?

    iv. the provision of only two meals a day for the majority of the Lockdown Period?

    v. the subjection of Subclass Members to cell extractions in which TAC members with firearms drawn accompanied the ERT onto the ranges, were present at the Subclass Members' cell doors during extractions, and escorted Subclass Members down their respective ranges to be strip searched?

    vi. the subjection of the Subclass Members to strip-searches during the Second Search?

c. If so, was the deprivation of liberty and/or security of the person in accordance with the principles of fundamental justice?

d. If the deprivation of liberty and/or security of the person was not in accordance with the principles of fundamental justice, was the s.7 *Charter* breach justified under s.1 of the *Charter*?

Section 8

e. Did the Defendant's Agents fail to reasonably plan and/or execute the First Search to ensure it would not need to be repeated?

f. If not, did the cell searches and strip-searches that Class Members were subjected to during the Second Search amount to unreasonable searches under s.8 of the *Charter*?

g. If so, was the s.8 *Charter* breach justified under s.1 of the *Charter*?

Section 12

h. Considering each Subclass in turn, did the conditions of confinement and treatment of the Subclass Members, as set out in subparagraphs 15 (a)-(h) of the Second Further Amended Notice of Civil Claim, amount to cruel and unusual treatment or punishment under s.12 of the *Charter*?

i. If so, was the s.12 breach justified under s.1 of the *Charter*?

Section 24(1)

j. If the Class Members' or Subclass Members' s.7, s.8 and/or s.12 *Charter* rights were breached, are damages pursuant to s.24(1) of the *Charter* a just and appropriate remedy?

k. If the Class Members' or Subclass Members' s.7, s.8 and/or s.12 *Charter* rights were breached, are declarations pursuant to s.24(1) of the *Charter* warranted?

[141] In *Ewert C.A.*, the Court of Appeal discussed at some length the plaintiff's *Charter* claims, as then pleaded. The court said:

> [79] The theory of the *Charter* damage claim is that agents of Canada – the Kent Institution personnel – committed systemic breaches of the inmates' rights under ss. 7 and 12 of the *Charter* for which damages under s. 24(1) of the *Charter* is an appropriate remedy. The breaches are posed as applying collectively to class members, without individual distinction…
>
> …
>
> [83] In particular with respect to *Good*, Mr. Ewert disputes Canada's characterization of it as turning on the common application of a single command. He describes *Good* as being a claim of poor and over-crowded conditions in a detention centre, analogous to this claim based on deficient and harmful conditions after the decision to conduct a s. 53 lockdown and search. In contrast, he says, *Thorburn* was an action for damages for the manner in which a search was conducted, not, as in this case, about an institutional response that caused harm.
>
> [84] I do not agree that this case is akin to *Good*. In my reading of *Good*, it turned on the allegation that an order was made "without regard to the specific conduct of the persons being detained" (para. 48), which, if true, was likely inconsistent with *R. v. Mann*, 2004 SCC 52. This case, on the other hand, does not challenge the lawfulness of the order to conduct a s. 53 search, but rather, for purposes of ss. 7 and 12, complains of the length of time taken in the two searches, the manner of the searches, and the consequences to class members (some of which are acknowledged to have been inconsistently experienced).
>
> …
>
> [86] In my view, the *Charter* claims are bound to raise individual issues, resolution of which will require justification advanced for any particular action taken with respect to an individual class member. As noted in *Thorburn*, above, the ss. 7 and 12 rights that base the s. 24(1) claim for damages are presumptively individual in nature. In this case, the individual nature of the alleged breaches is apparent from the list of complaints in paras. 49 and 51 of the pleading, replicated above, that refer to the long list of deprivations I have commented on earlier. I see no common issue stated on this claim that avoids an individual investigation to determine whether a class member's *Charter* rights were breached.
>
> [87] It follows that the common issue posed on the appropriateness of a s. 24 remedy, also, is not susceptible to determination, absent individual consideration.

[142] The concerns mentioned in the preceding passages arise again in this latest certification application. This is obvious from question (b), reproduced above, as it lists a number of matters that will inevitably require individualised inquiries.

[143] The first s. 7 question (question (a) above) focuses solely on out-of-cell time alone as constituting a deprivation of liberty, with associated question (c) asking whether the deprivation was in accordance with the principles of fundamental justice. However, it is important to reiterate that the plaintiff does not challenge the lawfulness of the two lockdowns themselves. In *Ogiamien*, the Ontario Court of Appeal found that the frequent lockdowns in that case did not amount to a deprivation of liberty and, in any event, the inmate restrictions accorded with the principle of fundamental justice because they were rationally connected to the safety and security at the prison and were not arbitrary: paras. 81-85. Those same conclusions apply here.

[144] For this particular s. 7 claim, the plaintiff faces the same hurdles as he did for his claim for unlawful imprisonment. In his first question he has confined his proposed common issues to the restriction on out-of-cell time in order to plead the experience that was common to all inmates, but by doing so he has omitted other lockdown features that might form the foundation for a claim that the conditions of incarceration had changed so fundamentally that they triggered a deprivation of residual liberty under s. 7: see *Ogiamien* at para. 81.

[145] Accordingly, while the plaintiff's proposed common issue (question (a)) does reflect an event experienced by all inmates, it is not viable as a common issue because mere out-of-cell time cannot amount to a deprivation of liberty pursuant to s. 7 of the *Charter* in the circumstances of this case.

[146] For the second of the plaintiff's s. 7 common issues (question (b)), the plaintiff raises issues that would inevitably invite individualized inquiry, as already noted.

[147] I need not address the proposed common issues for the s. 8 claim as I have concluded the plaintiff has not pleaded a viable cause of action for that claim.

[148] The plaintiff's proposed common issues for his s. 12 claim (cruel and unusual treatment or punishment) refer to the "conditions of confinement and treatment" of class members "as set out in subparagraphs 15 (a)-(h)" of the current NOCC, which is a list of restrictions and deprivations that will require individualized assessment. As there are no viable or suitable proposed common issues here, this claim does not meet the requirements of s. 4(1)(c) of the *CPA*.

[149] In summary, I conclude the plaintiff has satisfied the requirements of s. 4(1)(c) of the *CPA* for the following claims: (1) negligence against prison administrators; and (2) negligence against correctional staff.

Damages

[150] The plaintiff's proposed common issues on damages are relatively straightforward:

> a. If the Defendant breached the Class Members' or Subclass Members' common law or *Charter* rights, can the court make an aggregate assessment of damages as part of the common issues trial?
>
> b. If so, what amount of aggregate damages is appropriate for the common Class Member or Subclass Member experience?

[151] I am satisfied that these are viable common issues on damages, if suitably revised to reflect the present determinations, although I feel obliged to make the possibly pedantic remark that the reference to beaches of "common law … rights" is inapt given that a negligence claim involves an alleged duty of care, not a breach of a person's rights.

[152] The proposed common issues for the claim of punitive damages are suitably framed.

(d) Whether a Class Action is the Preferable Procedure

[153] Section 4(1)(d) of the *CPA* requires that a class proceeding be the preferable procedure for the fair and efficient resolution of the common issues.

[154] Section 4(2) of the *CPA* states that in determining whether a class proceeding satisfies s. 4(1)(d), the court must consider all relevant matters including the following:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[155] The plaintiff says this proceeding satisfies each of these factors. The plaintiff notes in particular:

a) Individual proceedings brought by members of the proposed class would create a risk of inconsistent adjudications in multiple jurisdictions;

b) 118 members of the putative class have already contacted counsel to register their wish to join the proposed class proceeding;

c) Individual litigation would be very difficult given the challenging practical circumstances of many of the putative class members as federal inmates; and

d) Having this matter proceed as a class action is in the interests of behavioural modification as it will address systemic issues within Correctional Service Canada. The plaintiff notes that the defence response that “behavioural modification has already been achieved” is puzzling and inconsistent with the fact that the defendant has denied any wrongdoing.

[156] The plaintiff also quoted Justice Perell's comments from *O'Brien*, which were quoted with approval in *N&C Transportation Ltd. v. Navistar International Corporation*, 2016 BCSC 2129 at para. 180, rev'd on other grounds, 2018 BCCA 312, leave to appeal to SCC ref'd, 38327 (28 March 2019):

> [227] … (a) assuming there is even one worthwhile common issue, it is quite easy for a class action to be preferable in comparison to the alternatives even when the class members' individual claims are monetarily substantial; (b) assuming there is even one worthwhile common issue it is very difficult to convince a court that the class action would be unmanageable; and (c) assuming there is even one worthwhile common issue, then the dice are loaded so to speak in favour of answering Justice Cromwell's five questions in favour of a class proceeding being the preferable procedure.
>
> [228] Put somewhat differently, and asking a rhetorical question, assuming that there was a worthwhile common issue and a representative plaintiff supported by a class counsel willing to take on the risk of litigating the common issue, why would or should a court decline to achieve the access to justice and the economies for the parties and the administration of justice available from prosecuting a class proceeding as far as it can be taken?

[157] The defendant submits a class action would be disproportionately costly and time consuming relative to individual inmates with viable claims. The defendant also submits: (1) the claim, as presented, has more individual issues than common ones; (2) each putative class member's claim would require a separate analysis of loss and causation such that resolution of any common issues would not sufficiently advance the class member's claim; (3) individual trials would be required for those claims involving psychological injury; and (4) behavioural modification has already been achieved in this case.

[158] I conclude that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. The determinations I have made in these reasons make it less likely there will be individual claims pursued for the events in question. It seems entirely possible that no individual claims will be pursued.

[159] Leaving aside what appears to be the very limited prospect for individual claims, I note that individual claims would likely involve relatively modest sums that would be challenging to prosecute economically. As matters stand, the claims in the class proceeding have been distilled to a relatively few common issues, the

resolution of which will benefit the putative class as a whole. This is a strong factor in favour of proceeding as a class action.

[160] The number of inmates interested in participating in a class proceeding also indicates strong support for this proposed class action, which is another factor in favour of a class action.

[161] Finally, I note and agree with the general thrust of Justice Perell's comments in *O'Brien*. Given the worthwhile common issues in this case, together with a representative plaintiff supported by a class counsel willing to take on the risk of litigating those issues, I see no good reason to decline the access to justice and economies of collective litigation available from prosecuting this matter as a class proceeding.

(e) Appropriate Representative

[162] The defendant does not argue that Mr. Ewert is unsuitable representative but submits he has not advanced a workable litigation plan.

[163] I have reviewed the plaintiff's litigation plan and considered the numerous objections and criticisms of that plan by the defendant. I conclude that the plan provides a reasonable outline of litigation events and the manner in which these will be addressed. As with all litigation plans, it will almost certainly have to be amended from time to time. It will also have to be amended to reflect the determinations I have made in these reasons.

[164] In brief, I am satisfied the plaintiff's litigation plan satisfies the requirements of s. 4(1)(e)(ii) of the *CPA*.

VIII. Conclusion

[165] I conclude that certain of the plaintiff's claims provide an appropriate basis for the certification of this matter as a class proceeding. Those claims are:

a) the claims against the prison administrators alleging negligence in failing to properly plan and/or supervise the first s. 53 search; and

b) the claims against correctional staff alleging negligence in failing to properly conduct the first s. 53 search.

[166] I make the following orders:

a) this action is certified as a class proceeding;

b) the class is described as all persons who were inmates of Kent Institution in Agassiz, British Columbia, in the period from January 7, 2010 to January 22, 2010, inclusive;

c) the class is divided into subclasses based on the cellblocks at Kent Institution during the relevant period;

d) Jeffrey George Ewert is appointed as the representative plaintiff for all class members;

e) the common issues to be determined are as set out in Schedule A to the Notice of Application, for the approved claims, but revised in accordance with these reasons; and

f) the plaintiff will revise the litigation plan set out in Schedule B to the notice of application such that it reflects the determinations made in these reasons.

[167] The parties have leave to address any issues arising from this judgment, and in particular, any issues with finalizing the common issues or the revised litigation plan.

"Blok J."

Schedule "A"

THIRD REVISED COMMON ISSUES

(July 8, 2023)

The Plaintiff proposes the following common issues:

1. Terms

   a. "Class members" means all persons who were inmates at Kent Institution in the period from January 7, 2010 to January 22, 2010 (inclusive);

   b. "CSC" means Correctional Service of Canada;

   c. "Defendant's Agents" means the employees, agents and/or servants of the Attorney General of Canada, including but not limited to the CSC, the ERT, the TAC, and the Kent Institution administrators, Warden and correctional staff;

   d. "ERT" means the CSC Pacific Region Emergency Response Team;

   e. "First Search" means the search at Kent Institution pursuant to s.53 of the *Corrections and Conditional Release Act* that was authorized on or about January 7, 2010 and was completed by on or about January 11, 2010;

   f. "Lockdown Period" means the period of January 7 – 22, 2010 (inclusive), during which, in order to facilitate the Searches, normal operational routine at Kent Institution was suspended and Class Members and Subclass Members were locked in their cells or subject to a modified routine;

   g. "Searches" means the First Search and Second Search;

   h. "Second Search" means the search at Kent Institution pursuant to s.53 of the *Corrections and Conditional Release Act* that was authorized on or about January 11, 2010 and was completed by on or about January 18, 2010;

   i. "SMEAC Plans" means any of the several Situation, Mission, Execution, Administration and Communications Action Plans that were authorized by the Warden of Kent Institution in relation to the Searches;

   j. "Subclass" and "Subclass Members" means the Class Members broken down into four subclasses representing each of the four living units at Kent Institution (Unit I, II, III and IV) during the Lockdown Period;

   k. "TAC" means the Tactical Component of Pacific Region, CSC; and

   l. "Time Out of Cell" means tier time, yard time, gym time or any other free/personal time an inmate may have out of their cell during the day.

2. Unlawful Imprisonment

    a. Considering each Subclass in turn, did the deprivation of Time Out of Cell during the Lockdown Period constitute a deprivation of the Subclass Members' residual liberty?

    b. If so, was this deprivation of the Subclass Members' residual liberty lawful?

3. Negligence: Prison Administrators

    a. Did Kent Institution management owe the Class Members a duty of care?

    b. If so, what is the nature of that duty?

    c. Did Kent Institution management breach a duty of care by:

        i. Failing to reasonably plan the First Search to ensure it would not need to be repeated?

        ii. Failing to adequately train correctional staff responsible for executing s.53 searches to conduct the searches in a manner that minimized the likelihood the search would need to be repeated?

        iii. Failing to ensure that Class Members or Subclass Members were permitted a reasonable period of Time Out of Cell, daily or otherwise, during the Lockdown Period?

        iv. Failing to ensure that Class Members or Subclass Members were provided reasonable access to showers, laundry facilities and/or the telephone, during the Lockdown Period?

        v. Failing to ensure Class Members were advised of the reason for the Lockdown Period, the nature of the cell block routines during the Lockdown Period, and the anticipated length of the Lockdown Period, in a timely manner?

        vi. Failing to ensure that Class Members were provided reasonable access to legal counsel during the Lockdown Period?

        vii. Failing to monitor and/or supervise the ERT/TAC team during the Lockdown Period and Searches to ensure compliance with the SMEAC Plans, and CSC policy, in respect of the use of force?

        viii. Failing to ensure Class Members or Subclass Members were provided three meals a day or sufficient nourishment during the Lockdown Period?

d. If so, was there harm caused by the breach/es of the duty of care that was common to all Class Members or Subclass Members?

4. Negligence: Correctional Staff

   a. Did the correctional staff who executed the First Search owe the Class Members a duty of care?

   b. If so, what is the nature of that duty?

   c. Did the correctional staff who executed the First Search breach a duty of care by failing to conduct the First Search in a reasonable manner that minimized the likelihood it would need to be repeated?

   d. If there was a breach of a duty of care, was there harm caused by the breach that was common to all Class Members or Subclass Members?

5. Negligence: ERT/TAC Leadership

   a. Did the leadership of the ERT/TAC team owe a duty of care to the Class Members?

   b. If so, what is the nature of that duty?

   c. Did the leadership of the ERT/TAC team breach a duty of care by directing that, in carrying out the cell extractions, TAC members with firearms drawn would accompany ERT members onto the ranges, be present at the cells doors of each inmate during the cell extraction process, and escort the inmates down their respective ranges to be strip-searched?

   d. In the alternative, did the leadership of the ERT/TAC team breach a duty of care by failing to monitor and/or supervise the ERT/TAC team members to ensure they carried out cell extractions in accordance with the SMEAC Plans?

   e. If there was a breach of a duty of care, was there harm caused by the breach that was common to all Class Members or Subclass Members?

6. Misfeasance in Public Office: ERT/TAC Leadership

   a. Was there a decision or command within the leadership of the ERT/TAC team to effect the s.53 Searches unlawfully?

   b. If so, was this decision or command made with either (1) subjective intent to harm the Class Members; or (2) with knowledge of the unlawful nature of the decision or command and knowing it was likely to injure the Class Members?

7. *Charter* Breaches

   Section 7

a. Considering each Subclass in turn, did the deprivation of Time Out of Cell during the Lockdown Period amount to a deprivation of the Subclass Members' liberty under s.7 of the *Charter*?

b. Considering each Subclass in turn, did the following, whether individually or in any combination, amount to a deprivation of the Subclass Members' security of the person under s.7 of the *Charter*?

   i. the deprivation of Time Out of Cell?

   ii. the deprivation of visits and phone calls?

   iii. the deprivation of showers?

   iv. the provision of only two meals a day for the majority of the Lockdown Period?

   v. the subjection of Subclass Members to cell extractions in which TAC members with firearms drawn accompanied the ERT onto the ranges, were present at the Subclass Members' cell doors during extractions, and escorted Subclass Members down their respective ranges to be strip-searched?

   vi. the subjection of the Subclass Members to strip-searches during the Second Search?

c. If so, was the deprivation of liberty and/or security of the person in accordance with the principles of fundamental justice?

d. If the deprivation of liberty and/or security of the person was not in accordance with the principles of fundamental justice, was the s.7 *Charter* breach justified under s.1 of the *Charter*?

Section 8

e. Did the Defendant's Agents fail to reasonably plan and/or execute the First Search to ensure it would not need to be repeated?

f. If not, did the cell searches and strip-searches that Class Members were subjected to during the Second Search amount to unreasonable searches under s.8 of the *Charter*?

g. If so, was the s.8 *Charter* breach justified under s.1 of the *Charter*?

Section 12

h. Considering each Subclass in turn, did the conditions of confinement and treatment of the Subclass Members, as set out in subparagraphs 15 (a)-(h) of

the Second Further Amended Notice of Civil Claim, amount to cruel and unusual treatment or punishment under s.12 of the *Charter*?

i. If so, was the s.12 breach justified under s.1 of the *Charter*?

Section 24(1)

j. If the Class Members' or Subclass Members' s.7, s.8 and/or s.12 *Charter* rights were breached, are damages pursuant to s.24(1) of the *Charter* a just and appropriate remedy?

k. If the Class Members' or Subclass Members' s.7, s.8 and/or s.12 *Charter* rights were breached, are declarations pursuant to s.24(1) of the *Charter* warranted?

8. Aggregate Damages

a. If the Defendant breached the Class Members' or Subclass Members' common law or *Charter* rights, can the court make an aggregate assessment of damages as part of the common issues trial?

b. If so, what amount of aggregate damages is appropriate for the common Class Member or Subclass Member experience?

9. Punitive Damages

a. Is the Defendant guilty of conduct that justifies an award of punitive damages?

b. If so, what amount of punitive damages is awarded?