CITATION: Brazeau v. Canada (Attorney General), 2020 ONSC 3272
COURT FILE NO.: CV-15-53262500-CP
DATE: 2020/05/28

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CHRISTOPHER BRAZEAU and DAVID KIFT	)	*James Sayce*, *Charles Hatt*, and *Nathalie Gondek*, for the Plaintiffs
Plaintiffs	)	
- and -	)	
ATTORNEY GENERAL OF CANADA	)	
Defendant	)	*Gregory Tzemenakis*, *Susan Gans*, and *Diya Bouchedid* for the Defendant
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: In writing

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In this action under the *Class Proceedings Act, 1992*[1] against the Government of Canada, after a summary judgment motion, I made a base-level aggregate assessment of *Charter* damages. The award of $20 million was just for vindication and deterrence; the award did not include compensatory damages. I ordered that the $20 million, after deduction for legal fees and disbursements, to be used by Canada for additional mental health or program resources for structural changes to federal penitentiaries as the court on further motion may direct.

[2] There was an appeal, and while affirming my judgment on liability, the Court of Appeal held that I had made serious errors of law and set aside the award of damages and remitted the issue of damages to me to be determined on proper principles. The Class Members now repeat

[1] S.O. 1992, c. 6.

the request for an aggregate award of *Charter* damages, and they seek an award of $20 million to be distributed to them directly after deduction of Class Counsel's fee and expenses. Canada, however, submits that the appropriate award is $2.4 million just for vindication and deterrence to be distributed directly to Class Members less Class Counsel's fee and expenses.

B. Factual Background

[3] This class action, which I shall refer to as *Brazeau*, is about the use of administrative segregation in federal penitentiaries. In *Brazeau*, the Representative Plaintiffs, Christopher Brazeau and David Kift, sued the Government of Canada (represented by the Defendant Attorney General of Canada) for breaches of s. 7 and 12 of the *Canadian Charter of Rights and Freedom*.[2]

[4] The Plaintiffs were granted a summary judgment, in which, based on *Vancouver (City) v. Ward*,[3] the Class Members were awarded aggregate *Charter* damages of $20 million for vindication and deterrence.[4] In *Brazeau*, the Class Members recovered no aggregate damages for compensation. Their individual compensatory damages were to be assessed at individual issues trials. In *Brazeau*, I ordered that the $20 million award less Class Counsel's fee be paid by Canada paying for additional mental health or program resources at its penitentiaries.

[5] I thought my approach was quite favourable to Canada, which had the opportunity to put the $20 million to societal use for the betterment of all Canadian citizens and not just the Class Members who would be a major but the indirect beneficiary of the improvements to the Canadian penitentiaries. Canada, however, did not think this was a lawful approach to *Charter* damages.

[6] Canada appealed the *Brazeau* decision.

[7] While the *Brazeau* appeal was pending, Jullian Jordea Reddock, another inmate of federal penitentiaries and the Plaintiff in a similar class action against Canada, successfully moved for summary judgment. In *Reddock*, the Class Members proved breaches of s. 7 and 12 of the *Charter*, and the Class Members recovered an aggregate damages award of $20 million for vindication, deterrence, and compensatory damages with additional compensatory damages payable at individual issues trials.[5] The Class also received pre-judgment interest of approximately $1 million on the compensatory portion of the damages award, so that the judgment was around $21 million for *Charter* damages.

[8] In *Reddock*, I did not follow the approach to *Charter* damages that I had employed in *Brazeau*. In *Reddock*, I explained why I would not follow the *Brazeau* approach as follows:

> [498] The order I made in the *Brazeau* Case was thus animated by the Federal Government's submissions and quite favourable to the Federal Government, but they submit that I did not have the jurisdiction to make it. If they are correct, then if the Court of Appeal in the *Brazeau* Case upholds the aggregate damages award but agrees that I erred in how it should be distributed, then I suppose the Court of Appeal will make the order that I ought to have made, which would be to distribute the vindication and deterrence *Charter* damages to the Class Members directly, which is what I propose to do in the immediate case.

[2] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.
[3] 2010 SCC 27.
[4] *Brazeau v. Attorney General (Canada)* 2019 ONSC 1888.
[5] *Reddock v. Canada (Attorney General)* 2019 ONSC 5053.

> [499] I disagree that I did not have the jurisdiction to make the Order I did in the *Brazeau* Case, but if I was wrong, then I shall not make the same mistake in the *Reddock* Case. But error avoidance is not the reason I shall make this order for a direct payment to the Class Members. The reason that I am making an order that the aggregate award be distributed directly to the Class Members is that on the evidence in the *Reddock* Case, I am satisfied that there is a base level of compensatory damages that is owed to the Class and it should be paid to them directly.[6]

[9] Canada appealed the *Reddock* decision.

[10] The appeals in *Brazeau* and *Reddock* were argued together, and for reasons that will become apparent below, it is important to note that the Province of Ontario was an intervenor in the *Brazeau* and *Reddock* appeal.

[11] On March 9, 2020, the Ontario Court of Appeal affirmed the judgment and the *Charter* damages award in *Reddock*, and the Court affirmed the judgment but not the methodology of the *Charter* damages award in *Brazeau*.[7] In the *Brazeau* appeal, the Court of Appeal stated:

> *Quantum of Damages and Damages for "Structural Changes"*
>
> 102. The motion judge concluded in *Reddock* that the class members had all suffered a "base level of damages" that could be determined without the need for proof from individual class members. These damages were awarded on an aggregate basis pursuant to s. 24 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"), … The motion judge, at para. 486 of *Reddock*, fixed the amount at $20 million for the three functions *Ward* holds to be pertinent, namely: vindication, deterrence, and compensation. The compensatory portion of that award was $9 million calculated on the basis of $500 for each inmate placed in administrative segregation for more than 15 days: at paras. 381, 396. After deduction of legal fees and disbursements, the amount remaining is to be distributed to the class members pursuant to s. 24(2) of the CPA: at para. 492.
>
> 103. We would not interfere with the premises of the damage award. Damages for the vindication of the class members' rights are suitable. A measure of deterrence damages is also warranted given the resistance of the correctional authorities to change, and while the CCRA has been amended and the SIUs introduced, there remain issues of implementation of the new scheme. Base compensation calculated on the basis of $500 for each inmate seems modest given the motion judge's findings of the harm the inmates suffered.
>
> 104. The motion judge's order contemplates a second stage of individual issues trials as contemplated by s. 25 of the CPA: at paras. 500-5. There is no reason to interfere with that aspect of the judgment.
>
> 105. In *Brazeau*, the motion judge also awarded $20 million as a base level of damages. He found that entire amount to be appropriate for vindication and deterrence and left the issue of compensation for the individual issues stage of the proceedings. He then took the unusual course, at paras. 458-59, of ordering that the $20 million, after deduction for legal fees and disbursements, be used by Canada for "additional mental health or program resources for structural changes to penal institutions as the court on further motion may direct."
>
> 106. The motion judge erred in law in making this order.
>
> […]
>
> 113. We were invited to maintain the aggregate damage award of $20 million [in *Brazeau*] and order it distributed to the class members. Given the serious error of law made by the motion judge,

[6] *Reddock v Canada* 2019 ONSC 5053 ("*Reddock*") at paras 497-499, PBOA, Tab 11.
[7] 2020 ONCA 184.

> we set aside his award of damages and remit the issue of damages to be determined on proper principles.

[12] While the appeal judgment in *Brazeau* and *Reddock* were pending, I heard the summary judgment motion of Conrey Francis in his action against the Province of Ontario. Mr. Francis' action (the *Francis* action) was with respect to Ontario's use of administrative segregation in provincial prisons and the Class Members' claims were for breaches of s. 7 and 12 of the *Charter*. I heard Mr. Francis' motion and reserved judgment.

[13] My judgment in *Francis* was still under reserve when the Court of Appeal released its decision in the *Brazeau* and *Reddock* appeals. In *Francis*, I asked and received written submissions about the significance of the Court of Appeal's decision.

[14] Thus, after the Court of Appeal released its decision in *Brazeau/Reddock*, I released my decision in *Francis*.[8] The Class Members in *Francis* were awarded $30 million in *Charter* damages for vindication, deterrence, and compensation. For present purposes, what I said in *Francis* about the quantification and awarding of *Charter* damages is pertinent. In *Francis*, I stated:

> *Quantification of Charter Damages*
>
> 597. I turn now to the quantification of the Class Members' *Charter* Damages. This assessment is on a class-wide basis, subject to the right of each Class Members to have an individual issues trial or assessment procedure to determine their idiosyncratic entitlement to damages for the *Charter* breaches.
>
> 598. Class Counsel requests base-level compensatory damages of: (a) $2,500 per inmate for members of the Inmate in Prolonged Administration Class, for an award of approximately $16.3 million in the aggregate; and; (b) $5,000 per inmate for members of the Inmates with a Serious Mentally Illness Class, for an award of approximately $53.0 million in the aggregate. In addition, Class Counsel requests $62.0 million for vindication and deterrence damages for a total award of approximately $131.0 million.
>
> 599. While there is no doubt that each Class Member has an idiosyncratic and unique response to the experience of having been placed in administrative segregation, Class Counsel submits that there is a base level of harm suffered by all the Class Members. I agree. However, I do not agree that the award should be $131.0 million.
>
> 600. I conclude that there is a base level of *Charter* damages that I would value at $30.0 million across the class. This base level award is for: compensation, vindication, and deterrence for the breaches of the *Charter* and it is inclusive of pre-judgment interest.
>
> 601. It is true that each Class Member has a unique or idiosyncratic claim for a remedy for having his or her *Charter* rights violated. It is also true that the totality of all the discrete claims of the Class Members can only be determined after individual issues trial, which is to say that an aggregate assessment of the totality of the Class Member's claims is not possible. However, while the totality of the Class Members' *Charter* damages claims cannot be determined in the aggregate on this summary judgment motion, there is a foundation for a base level of *Charter* damages that can be awarded to the class on this summary judgment motion.
>
> 602. The contravention of any of the *Charter* breaches would on a class-wide basis support vindication and deterrence damages, even if every member of the class could not be said to have suffered physical or psychiatric harm from the violation of his or her *Charter* rights. However, in

[8] *Francis v. Ontario*, 2020 ONSC 1644.

the immediate case all of the Class Members suffered personal injuries. As a result of the Supreme Court of Canada's decision in *Saadati v. Moorhead*,[9] about damages for mental harm, I am able to decide without requiring a trial that there is a base level of compensatory harm for the contraventions of the *Charter* or for negligence.

603. Before *Saadati v. Moorhead* decision, the conventional view was that recovery for mental injury required a claimant to prove with expert medical opinion evidence a recognized psychiatric illness, which came to mean an illness within the classification of mental disorders contained in the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM"), published by the American Psychiatric Association, and the *International Statistical Classification of Diseases and Related Health Problems* ("ICD"), published by the World Health Organization. After *Saadati v. Moorhead*, while an expert's opinion is relevant, it is not a necessity. After *Saadati* to establish a compensable mental injury, the claimant need not prove that he or she was suffering a recognized psychiatric illness. Rather, the claimant needs to prove that as a result of the defendant's negligence he or she suffered a mental disturbance that is serious and prolonged and that rises above the ordinary annoyances, anxieties and fears that come with living in civil society.

604. In the case at bar, I am satisfied from the evidence that for every Class Member, the stress and anxiety of administrative segregation was serious and prolonged and above the ordinary annoyances, anxieties and fears that come with living in a prison. In the immediate case, the Class Members of the Inmates with Serious Mental Illness Class were by definition suffering from a DSM level mental illness. The placement into administrative segregation just added to their misery and pain and their suffering is worthy of compensation.

605. There is, however, no established formula or juridical science to assessing *Charter* damages. I agree with what Justice Sharpe and Professor Roach say in their book, R.J. Sharpe and K. Roach, *The Charter of Rights and Freedoms*, (Toronto: Irwin Law, 2009) at pp. 384-5

> It can be extremely difficult to measure in money terms the amount appropriate to compensate the plaintiff for physical injuries or for damages to reputation, dignity, or privacy or simply for the violation of a *Charter* right. Translating into money the extent of the injury amounts to little more than sophisticated guesswork. In many cases, the damage suffered as a result of a *Charter* violation will fall into this intangible territory. The rights and freedoms guaranteed by the *Charter* are abstract and intangible and thus assessment of the extent of the injury in monetary terms will often be difficult. Low awards for the violation of a *Charter* right might trivialize the right while high awards may create an unjustified windfall for the applicant.

606. In *Brazeau*, which concerned administrative segregation in federal penitentiaries, I awarded *Charter* damages of $20.0 million for vindication and deterrence. There was no award for prejudgment interest.[10] In *Reddock*, another case about administrative segregation, I awarded $20.0 million for vindication, deterrence, and compensation plus pre-judgment interest ($1,120,797).

607. In *Reddock*, I assessed the compensatory portion of the award as having a value of $500 for each placement in administrative segregation for more than fifteen days. On a class-wide basis, I valued the compensatory portion of the award as having a value of approximately $9 million. Once pre-judgment interest was added and Class Counsel's fees and disbursements subtracted, each Class Member would receive a minimum award of $2,200.

608. In the immediate case, I shall award $30.0 million without allocation between, vindication, deterrence, and compensation and I mean the award to be inclusive of pre-judgment interest.

[9] 2017 SCC 28.
[10] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 3426

609. In arriving at $30.0 million, I reject the approach suggested by Class Counsel. What Class Counsel suggested was essentially based on the *Reddock* precedent, but the precedent became supercharged on steroids because in its *Reddock* decision, the Court of Appeal in a passing comment mentioned that the compensatory portion of the aggregate award was modest given the harm the inmates suffered. Class Counsel took the passing comment as a direction from the Court of Appeal to increase the compensatory part of *Charter* damages in cases about administrative segregation.

610. The Court of Appeal made no such direction and established no principle. *Charter* damages must be determined on a case by case basis. The Court of Appeal did not suggest that the $21.0 million in *Reddock* award was too low. Moreover, the base-level award in *Reddock* was meant to be just a base-level award. and it reserved the inmates' right to idiosyncratically make claims for more compensation at their individual issues trials. In my opinion, it would be an error in principle to develop an approach that would produce a result that overstated the defendant's base level of liability.

611. In the immediate case, based on the available evidence, an award of $30.0 million understates Ontario's exposure as demonstrated by the circumstances that Class Counsel submits that the award should be approximately four times as much.

612. As I said above, there is no established formula or juridical science to assessing *Charter* damages. And I now add that there cannot be and there should not be an established formula for assessing *Charter* damages especially in the context of a class action. The remedial assessment will very much depend upon the circumstances of each case and will be an amalgam of legal and public policy factors associated with deterrence, vindication, compensation, good governance, and respect for the different roles of governments and courts.

613. Contrasting the immediate case with the results in *Brazeau* and *Reddock* makes the point that a formulistic approach is not appropriate. In *Brazeau*, the award was designed to achieve vindication and deterrence, but not compensation, on a class-wide basis with respect to *Charter* breaches in the administration of a national penitentiary system involving 43 penal institutions, including 15 community correctional centres, and 5 Regional Treatment Centres with a daily relatively stable and long-term population of approximately 14,000 inmates. The Court of Appeal, without suggesting that the gross amount of the award was inappropriate, however, has ordered that the damages award in *Brazeau* be reconsidered. In *Reddock*, the award was for all of vindication, deterrence and compensation for the same national penitentiary system with a class size of approximately 9,000 inmates, and once again the Court did not suggest that the gross amount of the award was inappropriate. In the immediate case, if I were to adopt Class Counsel's approach, based on a passing comment in the *Brazeau* and *Reddock*, there would be an award - before the calculation of pre-judgment interest - of approximately $130.1 million for compensation, vindication and deterrence with respect to a provincial prison system of 32 institutions with a daily churning population of approximately 7.500 inmates in custody and a class size of approximately 11,167 inmates.

614. In the immediate case, I do not adopt the approach of *Brazeau*, which has been remitted for reconsideration. I do not adopt the approach of *Reddock*, which was appropriate for a national system, which has similarities but also major differences from Ontario's provincial system. There was no direction from the Court of Appeal that the courts should apply some sort of formula in arriving at a *Charter* remedy. I do not attempt to rationalize the outcomes. I shall exercise my jurisdiction to fashion a s. 24 (1) remedy appropriate for the circumstances of the immediate case.

615. In the immediate case, I am awarding $30.0 million for all of compensation, pre-judgment interest, deterrence and vindication. I make this award because based on the particular circumstances of the immediate case, in my opinion, anything less: (a) would not achieve deterrence, vindication, and compensation on a class-wide basis; and (b) would not achieve the purposes of the *Class Proceedings Act, 1992*, which are access to justice and behaviour modification, and awarding more: (c) is not necessary, because there will be individual issues

> trials or assessments to determine the appropriate amount of compensation for the harms suffered individually; and (d) it is not prudent or fair to the defendant Ontario, because awarding more runs the risk of overstating its liability.
>
> 616. I also alert counsel that *Brazeau* and *Reddock* should not be taken as precedents for the approval of the Class Counsel's fees that are to be deducted from the Class Members' base-level awards.
>
> 617. I, therefore, quantify the base-level of *Charter* damages as $30.0 million, all inclusive.

[15] As appears from the above account of the factual background, when I released my decision in *Reddock*, I decided not to use the approach to *Charter* damages that I had employed in *Brazeau*, and when I released my decision in *Francis*, I decided not to use the approach that I had used in *Reddock.* At the time that I released my decision in *Francis*, I knew that *Brazeau* had been remitted to me for a redetermination of the damages for the contraventions of sections 7 and 12 of the *Charter*.

C. The Plaintiffs' Submissions

[16] On this motion to redetermine the *Charter* damages award, but for copious incorporations by reference of the arguments that they made at the original summary judgment hearing, the Plaintiffs' submissions in their factum are brief. So, I shall set them out in full, as follows:

> 21. The $20-million aggregate damages award in *Brazeau* does not overstate the Defendant's liability, it achieves the purposes of vindication and deterrence of the *Charter* breaches and it is fair and just to all parties. While the Plaintiffs recognize that this Court has jurisdiction and authority to adjust the figure, their position is that $20 million is the appropriate figure.
>
> 22. The Plaintiffs will not re-state their submissions on aggregate damages, but instead continue to rely on their submissions in paras 292-307 of their moving factum and 58-61 of their reply factum on the Brazeau summary judgment motion and paras. 362-371 of the *Reddock* summary judgment factum.
>
> 23. If this Court decides to include compensatory Charter damages in the aggregate award, the aggregate quantum may still remain the same. From the Plaintiffs' perspective, not much turns on the purposes of the damages at this point, only that base-level damages are available. However, awarding compensatory *Charter* damages would create further issues with respect to pre-judgment interest on the compensatory aspect of the award, which Canada conceded in the *Reddock* matter should be payable.
>
> 24. The Court made itself very clear in the recent *Francis* reasons that quantifying *Charter* damages is a highly discretionary process, which turns on the particulars of the evidence before the Court:
>
> > There is no established formula or juridical science to assessing *Charter* damages. There cannot be and there should not be an established formula for assessing *Charter* damages especially in the context of a class action. The remedial assessment will very much depend upon the circumstances of each case and will be an amalgam of legal and public policy factors associated with deterrence, vindication, compensation, good governance, and respect for the different roles of governments and courts.
>
> 25. The Court of Appeal found no factual or legal errors in *Brazeau* other than the Structural Remedy. This Court has already considered the particular circumstances of the *Brazeau* case and arrived at $20 million to vindicate and deter. This is the appropriate quantum.

> 26. A $20 million aggregate damages award will yield a higher base award per Class Member in *Brazeau* than in the *Reddock* case given the smaller class size in *Brazeau*. However, that would lead to no injustice or potential overpayment by the Defendant. The jurisprudence is clear that Courts should only be concerned with overpayment by Defendants, not with over or under-compensation of individual Class Members through the "rough justice" of aggregate awards.
>
> 27. Furthermore, the Court accepted as fact in *Brazeau, Reddock* and *Francis* that the seriously mentally ill suffer more in solitary confinement than those who do not suffer from mental illness. That is why the Mandela Rules contain a complete bar on solitary confinement for the mentally ill, a broader group than the "sickest of the sick" who make up the *Brazeau* class. Given the explicit exemption for Class Members (prohibiting segregation for any period of time) in Canada's own policy CD-709, and Canada's clear breach of its own policies in this regard, the need for vindication and deterrence is amplified in this matter when compared to *Brazeau* or *Francis*. A higher vindication and deterrence award in this case is justifiable.

[17] It is a simplification but, in essence, the Plaintiffs submit that the court should make an award of $20 million for vindication and deterrence and distribute the award less Class Counsel's fee directly to the Class Members. As a sort of alternative submission, the Plaintiffs submit that the court should make an award of $20 million for vindication, deterrence, and compensation in which case pre-judgement interest would need to be calculated on the compensatory portion of the award.

D. Canada's Submissions

[18] It is an oversimplification of a complex and relentless submission, but Canada submits, in essence, that the court should award the Class Members $2.4 million for vindication and deterrence and distribute the award less Class Counsel's fee directly to the Class Members and not make any award for compensatory damages. Such an award would require a recalculation of Class Counsel's fees for the successful summary judgment motion.

[19] Canada submits that the Court of Appeal remitted both the amount and the manner of distribution of the *Charter* damages award to be redetermined on proper principles. It submits that compensatory damages should not be included in the award and that the *Reddock* methodology for vindication and deterrence damages should be applied and the class size should be factored into the assessment of a *per capita* award. Canada submits that the Plaintiffs' request to maintain the original quantum of $20 million is not in keeping with and rather is inconsistent with established *Charter* damages jurisprudence that must be followed. It submits that aggregate awards for vindication and deterrence in *Brazeau* and *Reddock* have to be coherent. Canada submits that the Plaintiffs' request for $20 million just for vindication and deterrence would mean that the Class Members would unjustly and disproportionately each recover $10,000 while in *Reddock* the award for vindication and deterrence was approximately $1,200 each. Canada submits that the necessity for congruence of *Charter* awards for *Brazeau* and *Reddock* is amplified because: these are overlapping, interconnected cases raising the same allegations; they are based on a similar factual record; and they are concerned with the same national penal system. In these circumstances, Canada submits that there is no factual justification for a drastic disparity between *Reddock* and *Brazeau*. Further, Canada submits that in determining the award for vindication and deterrence in *Brazeau*, the court can take into account the vindication and deterrence affected by *Reddock*. Taking into account the vindication and deterrence achieved in *Reddock*, which came after *Brazeau*, means in Canada's view much less vindication and deterrence damages should be awarded after the fact of the redetermination of the damages in

Brazeau.

[20] Moreover, Canada submits that in order to award aggregate compensatory damages, which it opposes, it would be necessary to exclude Class Members whose claim was based only on a contravention of section 7 of the *Charter* and whose placement in administrative segregation was for less than five days. In other words, for such an inmate, Canada submits there would be no claim under section 12 of the *Charter* for a prolonged segregation and no causation of damages for the section 7 contravention. Thus, Canada submits that for compensatory damages to be included in *Brazeau*, this Court would have to create sub-classes to differentiate between: (a) Class Members who have proven *Charter* breaches for lack of independent review and for prolonged segregation (which is only established after 15 days); and (b) Class Members who have proven a *Charter* breach for lack of independent review but not for prolonged administrative segregation but who were confined for more than five days. Class members who were segregated for only five days or less, should be excluded altogether from receiving compensatory damages.

E. Discussion and Analysis

[21] I agree with Canada's submission that the Court of Appeal remitted the matter of determining the nature of and the quantum of the *Charter* damages to this court. The issue, however, is not a *tabula rasa* because it is to be based on the affirmed findings of law and fact of both *Brazeau* and *Reddock*.

[22] I also agree with an aspect of Canada's submission, which is that there should be some congruence at least with respect to the facts between the immediate case and the *Reddock* case because these are overlapping, interconnected cases raising the same allegations; they are based on a similar factual record; and the cases are concerned with the same national penal system.

[23] I would add that in assessing the *Charter* damages in *Brazeau* there are factual and legal lessons to be learned from not only *Reddock* but also from the *Francis* decision. The law about *Charter* damages in a class action context have been evolving, and in this regard it is worth recalling that the provincial government intervened in the *Brazeau* and *Reddock* appeals and Ontario made written submissions to me about the significance of the Court of Appeal's decision before I released my decision in *Francis*.

[24] I disagree, however, with Canada's submission that I should not include compensatory damages in this redetermination of the *Charter* damages. This submission is logically incoherent with Canada's main submission that I should make the award in the immediate case congruent with the award made in *Reddock*.

[25] In any event, I also disagree that I am compelled to adopt the *Reddock* approach and that I must discount the result in *Brazeau* because vindication and deterrence damages have been awarded in *Reddock*.

[26] I turn then to quantification of the Class Members' *Charter* damages. This assessment is on a class-wide basis, subject to the right of each Class Member to have an individual issues trial or assessment procedure to determine their idiosyncratic entitlement of damages for the *Charter* breaches.

[27] Based on the evidence in the immediate case as confirmed and supported by the evidence and the lessons learned from *Reddock*, which Canada concedes involves the same evidentiary

footprint as *Brazeau*, while the totality of the Class Members' *Charter* damages claims cannot be determined in the aggregate on this summary judgment motion, there is a foundation for a base level of *Charter* damages that can be awarded to the class.

[28] In the immediate case, each Class Member suffered from their confinement in administrative segregation. Here it should be noted that the class definition in *Brazeau* defined the Class Members as the sickest of the mentally sick. The evidence on liability and on the assessment of damages was that these Class Members should not have experienced administrative segregation as the means to secure their security or the security of the penitentiaries.

[29] As was the case in *Reddock*, and also as was the case in *Francis*, the contravention of any of the *Charter* breaches would on a class-wide basis support vindication and deterrence damages for the whole class, all of whom suffered physical or psychiatric harm.

[30] In the immediate case, the evidence establishes that all of the Class Members suffered psychiatric harm from being placed in administrative segregation, which in truth is solitary confinement contrary to the *Mandela Rules*. For a certainty, the evidence in the immediate case establishes that all those Class Members who were in prolonged administrative segregation suffered a base level of compensable harm. Indeed, the evidence establishes that the whole class, who are by definition seriously mentally ill, suffered profoundly. Rule 45 of the *Mandela Rules* require a complete ban on solitary confinement for the mentally ill. The Court of Appeal for Ontario has now twice recognized the application of the *Mandela Rules* in Canada. In *CCLA v. Canada*,[11] the Court of Appeal ruled that there should be a ban for the mentally ill in solitary confinement. In the immediate case, Drs. Grassian, Chaimowitz, and Haney all opined that the mentally ill suffer more, and suffer greater and more permanent harm, than those who do not suffer from mental illness. Dr. Austin and Dr. Haney opined that the placement of any seriously mentally ill inmate into solitary confinement is inappropriate and should be forbidden. The determination of whether a mentally ill prisoner should be placed in segregation for any period of time should be made by a medical professional, not by the warden of an institution.

[31] Canada, however, would exclude from any compensatory damages award those Class Members whose claim for compensation is based solely on section 7 of the Charter and whose placement or placements were less than five days. I, however, would not exclude these Class Members. These Class Members are certainly entitled to damages for vindication and deterrence, and I do not accept the argument that these Class Members are not entitled to compensatory damages, unless they were confined for more than five days. Given the state of their mental health, they should not have been placed in administrative segregation at all. Their plight would not have been saved if there was a review system that came five days too late in any event. In *Francis*, I ruled that an independent review that comes too late is not *Charter* compliant.

[32] Based on the evidence in the immediate case, I conclude that there is a base level of *Charter* damages that I would value at $20 million across the class. This base level award is for the entire class for vindication, deterrence, and compensation for the breaches of the *Charter*. The compensatory portion of the claim is inclusive of pre-judgment interest.

[33] For the purposes of distributing the $20 million, it is not necessary to break down the $20 million award into the heads of damages of vindication, deterrence, and compensation because I

[11] 2019 ONCA 243.

am satisfied that $20 million does not overstate Canada's liability in the aggregate. If, anything, $20 million understates Canada's liability.

[34] However, for the purposes of the individual issues trials that are to follow, I would designate each Class Member's share of the $20 million without deduction for Class Counsel's legal fees as compensatory damages. This is very fair to Canada because for many if not most of the Class Members they will not need to proceed to individual damages assessments for compensation because they will already have been fully compensated for this head of damages, and vindication and deterrence will also have been achieved on a class-wide basis by the aggregate award.

[35] In any event, I do not accept Canada's submission that the appropriate calculation of the head of damage for vindication and deterrence is $2.4 million. Based on the evidence in the immediate case, I could rationalize a $20 million award as being just for vindication and deterrence and that award would not overstate Canada's minimum aggregate liability.

[36] Based on the evidence in the immediate case, even if I valued vindication and deterrence at $2.4 million, I could rationalize a $20 million award as being for all of vindication, deterrence, compensation, and pre-judgment interest and, once again, I would not overstate Canada's liability. In the immediate case based on the evidence, I am confident of two things: first, that there is a base level of harm suffered across the Class; and, second $20 million understates Canada's liability across the class.

[37] Thus, in arriving at the $20 million, I reject the approaches suggested by both parties. I obviously do not apply the approach of *Brazeau* which was soundly rejected by the Court of Appeal. I also do not apply the approach of *Reddock*, which the Court of Appeal accepted. The approach I use has some resemblance to *Reddock* but is more is similar to the approach in *Francis* but varies that approach in a way that is favourable and fair to Canada. I have adopted an approach that accords with the evidence in the im-+mediate case and does not overstate Canada's liability.

[38] I appreciate that if the $20 million less Class Counsel's fees and expenses are distributed *per capita*, there are arguments that the Class Members whose claim is based solely on section 7 of the *Charter* and whose placement or placements were less than five days might be treated differently than the Class Members whose placements were for more than five days but less than 15 days and that there are arguments that Class Members whose placement were for more than five days but less than 15 days might be treated differently that the Class Members whose placements were for more than 15 days, but these are matters to be determined on the motion to settle how the $20 million should be distributed. I will deal with the scheme for distribution later.

[39] The distribution of the $20 million is a matter for which Canada should be indifferent because it remains the case that the $20 million does not overstate Canada's liability and attributing the $20 million as compensatory inclusive of pre-judgment interest for the purposes of the individual damages assessment is very favourable to Canada.

[40] In the context of class proceedings of the nature of the one in the immediate case, in my view, it is salutary to assess a base level of damages that understates the defendant's liability and then to leave it to Class Counsel at a hearing to resolve the distribution of those funds to develop a scheme to do so fairly. It will always be the case that there will be some over-compensation and some under-compensation for individual Class Members, but the defendant will not pay

more than he, she, or it is liable and those Class Members who are under-compensated have the right to individual assessments for the deficiency. The $20 million aggregate award of *Charter* damages in the immediate case is fair to the Class Members and it is fair to Canada.

F. Conclusion

[41] For the above reasons, I award the Class Members $20 million for vindication, deterrence, compensation, and pre-judgment interest. For the purposes of individual issues trials, the per capita award is to be deemed to be compensatory damages.

[42] If the parties cannot agree about the matter of the costs of this resumption of the summary judgment hearing, they may make submissions in writing beginning with the Plaintiffs' submissions within twenty days of the release of these Reasons for Decision followed by Canada's submissions within a further twenty days.

[43] In the circumstances of the Covid-19 emergency, these Reasons for Decision are deemed to be an Order of the court that is operative and enforceable without any need for a signed or entered, formal, typed order.

[44] The parties may submit formal orders for signing and entry once the court re-opens; however, these Reasons for Decision are an effective and binding Order from the time of release.

Perell, J.

Released: May 28, 2020

CITATION: Brazeau v. Canada (Attorney General), 2020 ONSC 3272
COURT FILE NO.: CV-15-53262500-CP
DATE: 2020/05/28

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHRISTOPHER BRAZEAU and DAVID KIFT

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR DECISION

PERELL J.

Released: May 28, 2020