

**CITATION:** Brazeau v. Canada (Attorney General), 2020 ONSC 7229  
**COURT FILE NO.:** CV-15-53262500-CP  
Reddock v. Canada (Attorney General), 2020 ONSC 7232  
**COURT FILE NO.:** CV-17-570771-00CP  
**DATE:** 2020/11/25

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**SUPERIOR COURT (Class Action  
Division)**

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

No.: 500-06-000781-167

**Between:**

**Between:**

**CHRISTOPHER BRAZEAU and DAVID  
KIFT  
Plaintiffs**

**ARLENE GALLONE  
Plaintiff**

**- and -**

**c.**

**ATTORNEY GENERAL OF CANADA  
Defendant**

**PROCUREUR GÉNÉRAL DU CANADA  
Defendant**

Proceeding under the *Class Proceedings Act,*  
1992

**And Between:**

**JULLIAN JORDEA REDDOCK  
Plaintiff**

**- and -**

**ATTORNEY GENERAL OF CANADA  
Defendant**

Proceeding under the *Class Proceeding Act,*  
1992

Date hearing/d'audience: October 6-8, 2020

**Counsel:**

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*André Lespérance, Clara Poissant-Lespérance, and Marianne Dagenais-Lespérance for the Demanderesse in Gallone c. Procureur Général du Canada*

*Susan Gans, Negar Hashemi, Sean Stynes, Lucan Gregory and Diya Bouchédid for the Defendant ou Défenderesse in: (a) Brazeau and Kift v. Attorney General of Canada; (b) Reddock v. Attorney General of Canada; and (c) Gallone c. Procureur Général du Canada*

*Lory Beauregard for the Fond d'aide aux actions collective*

## **REASONS FOR DECISION/JUGEMENT – Part I**

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## A. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*<sup>1</sup>, Justice Paul Perell of the Ontario Superior Court of Justice is case managing the Ontario class actions, *Brazeau v. Canada (Attorney General)* and *Reddock v. Canada (Attorney General)*. Pursuant to the *Québec Code of Civil Procedure*,<sup>2</sup> Justice Chantal Masse, of the Superior Court of Québec is case managing the Québec class action, *Gallone c. Canada (Attorney General)*.<sup>3</sup> As will soon become apparent, *Brazeau, Reddock, and Gallone* are intertwined class proceedings against the federal government of Canada.

[2] This is our jointly written decision or judgment in *Brazeau, Reddock, and Gallone*. While it is a jointly written decision, it may and should be read as separate decisions of the Ontario Superior Court of Justice and of the Superior Court of Québec. We collaborated in reaching the decision/judgment, but we independently came to our own decisions in accordance with the law and practice of our respective jurisdictions. In other words, this decision should be read as Justice Perell's decision in *Brazeau* and *Reddock* and Justice Masse's decision in *Gallone* that have been combined into one decision.

[3] For reasons that will soon become readily apparent, it was salutary for our respective courts and for the parties for us to collaborate and write a joint decision that would combine our independent decisions.

[4] In each of *Brazeau, Reddock, and Gallone*, the Class Members were or are inmates of penitentiaries operated by the Correctional Service of Canada ("CSC"). In each of *Brazeau, Reddock, and Gallone*, the Class Members were awarded a judgment for aggregate damages. They

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<sup>1</sup> S.O. 1992, c. 6.

<sup>2</sup> CQLR, c. C-25.01.

<sup>3</sup> C.S.Q Court File No.: 500-06-000781-167.

are entitled to a distribution of those awards. In each of the actions, the Class Members were awarded damages as a partial remedy for their unlawful placement in administrative segregation contrary to ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms*.<sup>4</sup> In each of *Brazeau*, *Reddock*, and *Gallone*, the Class Members were also granted judgments to have their individual damages determined.

[5] In each of *Brazeau*, *Reddock*, and *Gallone*, Class Counsel now bring motions for court approvals of: (a) Distribution Protocols for the Aggregate Award of Damages; and (b) an Individual Issues Protocol setting out the procedure for the individual issues determinations.

[6] In so far as the Distribution Protocols are concerned, it shall be important to keep in mind that the award made in *Gallone* is proportionally similar to the awards made in *Brazeau* and *Reddock*.

[7] Typically, in class actions, designing a distribution plan and designing a procedure for adjudicating individual issues are addressed in settlement agreements, where subject to court approval, the parties can by contract, resolve the issues. In the immediate cases, however, the parties disagreed about the terms of the Distribution Protocol and of the Individual Issues Protocol. There is no settlement agreement, and it is for the courts of Ontario and Québec to adjudicate a Distribution Protocol and an Individual Issues Protocol.

[8] In Ontario, the Distribution Protocol and the Individual Issues Protocol would be settled pursuant to the authority provided by the *Class Proceedings Act, 1992*, the *Rules of Civil Procedure*<sup>5</sup> and the *Charter*. In Québec, the Distribution Protocol and the Individual Issues Protocol would be settled pursuant to Québec *Code of Civil Procedure* and the *Charter*.

[9] In the immediate cases, settling the protocols is a daunting challenge because: (a) the jurisprudence is underdeveloped in both Ontario and Québec; (b) there are problems finding answers for two jurisdictions; (c) the approaches of the parties evolved and changed numerous times before and during the joint hearing of the motions; and (d) there were numerous contentious points.

[10] It was desirable for efficiency, economy, administration, management, and fairness to coordinate the determination of the Distribution Protocol and the Individual Issues Protocol. Thus, the superior courts of Ontario and Québec agreed to hold a joint hearing. The hearing was held in a virtual courtroom on October 6-8, 2020. The hearing was also pursuant to the Canadian Bar Association's revised *Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions and the Provision of Class Action Notice*, also known as the 2018 Protocol.

[11] Before the hearing, between September 23 and September 25, 2020, the parties met to attempt to negotiate a resolution and to design their own protocols. The Honourable Dennis O'Connor acted as mediator. The parties were mostly successful with respect to the proposed Distribution Protocol and far less so with respect to the Individual Issues Protocol.

[12] Before the hearing, Class Counsel proposed Distribution Protocols and Individual Issues Protocols for each of the three class actions. Attached as Schedule "A" is the Individual Issues Protocol originally proposed for *Brazeau*, which was the most complicated of the individual issues proposals. Canada responded with counterproposals. Canada had its own proposal for the

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<sup>4</sup> Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>5</sup> R.R.O. 1990, Reg. 194.

Individual Issues Protocol. Canada's draft of an Individual Issues Protocol is attached as Schedule "B".

[13] When the virtual hearing commenced, Class Counsel had a proposal for a combined Distribution Protocol for *Brazeau*, *Reddock*, and *Gallone* and separate proposals for Individual Issues Protocols for *Brazeau*, *Reddock*, and *Gallone*. During the hearing, Class Counsel were asked about the possibility of a combined Distribution and Individual Issues Protocol, and they submitted a draft combined protocol for the three actions, which is attached as Schedule "C".

[14] To summarize, the ultimate Distribution and Individual Issues proposal of Class Counsel, for *Brazeau*, *Reddock*, and *Gallone* (Schedule C) has eleven major elements.

- a. The first element is the appointment of an Administrator and of a Roster of Medical Referees and of Claims Referees by agreement of the parties or by order of the court.
- b. The second element is a plan for the dissemination of a Notice to the Class Members along with a Claims Form.
- c. The third element is the establishment of two combined funds from the Aggregate Damages Awards of *Brazeau*, *Reddock*, and *Gallone*.
  - i. One combined fund is for the Class Members of *Brazeau* and *Gallone* who were Seriously Mentally Ill ("SMI") when they were placed in administrative segregation.
  - ii. The second combined fund is for Class Members of *Brazeau*, *Reddock*, and *Gallone* who were placed in administrative segregation for more than 15 days; *i.e.*, a fund for non-SMI Class Members.
- d. The fourth element is that the Administrator would disseminate to the Class Members a Notice of the right to a share of one of the two combined funds along with a Claims Form.
- e. The fifth element is that Class Members may complete the Claims Form to make one of three choices; namely:
  - i. to apply for a share of the SMI-Fund or of the non-SMI Fund;
  - ii. to apply for a share of the SMI-Fund or the non-SMI Fund and to apply for compensation for general or moral damages of less than \$100,000 pursuant to the Simplified Track procedure; or,
  - iii. to apply for a share of the SMI-Fund or the non-SMI Fund and to apply for compensation of more than \$100,000 pursuant to a Motion Track procedure.
- f. The sixth element is that where a Class Member makes a claim for a share of the SMI-Fund, a Medical Referee, who has been provided with copies of the Class Member's prison file, would determine whether the Class Member is eligible for a share. There is an appeal of the Medical Referee's determination to the court.
- g. The seventh element is that where a Class Member makes a claim for compensation for general or moral damages of less than \$100,000 (Simplified Track), the claim would

be determined by a Claims Referee based on a paper record. The Claims Referee would apply a *per diem* rate for the days the Class Member was placed in administrative segregation. There is a different *per diem* rate for SMI Class Members and for non-SMI Members. As proposed by Class Counsel, this is a mechanical exercise based on the paper record of days in administrative segregation, and there would be no appeal of the Claims Referee's determination to the court.

h. The eighth element is that where a Class Member makes a claim for compensation for damages of more than \$100,000 (Motion Track), the claim would be determined by the court pursuant to a motion procedure akin to a summary judgment motion.

i. The ninth element of Class Counsel's proposal is that the Administrator would manage the distribution of the Class Members' share of the two funds and of individual issues awards.

j. The tenth element is that there would be a deadline for making claims. The deadline would be nine months after the first publication of Notice to the Class Members subject to the court granting leave for late claims.

k. The eleventh element is that Class Counsel's retainer agreement with the Representative Plaintiff would carry over to the completion of the individual issues determinations.

[15] To summarize the proposed Distribution and Individual Issues Protocol of Canada, it has ten major elements that differentiate it from Class Councils' proposal. The ten elements are as follows:

a. The first element is the appointment of an Administrator and a Roster of Referees pursuant to Rule 54 of the *Rules of Civil Procedure*. This element requires Canada's consent.

b. The second element is the establishment of four combined funds from the Aggregate Damages Awards of *Brazeau*, *Reddock*, and *Gallone*.

i. The first fund is for the Class Members of *Brazeau* and *Gallone* who were Seriously Mentally Ill ("SMI") and who were placed in administrative segregation for 1-5 days.

ii. The second fund is for the Class Members of *Brazeau* and *Gallone* who were Seriously Mentally Ill ("SMI") and who were placed in administrative segregation for 6-15 days.

iii. The third fund is for the Class Members of *Brazeau* and *Gallone* who were Seriously Mentally Ill ("SMI") and who they were placed in administrative segregation for more than 15 days.

iv. The fourth fund is for Class Members of *Brazeau*, *Reddock*, and *Gallone* who were placed in administrative segregation for more than 15 days; *i.e.*, a fund for non-SMI Class Members. A share of this fund would be capped at \$2,200 per Class Member.

c. The third element of Canada's proposal is that a Class Member would self-designate his or her eligibility for a share of a SMI fund, which self-designation could be

challenged by Canada, in which case, if there were a dispute about Canada's designation of the Class Member, the dispute would be resolved by a motion to the court.

d. The fourth element is that once all the eligibility disputes were determined, the Administrator would distribute the non-SMI fund shares and the court would determine how the SMI funds should be apportioned and then distributed by the Administrator.

e. The fifth element is that once the court had determined the allocation of shares of the funds to the Class Members, any unallocated funds would revert to Canada to be applied to awards made in the individual issues adjudications.

f. The sixth element of Canada's proposal is that if a Class Member makes a claim for additional damages, there would be three individual issues tracks; namely:

- i. A Small Claims Track, where damages would be determined by a Referee from the Roster of Referees for claims up to \$35,000. The only issue would be quantum of damages above and beyond the Class Member's share of the Aggregate Damages Award allocated to him or her.
- ii. A Simplified Track, which would be a summary motion track, where damages would be determined by a judge, for claims over \$35,000 and up to \$100,000.
- iii. A Regular Action Track for claims, where damages would be determined by a judge, for claims above \$100,000.

g. The seventh element is that claims in the Small Claims Track would be adjudicated by a Referee based on a written record pursuant to a motion under Rules 20 and 55.01 of the Ontario *Rules of Civil Procedure*. Any cross-examinations would take place out of court. The Referee's Reasons would be deemed a report under Rule 54 of the *Rules of Civil Procedure*. Any disagreement about a decision of a Referee would be resolved by way of a report confirmation motion under Rule 54.

h. The eighth element is that for claims over \$35,000 (Simplified Track) and for claims over \$100,000 (Regular Action Track), the claims would be adjudicated by a judge and subject to rights of appeal.

i. The ninth element is that to be eligible for compensation under the Simplified Track or the Regular Action Track, a Class Member would have to prove on the balance of probabilities that his or her placement in administrative segregation caused the alleged harms that are above and beyond the base level of harm established in the common issues phase of the class actions.

j. The tenth element of Canada's proposal is that Class Members wishing to file a Claim must do so within one year of the final resolution of his or her entitlement to a share in the distribution of the funds. Any claim received after the Claims Deadline would not be accepted except with leave of the Supervising Judge.

[16] By the end of the hearing, the parties agreed on an approach for the courts to follow to determine the Protocols. The parties agreed that the joint hearing should be adjourned so that we, Justices Masse and Perell, could consult and draft a *Distribution and Individual Issues Protocol* ("Draft D&I Protocol") for our respective courts.

[17] Our draft would be a provisional decision of the courts of Ontario and Québec. Before the respective courts issued a final Order, the draft would be provided to Class Counsel and to Canada, and the parties would have an opportunity to make submissions in writing and, if necessary, oral submissions. (The parties also would have the opportunity to consider the courts' draft and to negotiate an alternative proposal for court approval.)

[18] Thus, on October 8, 2020, the joint hearing was adjourned on terms as set out in Justice Perell's Endorsement as follows:

[...]

5. In accordance with the following directions, the joint hearing is adjourned *sine die*. The directions are:

a. On consent, the parties agree to forthwith file the evidentiary record from the *Brazeau v. Canada (Attorney General)* and *Reddock v. Canada (Attorney General)* summary judgment motions for the *Gallone c. Canada (Attorney General)* distribution and individual issues motion.

b. On consent, the parties agree to forthwith file the evidentiary record from the *Gallone c. Canada (Attorney General)* distribution and individual issues motion for the *Brazeau v. Canada (Attorney General)* and *Reddock v. Canada (Attorney General)* distribution and individual issues motions.

c. After receipt of the evidentiary records, the respective courts shall release provisional decisions settling a Distribution Protocol and an Individual Issues Protocol, and the courts shall invite the parties to show cause in writing why the provisional decisions should not be made final Orders for the respective courts.

d. The written submissions shall be simultaneous exchanged in accordance with a schedule set by the respective courts.

e. Before releasing a final decision, the respective courts shall provide further directions as to whether there should be oral submissions in addition to the written submissions.

[19] Attached as Schedule "D" is the *Draft D&I Protocol* that we prepared for our respective courts. To summarize, it has nine major elements as follows:

a. The first element is the appointment of an Administrator and a Roster of Manager/Experts by agreement of the parties or by order of the court. (It is shall be important to note that a Manager/Expert is **not** appointed as a referee with adjudicative authority.)

b. The second element is the establishment of one Aggregate Damages Award fund combining the awards made in *Brazeau*, *Reddock*, and *Gallone* into one fund. (This ensures that all Class Members from across the country are treated equivalently.)

c. The third element is court approval of a plan for the dissemination of a Notice to the Class Members along with a Claims Form.

d. The fourth element is that the Administrator would disseminate a Notice to Class Members along with a Claims Form. The Claims Form would provide Class Members the selection of making a claim under one of three tracks; namely:

i. Track 1 (*Distribution and Release of Claim Track*).



- ii. Track 2 (*Distribution and Under-\$50,000 Track*).
- iii. Track 3 (*Distribution and Over-\$50,000 Track*).

e. The fifth element is that where a Class Member selects Track 1 (*Distribution and Release of Claim Track*), a Manager/Expert would determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert would report his or her decision to the parties and the Administrator. The Class Member would release all other claims. (There would be no appeal of the Manager/Expert's decision, which is an administrative not an adjudicative decision.).

f. The sixth element is that where a Class Member selects Track 2 (*Distribution and Under-\$50,000 Track*),

- i. a Manager/Expert would determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file, and the Manager/Expert would report his or her decision to the Administrator and the parties. (There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility, which is an administrative not an adjudicative decision.);
- ii. the Manager/Expert would inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Class Member's claim by reviewing the Claims Form, the Class Member's CSC file, and the affidavit material, transcripts, and factums filed by the Class Member and Canada; and,
- iii. Either party may move without additional evidence to the Ontario Superior Court of Justice or to the Superior Court of Québec for an Order determining the quantum of the Track 2 claim.

g. The seventh element is that where a Class Member selects Track 3 (*Distribution and Over-\$50,000 Track*),

- i. a Manager/Expert would determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file, and the Manager/Expert would report his or her decision to the Administrator and the parties. (There would be no appeal of the Manager/Expert's decision with respect with respect to a Class Member's eligibility, which is an administrative not an adjudicative decision.); and,
- ii. a judge of the Ontario Superior Court of Justice or of the Superior Court of Québec would determine the Class Member's claim pursuant to a summary judgment procedure under Rule 20 of Ontario's *Rules of Civil Procedure* or an analogous procedure

pursuant to s. 600 of Québec's *Code of Civil Procedure*.

h. The eighth element concerns the fees that may be charged for legal services for Tracks 1, 2, and 3 as follows:

- i. If a Class Member selects Track 1, then Class Counsel or the lawyer retained to act for the Class Member cannot charge for his or her services for the Class Member with respect to the Track 1 claim.
- ii. If a Class Member selects Track 2, then Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member with respect to the Track 2 claim, such fee not to exceed 15% of the damages awarded plus reasonable disbursements.
- iii. If the Class Member selects Track 3, then Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member as may be approved by the court.

[20] In accordance with the Adjournment Endorsement, the parties shall have 30 days to show cause in writing why the *Draft D&I Protocol* should not be made final Orders for the courts. Those written submissions shall be simultaneously exchanged and simultaneously delivered to the Ontario Superior Court of Justice or to the Superior Court of Québec.

[21] What follows is our explanation and the rationale for the *Draft D&I Protocol* set out in Schedule "D". To repeat what was noted above, the joint decision is a provisional decision of the courts of Ontario and Québec respectively. Part 1 of our joint decision includes the invitation to the parties to make submissions in writing, and orally if necessary, before the hearing is concluded and a final Order is made by our respective courts.

[22] In other words, the *Draft D&I Protocol* is not written in stone, and we will consider the critiques of the parties before making a final order for our respective courts. Also as noted parenthetically above, the parties are invited to negotiate and settle the protocols consensually. Negotiated protocols are subject to court approval. As the discussion below will reveal, we appreciate that by settlement, the parties may design procedures that may be beyond the courts' jurisdiction to design.

## **B. Factual Background**

### **1. Brazeau**

[23] The *Brazeau* action was commenced on July 17, 2015. In *Brazeau*, the Representative Plaintiffs, Christopher Brazeau and David Kift, sue the Government of Canada (represented by the Defendant Attorney General of Canada) for breaches of ss. 7 and 12 of the *Canadian Charter of Rights and Freedom*. On December 14, 2016, *Brazeau* was certified as a class proceeding.<sup>6</sup>

[24] Koskie Minsky LLP is Class Counsel in *Brazeau*.

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<sup>6</sup> *Brazeau v. Attorney General (Canada)*, 2016 ONSC 7836.

[25] With a carve out for Class Members of the *Gallone* action, the *Brazeau* Class is composed of inmates of federal penitentiaries who were placed in administrative segregation for any period of time after November 1, 1992 if: (a) they were diagnosed by a medical doctor with an Axis I Disorder (excluding substance abuse disorders), or Borderline Personality Disorder; and (b) suffered significant impairment from their disorder.

[26] During the course of the hearing of the *Brazeau* summary judgment motion, because the Representative Plaintiffs discontinued certain claims that did not involve administrative segregation but were concerned about Correctional Service Canada's alleged failures in providing health care to the Class Members, Messrs. Brazeau and Kift were granted leave to amend the Class Definition.

[27] After the summary judgment hearing, there was a further amendment on consent to carve out from the Class Definition certain inmates in Québec penal institutions because they are Class Members in the parallel class action; *i.e.*, in, *Gallone*. As a result of these amendments, Messrs. Brazeau and Kift are the Representative Plaintiffs for the following class, which may be referred to as the SMI (Serious Mentally Illness) Class:

All offenders in federal custody, who were placed in administrative segregation in a federal institution situated outside Québec after February 24, 2013, or who placed in administrative segregation in a federal institution anywhere in Canada before February 24, 2013 were diagnosed by a medical doctor with an Axis I Disorder (excluding substance use disorders) or Borderline Personality Disorder, who suffered from their disorder, in a manner described in Appendix A, and reported such during their incarceration, where the diagnosis by a medical doctor occurred either before or during incarceration in a federal institution and the offenders were incarcerated between November 1, 1992 and the present, and were alive as of July 20, 2013.

[28] Appendix "A" of the *Brazeau* Class Definition lists the ways in which inmates diagnosed with an Axis I Disorder (excluding substance use disorders) or Borderline Personality Disorder ("BPD"), suffered from their disorder and can be identified as Class Members. Appendix A states:

(a) significant impairment in judgment (including inability to make decisions; confusion; disorientation); (b) significant impairment in thinking (including constant preoccupation with thoughts, paranoia; (c) delusions that make the offender a danger to self or others); (d) significant impairment in mood (including constant depressed mood plus helplessness and hopelessness; (e) agitation; (f) manic mood that interferes with ability to effectively interact with other offenders, staffs or follow correctional plan); (g) significant impairment in communications that interferes with ability to effectively interact with other offenders, staff or follow correctional plan; (h) significant impairment due to anxiety (panic attacks; overwhelming anxiety) that interferes with ability to effectively interact with other offenders, staff or follow correctional plan; (i) other symptoms: hallucinations; delusions; (j) severe obsessional rituals that interferes with ability to effectively interact with other offenders, staff or follow correctional plan; (k) chronic and severe suicidal ideation resulting in increased risk for suicide attempts; (l) chronic and severe self-injury; or, (m) a GAF [Global Assessment of Functioning scale] score of 50 or less.

[29] On this motion, Canada provided evidence about the placement of Class Members in administrative segregation. In his affidavit dated August 13, 2020, Mike Hayden, who is a manager and statistical data analyst in the Policy Sector of CSC, deposed that:

- a. Since 2009, 3,026 inmates had a placement between 100 and 300 days and 246 inmates had a placement longer than 300 days.
- b. Since 2011, 56% of the placements in administrative segregation have been for less than 60 days.

[30] On March 25, 2019, the *Brazeau* Representative Plaintiffs were granted a summary judgment in which the Class Members were awarded aggregate *Charter* damages of \$20 million for vindication and deterrence.<sup>7</sup>

[31] Although later overturned on appeal, in *Brazeau*, the \$20 million award less Class Counsel's fee were to be paid by Canada paying for additional mental health or program resources at its penitentiaries. In the initial summary judgment decision, in *Brazeau*, the Class Members recovered no aggregate damages for compensation and no pre-judgment interest.<sup>8</sup> Their individual compensatory damages were to be assessed at individual issues trials. Thus, the initial summary judgment in *Brazeau* was only for vindication and deterrence damages.<sup>9</sup>

[32] To recognize the impact of limitation periods, the judgment in *Brazeau* was granted for Class Members who were subjected to administrative segregation after July 20, 2009. Other Class Members were at liberty to refute the presumptive running of the limitation period by proving that they lacked capacity to bring suit.

[33] In the *Brazeau* decision, it was noted that the practical consequence of this conclusion about limitation periods was that subject to individual rebuttals in accordance with the laws relating to prescription and the limitation of actions in force in a province, the number of Class Members with claims, which included inmates from 1992 (estimated to be a class size of 6,750), was reduced to the number of inmates placed in administrative segregation from July 20, 2009 (estimated to be a class size of 1,500). In *Brazeau*, Justice Perell stated at para. 387 of his decision:

387. The claims of inmates who were placed in administrative segregation only before July 20, 2009 are statute-barred unless they can rebut the running of the limitation period by establishing that: (a) their claim was not discoverable in their particular case: or (b) the running of the limitation period was suspended due to the inmate not having litigation guardian and being incapable of commencing a legal proceeding due to his or her mental condition (estimated to be 500 inmates). Thus, if there is an operative limitation period, Messrs. Brazeau and Kift estimate the total class size to be 2,000 inmates.

[34] Class Counsel has re-calculated and advises that approximately 3,636 *Brazeau* Class Members were granted a judgment and an entitlement to share in the distribution of the Aggregate Damages Award.<sup>10</sup>

[35] Canada appealed the *Brazeau* summary judgment.

[36] On August 9, 2019, a Class Counsel fee award was made in *Brazeau*.<sup>11</sup> It was a complex award.<sup>12</sup> The outcome was that the net aggregate damages award to be distributed in *Brazeau* is

<sup>7</sup> *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888.

<sup>8</sup> *Brazeau v. Attorney General (Canada)*, 2019 ONSC 3426.

<sup>9</sup> \$20 million was arrived at by using the multiplier of \$10,000 for each of the then estimated 2,000 Class Members, which multiplier was selected by analogy to the common experience payment ("CEP") that the Federal Government agreed to pay in the Indian Residential School Settlement Agreement. *Brazeau v. Attorney General (Canada)* 2019 ONSC 3426 at para. 445 *et seq.*

<sup>10</sup> The Claimant Class was calculated by class counsel on the basis of data provided by the Counsel for Canada in 2020. They represent 18.3% of those inmates who had stays of any duration during the *Brazeau* class period.

<sup>11</sup> *Brazeau v. Attorney General (Canada)*, 2019 ONSC 4721.

<sup>12</sup> Class Counsel was awarded a fee of \$6,660,000 plus \$865,800 for HST. There were disbursements of \$435,627.66 (inclusive applicable taxes). Pursuant to s.10 of Regulation 771/92 of the *Law Society Act*<sup>12</sup>, the Class Proceedings Fund was entitled to a levy out of the aggregate damages award of \$1,280,857.23. The Fund It was also entitled to reimbursement for its share of the disbursement funding. Canada was also obliged to pay Class Counsel \$530,973, plus HST of \$69,027, for a total of \$600,000 pursuant to a Costs Order of June 5, 2019. With Canada's

\$11,527,661.11.

[37] The Ontario Court of Appeal heard the *Brazeau* appeal and the *Reddock* appeal together.

[38] On March 9, 2020, the Ontario Court of Appeal affirmed the *Charter* damages award in *Reddock*, and the Court affirmed the judgment on liability but not the methodology of the *Charter* damages award in *Brazeau*.<sup>13</sup> In *Brazeau*, the Court of Appeal remitted the matter of the *Charter* damages for redetermination.

[39] The damages re-determination was heard as a motion in writing, and on March 28, 2020, Justice Perell released his decision in *Brazeau* about the *Charter* damages.<sup>14</sup> This time, he awarded the *Brazeau* Class Members \$20 million for vindication, deterrence, compensation, and pre-judgment interest pursuant to the *Courts of Justice Act* without breaking down the award. For the purposes of individual issues trials, the damages award was deemed to be compensatory damages. The Reasons for Decision stated at paragraphs 27-40:

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*, 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*,<sup>15</sup> 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

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payment for costs, the remaining \$6,129,027 in fees, plus \$796,773 in HST, (\$6,925,800 total), shall be payable out of the Aggregate Damages Award. The \$200,000 in disbursements were to be paid by Canada to the Fund pursuant to the Costs Order of June 5, 2019, and the remaining \$235,627.66 in disbursements was to be distributed out of the Aggregate Damages Award as follows: (i) current disbursements and \$100,000 in future disbursements payable to Koskie Minsky LLP; (ii) \$117,239.63; and, (iii) disbursements payable to the Fund in the amount of \$118,388.03; and, that a \$15,000 honorarium shall be payable to each of David Kift and Christopher Brazeau out of the Aggregate Damages Award.

<sup>13</sup> 2020 ONCA 184.

<sup>14</sup> *Brazeau v. Canada (Attorney General)*, 2020 ONSC 3272.

<sup>15</sup> 2019 ONCA 243.

be placed in segregation for any period of time should be made by a medical professional, not by the warden of an institution.

[...]

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 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.

[...]

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 than 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.

## 2. Reddock

[40] The *Reddock* action was commenced on March 3, 2017. In *Reddock*, the Representative Plaintiff, Jullian Jordea Reddock, sues Canada for breaches of s. 7 and 12 of the *Canadian Charter of Rights and Freedom*. On June 21, 2018, the action was certified as a class proceeding.<sup>16</sup>

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<sup>16</sup> *Reddock v. Canada (Attorney General)*, 2018 ONSC 3914.

[41] Koskie Minsky LLP and McCarthy Tétrault LLP are co-Class Counsel in *Reddock*.

[42] With a carve out for Class Members of the *Brazeau* or *Gallone* actions, the *Reddock* class is composed of inmates of federal penitentiaries who were placed in administrative segregation for more than 15 days after November 1, 1992. The Class Definition for the *Reddock* action is:

All persons, except Excluded Persons, as defined below, who were involuntarily subjected to a period of Prolonged Administrative Segregation, as defined below, at a Federal Institution, as defined below, between November 1, 1992 and the present, and were alive as of March 3, 2015 (“the Class”);

Excluded person are:

i. All offenders incarcerated at a Federal Institution who were diagnosed by a medical doctor with an Axis I Disorder (excluding substance abuse disorders), or Borderline Personality Disorder, who suffered from their disorder in a manner described in Appendix “A”, and reported such during their incarceration, where the diagnosis by a medical doctor occurred either before or during incarceration in a federal institution and the offenders were incarcerated between November 1, 1992 and the present and were alive as of July 20, 2013; and

ii. All persons who were involuntarily subjected to Prolonged Administrative Segregation, as defined below, only at a Federal Institution situated in the Province of Québec after February 24, 2013. Persons who were involuntarily subjected to Prolonged Administrative Segregation at Federal Institutions situated in Québec and another Canadian province, or at a Federal Institution situated in Québec prior to February 24, 2013, are not Excluded Persons.

“Administrative Segregation” is defined as sections 31 to 37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

“Prolonged Administrative Segregation” is defined as the practice of subjecting an inmate to Administrative Segregation for a period of at least fifteen (15) consecutive days.

“Federal Institutions” are defined as the system of Federal correctional facilities across Canada that is administered by the Correctional Service of Canada, a Federal Government body.

[43] The *Reddock* class is made up of inmates who have spent more than fifteen consecutive days in administrative segregation. The Class definition was reached on consent to exclude *Brazeau* Class Members and to exclude the Class Members in *Gallone*, which concerns claims for damages suffered in Québec from February 24, 2013 onward.

[44] It is to be noted that *Reddock* includes claims for damages that were suffered by inmates in Québec before February 24, 2013. In other words, some persons who are or were inmates in Québec are Class Members in *Reddock*.

[45] Between November 1, 1992 and April 7, 2019, excluding segregation placements in Québec that continued past February 24, 2013, The Federal Government placed 27,817 inmates in administrative segregation for more than fifteen days for a total of 79,605 placements. The individual inmates were, on average, placed in segregation three times. The placements lasted an average of 71 days.

[46] Before the application of limitation periods barring claims, the *Reddock* class comprises

24,229 Class Members.<sup>17</sup>

[47] Applying a presumptive six-year limitation period, excluding placements in Québec that continued past February 24, 2013, the Federal Government placed 10,247 inmates in administrative segregation for more than fifteen days between March 3, 2011 and April 7, 2019 for a total of 21,641 placements. The inmates were, on average, placed in segregation twice. The placements lasted an average of 59 days. Applying a presumptive six-year limitation period, the *Reddock* Claimant class comprises 8,934 Class Members.<sup>18</sup>

[48] On August 29, 2019, Mr. Reddock was granted a summary judgment in which the Class Members were awarded aggregate damages of \$20 million for vindication, deterrence, and compensatory damages with additional compensatory damages to be payable after individual issues trials.<sup>19</sup> The Class also received pre-judgment interest of \$1,120,797 for pre-judgment interest on the compensatory portion of the damages award, so that the judgment was around \$21 million for *Charter* damages.

[49] To recognize the impact of limitation periods, the \$22 million were attributed to those *Reddock* Class Members placed in administrative segregation after March 3, 2011. Approximately 8,531 *Reddock* Class Members were granted judgment.<sup>20</sup>

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

[51] On the matters of causation and the quantification of the base level of damages, the decision in *Reddock* stated at paragraphs 268-272 and 381-397:

268. The contraventions of the rights to life, liberty, and security of the person caused severe psychological distress, including anxiety, hypersensitivity, cognitive dysfunction, significant impairment of ability to communicate; hallucinations, delusions, loss of control, severe obsessional rituals, irritability, aggression, depression, rage, paranoia, panic attacks, psychosis, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour. There are new psychological symptoms and exacerbated psychiatric conditions in those with diagnosed or undiagnosed mental illnesses. The negative health effects from administrative segregation can occur within a few days of segregation and those harms increase as the duration of the time in administrative segregation increases and the expert evidence in the immediate case establishes that there is physical and mental harm from prolonged administrative segregation, which is to say that every inmate placed in administrative segregation for more than fifteen days suffers a base level of psychiatric and physical harm.

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<sup>17</sup> The Federal Government admits that 18.3% of male inmates have both (i) a current Axis I Disorder (excluding substance use disorders) or a Borderline Personality Disorder, and (ii) a Global Assessment of Function score of 50 or less (pursuant to the World Health Organization's Modified GAF Scale) and that 50% to 70% of these inmates have a clinical diagnosis. Conservatively, therefore, 12.8% of inmates placed in administrative segregation for fifteen days or longer are Class Members of the *Brazeau* Case.

<sup>18</sup> The Class Definition does not include all inmates who have been placed in administrative segregation. Inmates who were placed in administrative segregation for less than fifteen days are not Class Members.

<sup>19</sup> *Reddock v. Canada (Attorney General)* 2019 ONSC 5053.

<sup>20</sup> The Claimant Class for the award was recalculated by Class Counsel on the basis of data provided by Canada. The Claimants represent 81.7% of those inmates who had placement of 16 days or more during the *Reddock* class period.



269. The personal stories, Messrs. Campbell, Cansanay, McMath, Reddock, and Spence about their experiences in administrative segregation, the academic literature, and the expert evidence of Drs. Chaimowitz, Grassian, and Martin and of Professor Méndez prove that while an inmate will suffer differentially from his or her placement in administrative segregation, they will also suffer to some degree and there is a base level of suffering that all will suffer from a placement in administrative segregation for more than fifteen days.

270. In a factual finding that was upheld by the Ontario Court of Appeal in the *Cdn Civil Liberties Assn* Case, Associate Chief Justice Marrocco concluded that keeping a person in administrative segregation exposes that person to abnormal psychological stress. The evidence in the immediate case (and also the evidence in the *Brazeau* Case) revealed that once the placement had become prolonged the stress and anxiety was serious and to borrow the language of the Supreme Court in *Mustapha v. Culligan of Canada Ltd.*<sup>21</sup> and *Saadati v. Moorhead*,<sup>22</sup> the stress and anxiety was above the ordinary annoyances, anxieties and fears that come with living in a penitentiary. In *Mustapha* and in *Saadati*, the Supreme Court spoke about the comparator of stress and anxiety in a civil society but the point to emphasize is that to be a compensable harm, the stress and anxiety must be serious and extraordinary. The evidence in the *Reddock* Case proves that the stress and anxiety from prolonged administrative segregation rises to the level that the inmate suffers a mental shock that is a compensable harm.

271. That there is a base level of harm for every inmate is now a matter of issue estoppel and *stare decisis*. In this regard, it is worth noting that in the *Cdn Civil Liberties Assn* Case, although the Ontario Court of Appeal was not prepared to find that administrative segregation was inherently cruel and unusual punishment for young persons or persons with a mental illness, it included these inmates as those suffering a cruel and unusual punishment if the segregation was more than fifteen days. It was the prolonged duration of the administrative segregation, not the idiosyncratic character of the inmate, that was determinative. Justice Benotto stated at paragraphs 66-67 of her judgment:

66. While I agree with the application judge's resolution of the apparent conflict between CD-709 and the Act, I do not share his confidence about the efficacy of s. 87(a) in preventing serious harm to inmates with a mental illness. In principle, I agree with the CCLA that those with mental illness should not be placed in administrative segregation. However, the evidence does not provide the court with a meaningful way to identify those inmates whose particular mental illnesses are of such a kind as to render administrative segregation for any length of time cruel and unusual. I take some comfort in my view that a cap of 15 days would reduce the risk of harm to inmates who suffer from mental illness -- at least until the court has the benefit of medical and institutional expert evidence to address meaningful guidelines. This issue therefore remains to be determined another day.

67. Based on the record as it presently exists, I would not therefore make the determination sought by the CCLA on this issue.

272. Thus, the Court of Appeal's decision was categorical about administrative segregation being unconstitutional when the placement was for more than fifteen days. And the unconstitutionality was universal for anyone placed in administrative segregation and not based on personality traits of the inmate. Moreover, the universality did not distinguish between voluntary or involuntary admissions to administrative segregation.

[...]

381. As I shall explain below, I conclude that there is a base level of *Charter* damages that I would value at \$20 million. This base level award is for: (a) vindication and deterrence for the breach of s. 7 of the *Charter* that the Federal Government does not dispute; and (b) vindication, deterrence and compensation for the other breaches of sections 7 and 12 of the *Charter*. I would assess the

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<sup>21</sup> 2008 SCC 27.

<sup>22</sup> 2017 SCC 28.

compensatory portion of this award as having a value of \$500 for each placement in administrative segregation for more than fifteen days. On a class-wide basis, I would value the compensatory portion of the award as having a value of approximately \$9 million.

382. 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.

383. 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.

384. Also, as noted above, that there is a base level of harm for every Class Member, who by definition has been in administrative segregation for more than fifteen days, is now a matter of issue estoppel and *stare decisis*. This follows because the Ontario Court of Appeal in the *Cdn Civil Liberties Case* held that administrative segregation for more than fifteen days is a cruel and unusual treatment that contravenes s. 12 of the *Charter*. It follows that there is a base level of harm caused by the breaches of sections 7 and 12 of the *Charter*.

385. Further, in any event, based on the evidence in the immediate case, I am satisfied that there is a base level of mental suffering that has been suffered by all Class Members. Further still, in any event, the evidence on this summary judgment motion is that every inmate would have suffered general damages for the assault on their *Charter* rights and this assault is worthy of compensation regardless of whether or not the Class Member suffered physical or mental harm. There is thus an evidentiary foundation for a base level *Charter* damages award, and in this part of my Reasons for Decision, I shall quantify that award.

386. I appreciate that I shall be going farther in the *Reddock* Case than I did in the *Brazeau* Case where I made a class-wide Charter damages award for vindication and deterrence but did not include compensatory damages, which were to be left to be assessed at individual issues trials.

387. I also appreciate that courts have rejected claims for aggregate damages in cases of personal injury where liability cannot be determined on a class-wide basis and that claims of psychological injury are generally not amenable to an aggregate assessment because of the individual nature of damages as well as causation. Indeed, I refused to make an award for psychological injury in *Healy v Lakeridge Health Corporation*,<sup>23</sup> in a judgment that was affirmed by the Ontario Court of Appeal. [...]

388. However, as a result of the Supreme Court of Canada's decision in *Saadati v. Moorhead*,<sup>24</sup> about damages for mental harm, I am fairly able to decide without requiring a trial that there is a base level of compensatory harm for the contraventions of the *Charter* or for systemic negligence. The Supreme Court in *Saadati* overturned the authority of *Healy v Lakeridge Health Corporation* and other cases as to what counts as a compensable psychiatric injury.

389. Prior to the *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

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<sup>23</sup> *Healey v Lakeridge Health Corporation*, 2010 ONSC 725, aff'd 2011 ONCA 55.

<sup>24</sup> 2017 SCC 28.

Psychiatric Association, and the International Statistical Classification of Diseases and Related Health Problems ("ICD"), published by the World Health Organization.

390. But after *Saadati v. Moorhead*, while an expert's opinion is relevant it is not a necessity and in order 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

391. In the case at bar, I am satisfied from the evidence in the *Reddock* Case that for every Class Member the stress and anxiety was serious and prolonged and to borrow the language of the Supreme Court in *Mustapha v. Culligan of Canada Ltd.* and *Saadati v. Moorhead*, the stress and anxiety was above the ordinary annoyances, anxieties and fears that come with living in a penitentiary.

392. In the *Reddock* Case, Class Counsel submitted that the quantum of damages should be guided by other *Charter* damages cases and provided the following examples: (a) In *Vancouver (City) v. Ward*, discussed above, the plaintiff recovered \$5,000 for two days of wrongful incarceration and a strip search; (b) in *Carr v. Ottawa Police Services Board*,<sup>25</sup> the plaintiff recovered \$7,500 for an unlawful arrest, detention, and strip-search; (c) in *Curry v. Canada*,<sup>26</sup> a prisoner detained in a dry cell for an illegal cavity search and x-ray searches recovered \$10,000; (d) In *Elmardy v. Toronto Police Services Board*,<sup>27</sup> the plaintiff who was wrongfully detained based on racial profiling recovered \$50,000 for breaches of sections 8, 9, 10, and 15 of the *Charter*; and (e) in *Ogiamien v. Ontario*,<sup>28</sup> the plaintiff recovered \$60,000 for a violation of s. 12 of the *Charter*.

393. While opposing the notion that could be any quantification on a class wide basis, the Federal Government provided a few more examples of *Charter* damages awards; namely: (a) *Hill v. British Columbia*,<sup>29</sup> where the plaintiff recovered \$500 because there was a failure to conduct a 5-day review of his placement in administrative segregation and the plaintiff was segregated for an additional 11 days; and (b) *Brandon v. Canada (Correctional Service)*,<sup>30</sup> where the plaintiff recovered \$680 for 68 days of unlawful detention in disciplinary segregation and administrative detention; and, (c) *Hermiz v. R.*,<sup>31</sup> where the plaintiff recovered \$6,000 for a wrongful two-month detention in jail.

394. 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.

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<sup>25</sup> 2017 ONSC 4331 at para. 248.

<sup>26</sup> 2006 FC 63 at para. 33.

<sup>27</sup> 2017 ONSC 2074 at para. 5.

<sup>28</sup> 2016 rev'd on liability 2017 ONCA 667.

<sup>29</sup> [1997] B.C.L.R. (3<sup>rd</sup>) 211 (C.A.)

<sup>30</sup> [1996] F.C.J. No. 1 (T.D.)

<sup>31</sup> 2013 FC 764.

395. The assessment of *Charter* damages is made somewhat easier in the immediate case, because only a base level award is being requested. In the *Brazeau* Case, I awarded *Charter* damages for vindication and deterrence of \$20 million and I see no reason to award any less in the immediate case.

396. I would include in this amount a base level award for compensatory damages which include damages for the mental suffering of the Class Members and general damages for the assault on their *Charter* rights. I assess that base level compensatory award as worth \$500 for each placement in administrative segregation for more than fifteen days. On a class-wide basis, I would value the compensatory portion of the award as having a value of approximately \$9 million.

397. I, therefore, conclude that there is a base level of *Charter* damages that I would value at \$20 million. This base level award is for vindication, deterrence, and compensation.

[52] Canada appealed the *Reddock* decision.

[53] On October 10, 2019, Mr. Reddock was awarded costs of \$1,122,590.33, all inclusive, for the summary judgment motion.<sup>32</sup>

[54] On December 5, 2019,<sup>33</sup> based on a contingency fee retainer agreement that provided for a 33% share of the judgment, the Class Counsel fee was approved. The court \$7,033,225.40, plus HST of \$914,319.30 for a total fee of \$7,947,544.70. Also approved was: (a) an honorarium for Mr. Reddock of \$15,000; and (b) the statutory levy payable to the Law Foundation of Ontario pursuant to s. 10 of Regulation 771/92 of the *Law Society Act*. The amount of the statutory levy was \$1,395,097.68.

[55] The outcome of these awards is that the net amount to be distributed in *Reddock* is approximately \$12,831,135.95. The sum is approximate because of accruing interest.

[56] As noted above, the Ontario Court of Appeal heard the *Brazeau* appeal and the *Reddock* appeal together, and on March 9, 2020, the Ontario Court of Appeal affirmed the judgment and the *Charter* damages award in *Reddock*.<sup>34</sup>

### 3. *Gallone*

[57] The *Gallone* action was commenced on February 24, 2016. In *Gallone*, Arlene Gallone sues Canada for breaches of ss. 7 and 12 of the *Charter*. On January 13, 2017, *Gallone* was authorized as a class proceeding.

[58] Trudel Johnston & Lespérance is Class Counsel in *Gallone*.

[59] As noted above, the *Gallone* Class is carved out of the *Brazeau* and *Reddock* classes, and it is composed of inmates of federal penitentiaries who were placed in administrative segregation in Québec after February 24, 2013, either for more than 72 consecutive hours or for any period of time if they were diagnosed by a medical doctor with an Axis I Disorder (excluding substance abuse disorders), or Borderline Personality Disorder, and suffered significant impairment from their disorder.

<sup>32</sup> *Reddock v. Canada (Attorney General)*, 2019 ONSC 6151.

<sup>33</sup> *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090.

<sup>34</sup> 2020 ONCA 184.

[60] The Class Definition for *Gallone* is:

Class members in prolonged solitary confinement

All persons held in "solitary confinement", such as in administrative segregation but excluding disciplinary segregation, after February 24, 2013 for more than 72 consecutive hours, in a federal penitentiary situated in Quebec, including consecutive periods totalizing more than 72 hours separated by periods of less than 24 hours;

And

Class members with mental health disorders

All persons held in "solitary confinement", such as in administrative segregation but excluding disciplinary segregation, after February 24, 2013 in a federal penitentiary situated in Quebec who were, prior to or during such "solitary confinement", diagnosed by a medical doctor either prior to or during such "solitary confinement" with an Axis I Disorder (excluding Substance Use Disorders), or Borderline Personality Disorder, who suffered from their disorder, in a manner described at Appendix A, and reported such prior to or during their stay in "solitary confinement".

Appendix A:

- Significant impairment in judgment (including inability to make decisions; confusion; disorientation)
- Significant impairment in thinking (including constant preoccupation with thoughts, paranoia; delusions that make the offender a danger to self or others)
- Significant impairment in mood (including constant depressed mood plus helplessness and hopelessness; agitation; manic mood that interferes with ability to effectively interact with other offenders, staffs or follow correctional plan)
- Significant impairment in communications that interferes with ability to effectively interact with other offenders, staff or follow correctional plan
- Significant impairment due to anxiety (panic attacks; overwhelming anxiety) that interferes with ability to effectively interact with other offenders, staff or follow correctional plan
- Other symptoms: hallucinations; delusions; severe obsessional rituals that interferes with ability to effectively interact with other offenders, staff or follow correctional plan
- Chronic and severe suicidal ideation resulting in increased risk for suicide attempts
- Chronic and severe self-injury; or
- A GAF score of 50 or less.

[61] There are approximately 3,257 *Gallone* Class Members, some of whom are also members of the *Brazeau* and *Reddock* class. The multi-class membership arises because some *Gallone* Class Members were also placed in administrative segregation outside of Québec or their placements in Québec came before the commencement of the *Gallone* class period.<sup>35</sup>

[62] There has been no trial in the *Gallone* action. However, Canada agreed to a consent

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<sup>35</sup> These figures have been calculated by Class Counsel on the basis of data provided by the Counsel for Canada in 2020.

judgment in which it agreed to a liability proportionate to its liability in *Brazeau* and *Reddock*. On September 10, 2020, Justice Masse ordered that the amount of aggregate damages in *Gallone* be determined for the same purpose and in the same manner as in *Brazeau* and *Reddock*, on a *pro rata* basis for the class size in *Gallone*. Thus, on consent, the *Gallone* Class Members recovered a judgment of \$5,948,769.23 comprised of an aggregate award of \$5,624,400 plus interest (5%) of \$250,919.40 plus additional indemnity \$73,449.83.

[63] Using data provided by Canada in July 2020, which identified 3,994 persons who had been placed in administrative segregation in Québec during the period covered by the *Gallone* action, and applying a prevalence of serious mental health disorders of 18.3%, there would be 731 SMI Class Members and 3,263 non-SMI Class Members from *Gallone*.

[64] The net award in *Gallone* is broken down in the following chart:

Gross Aggregate Award	\$5,948,769.23
Class Counsel Fee	(\$1,784,630.77)
Taxes	(\$267,248.46)
Anticipated Expenses	(\$87,013.22)
Net Distribution	\$3,809,876.78

[65] Of the net distribution sum, the parties allocated \$1,692,439.14 to the SMI Class Members in *Gallone* and \$2,117,431.64 to the non-SMI Class Members in *Gallone*.

## C. Discussion and Analysis: Settling the *D&I Protocol*

### 1. Introduction

[66] As noted in the Introduction, the parties could not agree about the Distribution Protocol or about the Individual Issues Protocol. There were disputes about the major elements of the rival proposals. Ultimately, unless the parties agree to a consensual proposal, it is for the courts of Ontario and Québec to settle the protocols.

[67] As noted in the Introduction, attached as Schedule “D” is a *Draft Distribution and Individual Issues Protocol* prepared by Justice Masse and Justice Perell for the courts of Ontario and Québec. The major elements of the *Draft D&I Protocol* are summarized in the Introduction to this decision.

[68] We shall now discuss, the legislative background, the issues raised during the joint hearing address, and the disputes between the parties. We shall now explain the rationale of the *Draft D&I Protocol*.

### 2. Statutory and Rules Background for *Brazeau*, *Reddock* and *Gallone*.

[69] There are two major branches to the motion before the court. One branch concerns the court’s authority with respect to the distribution of a judgment granted after a common issues trial or summary judgment motion. The second branch concerns the court’s authority in a class action

to design the procedure for the determination of the individual issues that remain after the common issues have been decided. The text of the relevant statutory provisions and rules of court for Ontario are set out in Schedule “E” and the text for the relevant statutory provisions and rules of court for Québec are set out in Schedule “F”

### (a) Distribution Protocol

[70] In Ontario, s. 26 of the *Class Proceedings Act, 1992* empowers the court to direct any means of distribution of amounts awarded where there is an aggregate assessment (section 24) and empowers the court to distribute monies where there are individual issues trials (section 25).

[71] In Québec, s. 596 of the *Code of Civil Procedure* allows the court to make provision for individual liquidation of the class members’ claim or for distribution of an amount to each class member where there is an aggregate assessment under s.592 and s.595. Sections 599-600 of the *Code of Civil Procedure* do not make provision with regards to the distribution of awards to be recovered individually.

[72] Distribution protocols are an intrinsic element of class actions and will arise in one of two ways. Where the defendant agrees to a settlement and to pay compensation to the class, then a distribution protocol will arise as an aspect of the settlement. Where the defendant is found liable, distribution protocols will arise after there is a trial or a summary judgment motion determining the quantum of the class member’s damages, which is what occurred in *Brazeau* and *Reddock*.

[73] In Ontario, the court’s authority to approve a Distribution Protocol is grounded in its jurisdiction to approve settlements.<sup>36</sup> The same can be said in Québec.<sup>37</sup> Subject to court approval, Class Counsel are required to develop a distribution protocol that is in the best interests of the class.<sup>38</sup> A protocol will be appropriate if it is fair, reasonable, and in the best interests of the class.<sup>39</sup> Deciding what is fair and reasonable can involve considerations of what is economical and practical on the facts of a particular case.<sup>40</sup>

[74] The test for approving a distribution plan is analogous to the test that the court applies when deciding whether to approve a settlement.<sup>41</sup> A settlement must fall within a zone of reasonableness to be approved.<sup>42</sup> The zone of reasonableness assessment allows for variation between settlements (and distribution plans) depending upon the subject matter of the litigation and the nature of the damages for which the settlement provides compensation.<sup>43</sup> A settlement and a distribution plan

<sup>36</sup> S. 27.1 of the *Class Proceedings Act, 1992*. *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493.

<sup>37</sup> S.590 of the *Code of civil procedure*.

<sup>38</sup> *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para. 108.

<sup>39</sup> *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59; *Bouchard c. Abitibi Consolidated Inc.*, J.E. 2004-1503 (C.S.), 2004 CanLii 26353 (QCCS), at para.16; *Option Consommateurs c. Banque Amex du Canada*, 2018 QCCA 305 at para. 8 and 83-84

<sup>40</sup> *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936 at para 34; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891; *Bouchard c. Abitibi Consolidated Inc.*, J.E. 2004-1503 (C.S.) at para.23-24; *Option Consommateurs c. Banque Amex du Canada*, 2017 QCCS 200 at para.43, affd. 2018 QCCA 305 at para.8 and 83-84.

<sup>41</sup> *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192; *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59; *Eidoo v Infineon Technologies AG*, 2014 ONSC 6082; *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para 74.

<sup>42</sup> *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 at para 12; *Leslie v. Agnico-Eagle Mines*, 2016 ONSC 532 at para. 8.

<sup>43</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

is to be reviewed on an objective standard; that standard recognizes the inherent difficulty in crafting a universally satisfactory settlement or distribution plan.<sup>44</sup> In other words, to quote from the decision rendered by Justice Pierre-C. Gagnon in *M.G. c. Association Selwyn House*<sup>45</sup> :

25. The French philosopher Voltaire wrote *Le mieux est l'ennemi du bien*, meaning *The better is the enemy of the good*. He meant that often it is preferable to opt for a fair and reasonable outcome rather than turning down anything less than perfection.

[75] The *Class Proceedings Act, 1992* and the *Code of Civil Procedure* envision that distribution protocols may differentiate between Class Members, who do not all have to receive the same allocation of the settlement proceeds. In other words, while in some cases it may be appropriate to distribute the judgment or the settlement funds *per capita* dividing the fund by the number of class members, pursuant to s.26 (1) of the *Class Proceedings Act, 1992* or pursuant to s.596 of the *Code of Civil Procedure*, the courts may direct any means of distribution that they consider appropriate.

[76] Ideally or optimally, if the access to justice goals of the *Class Proceedings Act, 1992*, of the Title III of the *Code of Civil Procedure* and other class action statutes across the country are to be achieved, the judgment or the settlement funds should be distributed to the Class Members and not be refunded to the defendant or distributed *cy-près*, which achieves behaviour modification but not access to justice for individual Class Members.

[77] In approving plans of distribution, courts have found that distinguishing between different types of Class Members is reasonable and appropriate. For example, in *Gould v BMO Nesbitt Burns Inc.*,<sup>46</sup> Justice Cullity approved a Plan where there were discounts for the claims of secondary market purchasers to reflect increased certification and substantive litigation risks affecting their claims.<sup>47</sup> However, in *Zaniewicz v. Zungui Haixi Corp.*<sup>48</sup> the court held that it was inappropriate and unfair to include persons as Class Members and then to exclude them from a distribution.

### **(b) Individual Issues Protocol**

[78] Turning to the matter of the Individual Issues Protocol, where following the common issues judgment, there are individual issues to be determined, in Ontario, s. 25 of the *Class Proceedings Act, 1992*, empowers the court to design the procedure for the individual issues trials. Section 25 is connected to sections 24, 26, and 27.

[79] The court's power under ss. 24 to 27 of the *Class Proceedings Act, 1992*, which are considerable,<sup>49</sup> is augmented by other sections of the *Class Proceedings Act, 1992*, most

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<sup>44</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para 80 (S.C.J.).

<sup>45</sup> 2009 QCCS 989, at para. 25.

<sup>46</sup> *Gould v. BMO Nesbitt Burns Inc.*, [2007] O.J. No. 1095 at paras 2, 19-23 (S.C.J.).

<sup>47</sup> U.S. courts have also approved of this approach to plans of distribution. A reasonable plan may consider the relative strength and values of different categories of claims: *In re IMAX Sec Litig.*, 283 FRD 178 (SDNY 2012). Particularly in the case of a large class action, the apportionment of a settlement can never be tailored to the rights of each Plaintiff with mathematical precision: *In re PaineWebber Ltd P'ships Litig.*, 171 FRD 104 (SDNY 1997), aff'd, 117 F.3d 721 (2d Cir 1997). Exactitude is not required in allocating consideration to the class, provided that the overall result is fair, reasonable and adequate: *Silberblatt v. Morgan Stanley*, 524 F Supp 2d 425 (SDNY 2007).

<sup>48</sup> 2013 ONSC 5490. See also *Welsh v. Ontario*, 2018 ONSC 3217 at para 13.

<sup>49</sup> *Jiang v Peoples' Trust*, 2017 BCCA 119; *Lundy v VIA Rail Canada Inc.*, 2015 ONSC 7063.



particularly s.12.

[80] Section 35 of the *Class Proceedings Act, 1992* specifies that the *Rules of Civil Procedure* apply to class proceedings. The court's powers are also augmented by the court's powers on a summary judgment motion under rule 20.05.

[81] Thus, in the immediate case, relevant to settling the protocol for the distribution of the Aggregate Damages Award and for the resolution of the individual issues are Rules 1.04, 20, 52.03, 54 and 55 of the *Rules of Civil Procedure*.

[82] In Québec, the relevant provisions can be found at ss. 17, 18, 19, 157, 158, 234, 236, 238, 572, 592 and 600 of the *Code of Civil Procedure*.

[83] The urgings of the Supreme Court of Canada in *Hryniak v. Mauldin*<sup>50</sup> to employ those powers when justice can be done without requiring a regular trial are directed at all Canadian judges. Creativity and the principles of proportionality have a role to play in designing the individual issues stage of a class action.

[84] Further, as to the courts' authority on the motions before the courts, we agree with Class Counsels' submissions that in the immediate case, the courts' powers are further augmented, if necessary, by the court's remedial – and substantive – authority under s. 24 of the *Charter* to creatively fashion an appropriate remedy.

[85] Nevertheless, as mentioned by the Supreme Court of Canada in *Hryniak v. Mauldin*<sup>51</sup>, our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. Therefore, the major constraint on the design of the procedure for determining the individual issues is that the courts' procedural and evidentiary choices must be consistent with justice to Class Members and to defendants. What is consistent with justice will depend upon the nature of the particular case and upon the fundamental principles of justice and of natural justice.<sup>52</sup>

[86] In the immediate case, as noted above, it is for the courts to determine the terms of the Distribution and Individual Issues Protocols, but there are limits on our creativity. As a matter of settlement (but subject to court approval), the parties could select adjudicators that are not judges or court officers. In the immediate cases, it may be recalled that Canada in its proposal (Schedule B) and Class Counsel in its proposal (Schedule C) proposed the use of referees to adjudicate certain claims. In the rival proposals, the appointment of referees required the consent of the parties. However, as will be discussed further below, civil courts cannot outsource their adjudicative powers to external referees as adjudicators without the parties' consent. Courts do have, however, the power to use Court-appointed experts to assist the court. We foreshadow here that our *Draft Distribution and Individual Issues Protocol Draft* envisions the use of experts (Manager/Experts) to assist the court with respect to distribution and to provide expert evidence for the Track 2 claims.

### 3. The Funds for Distribution

[87] Class Counsel proposed that there should be two combined funds for distribution, one for

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<sup>50</sup> 2014 SCC 7 at para. 23-34.

<sup>51</sup> *Id.*, at para. 23. See also, in Québec, s.23 of the *Charter of Human Rights and Freedoms*, CQLR, c. C-12 and s.17 of the *Code of Civil Procedure*.

<sup>52</sup> *Lundy v VIA Rail Canada Inc.*, 2015 ONSC 7063.

SMI Class Members from *Brazeau* and *Gallone* and the other fund for non-SMI Class Members from *Reddock* and *Gallone*. As noted in the Introduction, Canada proposed that there be four combined funds for distribution of the Aggregate Damages Award. Three of the funds would be for SMI Class Members from *Brazeau* and *Gallone*, and the fourth fund would be for non-SMI Class Members from *Reddock* and *Gallone*.

[88] Under Class Counsels' proposal, eligibility for the SMI Fund would be dependent on the Class Member having a psychiatric assessment that he or she was serious mentally ill as defined by the class definition in *Brazeau* and *Gallone*. Class Counsel proposed that eligibility would be determined by Referees with medical profession credentials or with legal-medical professional credentials.

[89] Under Class Counsels' proposal, eligibility for the non-SMI Fund would be dependent on the inmate having been placed in administrative segregation for more than fifteen days, and Class Counsel proposed that an administrator could determine eligibility based on the Class Member's Claim Form and on the penitentiary records to be produced by Canada, which is a mechanical exercise that does not require medical expertise. Under Class Counsels' proposal, if Canada disputed the Referees' eligibility assessment, then there would be a distribution holdback and the Class Member's eligibility would be delayed and determined as part of the Individual Issues Protocol. After a year for the program to determine eligibility, the aggregate award would be distributed less the holdbacks.

[90] The premises of the two-fund approach promoted by Class Counsel were that: (a) because of their pre-existing mental conditions SMI Class Member Claimants suffered more than a non-SMI Class Members; (b) there were fewer SMI Class Members; and (c) their share of the aggregate damages awards in *Brazeau* and *Gallone* should not be diluted by combining the aggregate awards from all three actions.

[91] The following chart breaks out the allocation and distribution of funds for an SMI Fund, a non-SMI Fund, and also for a combined fund.

Net SMI Fund <i>Brazeau + Gallone</i>	Net Non-SMI Fund <i>Reddock + Gallone</i>	Net Combined Fund <i>Brazeau + Reddock + Gallone</i>	Gross Combined Fund <i>Brazeau + Reddock + Gallone</i>
3,636 <u>731</u> 4,367 Class Members	8,934 <u>3,363</u> 12,297 Class Members	4,367 <u>12,297</u> 16,664 Class Members	4,367 <u>12,297</u> 16,664 Class Members
\$11,527,661.11 <u>1,692,439.14</u> \$13,220,100.25 Fund	\$12,831,135.95 <u>2,117,431.64</u> \$14,948,567.59 Fund	\$13,220,100.25 <u>14,948,567.59</u> \$28,168,667.84 Fund	\$20,000,000.00 21,120,797.00 <u>5,948,769.23</u> \$47,069,566.23 Fund
100% Take-up: <b>\$3,027</b> Allocation (\$13,220,100.25/4,367)	100% Take-up: <b>\$1,216</b> Allocation (\$14,948,567.59/12,297)	100% Take-up: <b>\$1,690</b> Allocation (\$28,168,667.84/16,664)	100% Take-up: <b>\$2,824.62</b> Credit (\$47,069,566.23/16,664)
66% Take-up: <b>\$4,587</b> Allocation (\$13,220,100.25/2,882)	66% Take-up: <b>\$1,841</b> Allocation (\$14,948,567.59/8,116)	66% Take-up: <b>\$2,561</b> Allocation (\$28,168,667.84/10,998)	66% Take-up: <b>\$4,2279.83</b> Credit (\$47,069,566.23/10,998)

50% Take-up: <b>\$6,053</b> Allocation (\$13,220,100.25/2,184)	50% Take-up: <b>\$2,431</b> Allocation (\$14,948,567.59/6,148)	50% Take-up: <b>\$3,381</b> (\$28,168,667.84/8,3323)	50% Take-up: <b>\$5,649.25</b> Credit (\$47,069,566.23/8,332)
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[92] The approach of the *Draft D&I Protocol* does not accept the premise that there should be two or more separate funds differentiated by whether the Class Member was SMI or non-SMI. The determinations made under s. 24 (1) of *Class Proceedings Act, 1992* and under s. 595 of the *Code of Civil Procedure* as to the defendant's aggregate liability to Class Members determines the amount of the defendant's aggregate liability. Nevertheless, under s. 26 (1) of *Class Proceedings Act, 1992* and under s. 596 of the *Code of Civil Procedure* the courts may direct any means of distribution of the amounts awarded.

[93] As already alluded to above, the approach of the *Draft D&I Protocol* has one fund (gross \$47.0 million; net 28.2 million) with eligibility determined in accordance with the *Reddock* standard of eligibility. The distribution approach of the *Draft D&I Protocol* is as follows:

Aggregate Damages Award means the gross award of aggregate damages, costs, and interest made in *Brazeau*, *Reddock*, and *Gallone*, less:

- (a) Class Counsel's fees and disbursements as approved by the Courts;
- (b) the Class Proceedings Fund's levy, applicable to the *Reddock* and *Brazeau* actions;
- (c) the allocation to the Fond d'aide aux actions collective; and
- (d) any other deductions approved by the Courts

(for a net aggregate damages award of approximately \$28.0 million).

A share in Aggregate Damages Award is equal to the Aggregate Damages Award divided by the number of Class Members eligible to receive a share as determined by the Roster of Manager/Experts.

A Class Members who selects Track 1, Track 2 or Track 3 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

Where a Class Member selects Track 1, Track 2, or Track 3, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the parties and the Administrator.

There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

[94] In our opinion, there should be one fund comprised of the Aggregate Damage Awards of *Brazeau*, *Reddock*, and *Gallone*. Two funds are ultimately unfair and unreasonable and make the distribution of the award cumbersome, slow, expensive, and possibly unmanageable. With two or four funds, there is the prospect of unfair distributions and unnecessary inequalities between the treatment of Class Members from *Gallone* that were imprisoned in Québec depending on whether they were also members of *Reddock*.

[95] Visualize: under the two fund approach, if a putative SMI Fund Class Member from *Brazeau* and *Gallone* failed the eligibility psychiatric assessment, then he or she likely would be

eligible for a share of the aggregate award as a non-SMI Class Member, and if Canada was successful in challenging the eligibility of a large number of SMI Fund Claimants, this would lead to overcompensation of the remaining SMI Class Members or possibly a very large *cy-près* distribution or possibly a reversion to Canada. These discrepancies were not intended when the awards were made in *Brazeau*, *Reddock*, and *Gallone*.

[96] Further, the matter of whether a SMI Class Member should obtain more compensation than a non-SMI Class Member is a matter much more relevant to the determination of his or her individual issues claim than it is to the matter of whether he or she should take a larger share of the Aggregate Damages Award.

[97] In other words, it is not reasonable to differentiate between SMI and non-SMI Class Members in the Distribution Protocol. For the purposes of the distribution of the Aggregate Damages Award, all the Class Members should be treated the same. The awards in *Brazeau*, *Reddock*, and *Gallone* were class-wide awards, and they should be allocated and distributed taking into consideration that the SMI Class Members would default to being non-SMI Class Members.

[98] Moreover, it was the same wrongdoing by Canada inflicted on the *Brazeau*, *Reddock*, and *Gallone* Class Members. All of the Class Members share the commonality of being placed in administrative segregation contrary to the *Charter*. One fund avoids all the possible anomalous distributions that are described in Canada's factum and it avoids any reversion to Canada, and a one-fund distribution largely avoids a *cy-près* distribution. There is good substantive and practical sense in just creating one fund for the major commonality of all three class actions.

[99] In our opinion, the scheme of the *Draft D&I Protocol* about the scheme for distribution of the Aggregate Damages Award is fair and reasonable and preferable to the approaches of either Class Counsel or Canada.

#### 4. Claims Deadline and Fund Distribution

[100] Under Class Counsels' protocol, the deadline for claims would be nine months after the first publication of Notice subject to the court granting leave for late claims and the Aggregate Damages Award would be distributed on a date no later than ninety (90) days after the close of the Claims Filing Deadline, or the final determination of any Class Member's SMI Class membership, whichever is later.

[101] Under Canada's Distribution Protocol, the deadline for claims would be one-year after the first publication of Notice subject to the court granting leave for late claims and the Aggregate Damages Award would be distributed after all the eligibility disputes were resolved, which might take some time given the eligibility dispute scheme proposed by Canada.

[102] The approach of the *Draft D&I Protocol* is straightforward and far less cumbersome. The *Draft D&I Protocol* provides for a one-year claims deadline subject to the court granting leave for late claims.<sup>53</sup> It should be noted that unlike Class Counsel's and Canada's protocols, the *Draft D&I Protocol* specifies the criterion for granting leave to file an untimely claim. Leave shall be granted only if the Class Member establishes that the failure to file a timely Claims Form was due to circumstances beyond his or her control or that provide a reasonable explanation for the delay.

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<sup>53</sup> In Québec, with regards to individual recovery of claims, this is allowed under s. 84 and 599 (2) of the *Code of Civil Procedure*.

With a robust notice program, there should be little room for excuses for late filings.

[103] Before the deadline, the eligibility claims can be determined on a rolling basis by the Manager/Experts. The standard for eligibility is the standard from *Reddock* for all Class Members from *Brazeau*, *Reddock*, and *Gallone*. There is no appeal from the Manager/Expert's decision, which is administrative in nature based on the duration of the placement in administrative segregation and not on whether the Class Member is SMI or non-SMI, and once the Manager/Expert's has processed the timely claims, the Aggregate Damages Award can be distributed along with the Manager/Experts' Awards for the Track 2 adjudications. If a late claim arrives and leave is granted for the late claim to proceed, the Class Member is too late for a share of the Aggregate Damages Award and his or her claim would just proceed for an individual issues determination on Tracks 2 or 3.

[104] Thus, the approach of the Draft D&I Protocol as to administering the distribution of the Aggregate Damages Award is as follows:

Claims Form" means the electronic or paper claims form in English or in French that a Class Member must complete and submit before the Claims Filing Deadline to participate in the distribution of the aggregate damages and to have his or her individual issues determined in *Brazeau*, *Reddock*, and *Gallone*.

Claims Filing Deadline means the date by which the Claims Form (and the required supporting documentation) must be electronically submitted, sent via mail, or received in person by the Administrator, which date shall be one year after the first publication of Notice.

Before the Claims Filing Deadline, a Class Member may submit a Claims Form (and the required supporting documentation) to the Administrator.

After the Claims Filing Deadline, with leave of the court, Class Members may file Claims Forms for Tracks 2 or 3, and leave shall be granted only if the Class Member establishes that the failure to file a timely Claims Form was due to circumstances beyond his or her control or that provide a reasonable explanation for the delay.

Within twenty days of receipt of a Claims Form, the Administrator shall provide a copy of the Claims Form and any associated documents to:

- (a) a Manager/Expert from the Roster;
- (b) Class Counsel or the lawyer retained to act for the Class Member; and
- (c) Canada.

A Class Members who selects Track 1 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

Where a Class Member selects Track 1, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the parties and the Administrator.

There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

A Class Members who selects Track 2 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

Where a Class Member selects Track 2, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the Administrator and the parties.

There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

A Class Members who selects Track 3 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

Where a Class Member selects Track 3, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the Administrator and the parties.

There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

For Track 1 Claims, the Administrator shall pay the Class Member's share of the Aggregate Damages award within sixty days after the Roster of Manager/Experts has determined all timely submitted Claims Forms.

For Track 2 and Track 3 Claims, the Administrator shall hold the Class Member's share of the Aggregate Damages Award in trust pending the completion of the Class Member's Track 2 or Track 3 Claim, after which the Administrator shall pay the Class Member his or her share.

[105] In our opinion, the scheme of the *Draft D&I Protocol* about a claims deadline and the timing of the fund distribution is fair and reasonable and preferable to the approaches of either Class Counsel or Canada.

## **5. Appointment of Manager/Experts**

[106] Under Class Counsels' proposal, two kinds of referees would be appointed. First there would be Medical Referees with medical expertise; these Referees would decide whether Class Members were eligible as SMI Fund claimants for a share in the distribution of the Aggregate Damages Award. Second there would be Claims Referees; these Referees would apply the *per diem* damages grids for SMI Class Members and for non-SMI Class Members. The damages grids are based on the duration of the Class Member's placement in administrative segregation.

[107] Canada opposed Class Counsels' proposal. Although we were told at the hearing that Canada intended internally to hire experts with medical expertise to challenge the eligibility of claimants, it opposed the use of Medical Referees for this purpose, and Canada asserted that the courts did not have the jurisdiction to appoint Medical Referees without Canada's consent. Canada's counterproposal was that eligibility for a share of the three discrete SMI funds should be determined by the courts by motion after a challenge process.

[108] Under Canada's rival proposal, there would be referees not to determine eligibility for a share of the distribution but referees to determine individual issues. These referees, who Canada would consent to being appointed, would not decide eligibility but would adjudicate individual issues claims under Canada's Small Claims Track for claims up to \$35,000.

[109] In our opinion, the proposals of both Class Counsel and of Canada are not fair and reasonable and should not be approved.

[110] The approach of the *Draft D&I Protocol*, which in our opinion, is fair and reasonable and in the best interests of the Class Members, is to impanel a Roster of Manager/Experts as follows:

No later than ninety (90) days from the of the court approval of the Notice and Claims Form, Class Counsel and Canada shall constitute the Roster of Manager/Experts failing which the courts shall appoint the Manager/Experts to constitute the Roster from a list of candidates submitted by Class Counsel and/or Canada.

A Manager/Expert shall be:

- (a) a person licensed to practice medicine in any Canadian jurisdiction;
- (b) a person licensed to practice psychology in any Canadian jurisdiction;
- (c) a person registered as a psychotherapist in any Canadian jurisdiction;
- (d) a person registered as a psychiatric nurse in any Canadian jurisdiction; or
- (e) a person licensed as a psychiatric social worker in any Canadian Jurisdiction.

[111] Under the *Draft D&I*, the Manager/Expert would determine a Class Member's eligibility for a share of the pooled Aggregate Damages Award for Class Members proceeding on Track 1 (*Distribution and Release of Claim Track*), Track 2 (*Distribution and Under-\$50,000 Track*), and Track 3 (*Distribution and Over-\$50,000 Track*).

[112] Under the *Draft D&I Protocol*, for Track 2 claims, the Manager/Expert would inquire into and report to the Ontario Superior Court of Justice or to the Superior court of Québec his or her findings and conclusions as to the quantum of the Class Member's claim by reviewing the Claims Form, the Class Member's CSC file, and the affidavit material, transcripts, and factums filed by the Class Member and Canada. The Manager/Expert would then report to the courts, and then either party may move without additional evidence for an Order determining the quantum of the Track 2 claim.

[113] The courts do not require the consent of the parties to appoint an expert under the *Rules of Civil Procedure* or under the comparable provisions under the *Québec Code of Civil Procedure*.

[114] It should be noted that under the *Draft D&I Protocol*, it is only with respect to the Track 2 Claims that a Manager/Expert requires medical knowledge.

[115] Under the *Draft D&I Protocol*, eligibility for a share of the Aggregate Damages Award for Tracks 1, 2, and 3 is based on the *Reddock* class definition standard and, eligibility does not depend on qualifying for a separate fund for SMI Class Members. Under the *Draft D&I Protocol*, there is one fund, with eligibility determined in accordance with the standard of the *Reddock* class definition. That standard does not require medical knowledge and satisfying the standard can be determined based on a review of the CSC's records about placements in administrative segregation. The determination of eligibility is an administrative not an adjudicative task.

[116] In the immediate case, the courts of Ontario and Québec are confronted with the challenge of providing a meaningful remedy. It is conceivable that over 10,000 present and former inmates of federal penitentiaries will apply for a *Charter* remedy because of their unlawful placement in administrative segregation. In the immediate case, even ignoring the strains caused by the Covid-19 pandemic, without the assistance of Manager/Experts, the courts of Ontario and Québec do not have the resources to provide access to justice for thousands of claimants simultaneous bringing

claims. The appointment of Manager/Experts with the competence to understand the physical and psychological effects of administrative segregation for claims with values under \$50,000 is within the court's jurisdiction under s. 24 of the *Charter* and under the *Rules of Civil Procedure* and the comparable provisions under Québec's *Code of Civil Procedure*. The courts have this authority to appoint an expert to assist the court without the consent of the perpetrator of the *Charter* breach to make this appointment.

[117] In *Lundy v VIA Rail Canada Inc.*,<sup>54</sup> it was stated that the court has no ability to outsource its adjudicative function beyond that provided by the *Class Proceedings Act, 1992* and by Rules 54 and 55 of the *Rules of Civil Procedure*. *Lundy* was a negligence class action about a train derailment where: (a) the Class was less than 50 persons; (b) there were no serious injuries; (c) there was no aggregate assessment of damages, (d) the individual issues were genuine individual issues not an issue about asserting a claim to a share to an aggregate damages award; and (e) *Lundy* did not involve any breach of the *Charter*.

[118] The cases at bar are different than *Lundy*, and although the courts do not have the ability to outsource their adjudicative function for the Track 2 claims, the courts do have the authority to have the assistance of Manager/Experts as they adjudicate the Track 2 claims. (Although, by settlement, the parties could facilitate matters further by agreeing to have the panel of Manager/Experts act as court appointed referees.)

[119] And the courts have the jurisdiction to give directions to the Manager/Experts and to fix their remuneration and to order Canada to pay the Manager/Experts for their services to the administration of justice.

## 6. Issues for the Manager/Experts

[120] Class Counsel's Individual Issues Protocol envisions that where a Class Member has a limitation period issue or where the Class Member asserts a claim of over \$100,000, he or she would proceed under a somewhat modified summary judgment procedure. For claims under \$100,000, (Simplified Track) Class Counsel proposes that the Class Member would release all claims save for general or moral damages claimed up to \$100,000.

[121] Class Counsel's Individual Issues Protocol envisions that the Class Member's under-\$100,000 claim would be decided by a Referee applying a *per diem* rate of \$300/day for the *Brazeau* Class Members and the SMI Class Members of *Gallone*. The Referee would apply a \$200/day for the *Reddock* Class Members and for the non-SMI members of *Gallone*.

[122] Canada vehemently opposed Class Counsel's proposal as unfair.

[123] Canada objected to what would amount to a mechanical exercise of determining days in administrative segregation from the CSC's records and submitted that: (a) causation of harm had not been proven for individual damages claims; (b) there was not a necessary correlation between days in administrative segregation and the harm, if any, suffered by a Class Member; and (c) it was unfair to the extreme to preclude Canada from advancing evidence that there were mitigating factors in individual cases that were relevant to the determination of the quantum of an individual Class Member's claim.

[124] Canada's rival Individual Issues Protocol was substantially different than Class Counsels',

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<sup>54</sup> 2015 ONSC 7063.



although Canada's rival proposal for the determination of individual issues claim did involve determinations by a Referee. Under Canada's proposal, the Referee would decide cases under a Small Claims Track for claims under \$35,000. Where a Class Member selected the Small Claims Track, he or she would still have the burden of proof of proving causation and every other element of his or her claim.

[125] Under Canada's Individual Issues Protocol, the Referee's decision would be deemed to be a Report under Rule 54 of the *Rules of Civil Procedure*, which is to say that it would be subject to a confirmation procedure by motion to the court.

[126] Under Canada's proposal, the Referee's jurisdiction would end at \$35,000, and then Canada proposed a Summary Motion Track, where damages would be determined by a judge, for claims over \$35,000 and up to \$100,000.

[127] Canada proposed a Regular Action Track where the Class Member claimed damages above \$100,000.

[128] We agree with some but certainly not all of Canada's objections to Class Counsels' approach. We do not agree with Canada's proposal for individual issues determinations. In any event, the approach of the *Draft D&I Protocol* as to the role of the Manager/Expert is different from the proposals of the parties, and is as follows:

In this Protocol, "Roster" means the group of Manager/Experts appointed by the parties or by the court:

- (a) to determine eligibility for a share of the distribution of the Aggregate Damages Award; and
- (b) to inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Damages Award for Class Members who elect to make a Track 2 claim.

In the Claims Form, a Class Member shall elect to proceed on one of the following tracks:

- (a) Track 1 (Distribution and Release of Claim Track);
- (b) Track 2 (Distribution and Under-\$50,000 Track); or
- (c) Track 3 (Distribution and Over-\$50,000 Track.)

A Class Member whose claim is presumptively barred by a limitation period shall elect to proceed by Track 3.

In the Claims Form, a Class Members shall provide the following information:

- (a) his or her name;
- (b) his or her date of birth;
- (c) his or her Social Insurance Number;
- (d) his or her Prison Number;
- (e) his or her inmate classification;
- (f) the correctional institutions in which he or she was incarcerated;

- (g) the admission date and or transfer date to each of the correctional institutions in which he or she was incarcerated;
- (h) the date of placement and the release date for each placement in administrative segregation
- (i) his or her mailing address, email address, and phone numbers, if any;
- (j) for other than Incarcerated Class Members a direction as to how the Class Members should be paid his or her share of the distribution and his or her individual issues award
- (k) an acknowledgement that the Administrator is authorized to contact the Class Member to obtain further information;
- (l) if other than Class Counsel, the name and contact information for the lawyer retained to act for the Class Member;
- (m) a declaration that the information submitted in the Claims Form is true and correct.

Where the Class Member selects Track 2, he or she may annex to his or her or her Claims Form:

- (a) an affidavit from the Class Member of no more than 30 pages in length, including exhibits, in support of the Track 2 Claim;
- (b) no more than two affidavits of no more than 30 pages in length, including exhibits, from a person who would be qualified to be a Manager/Expert under this Protocol;
- (c) the transcript of any cross-examinations; and
- (d) a factum of no more than 30 pages.

Within twenty days of receipt of a Claims Form, the Administrator shall provide a copy of the Claims Form and any associated documents to:

- (a) a Manager/Expert from the Roster;
- (b) Class Counsel or the lawyer retained to act for the Class Member; and
- (c) Canada.

Within thirty (30) days of its receipt of a copy of the Claims Form, Canada shall send a copy of the Class Member's CSC file to the Manager/Expert assigned the claim.

Where the Class Member selects Track 2, Canada may also deliver to the Manager/Expert and to the Class Member:

- (a) an affidavit from a representative of the Canada Correctional Service of no more than 30 pages in length, including exhibits, in opposition to the Track 2 Claim;
- (b) no more than two affidavits of no more than 30 pages in length, including exhibits, from a person who would be qualified to be a Manager/Expert under this Protocol;
- (c), the transcript of any cross-examinations; and
- (d) a factum of no more than 30 pages.

Where a Class Member selects Track 2, after the parties have delivered their affidavits, a deponent may be summonsed for an out of court cross-examination by the opposing party, with the duration of the cross-examination not to exceed 60 minutes.

A Class Members who selects Track 2 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

Where a Class Member elects to proceed on Track 2, he or she shall be deemed to have released Canada from all claims arising from his or her placement(s) in administrative segregation save for the claims as set out in the damages grid set out below:

<b>Criteria for Award</b>	<b>Award</b>
15-60 days in administrative segregation	Up to \$10,000
More than 60 days in administrative segregation	Up to \$20,000
SMI Eligible	Up to \$10,000
Any one or more of: Post-traumatic stress disorder, Severe Clinical Depression, Self-injurious behavior, substantial degradation in Axis I Disorder (excluding substance use disorders), or substantial degradation of Borderline Personality Disorder (“BPD”)	Up to \$20,000

Damages awarded under Track 2 shall accrue pre-judgment interest at the rate of 5%, calculated from March 3, 2017. Post-judgment interest shall accrue at the rate of 3%, from the date of the Damages award.

The Class Member’s share of the gross aggregate damages award is a credit to the payment of the damages awarded under Tracks 2.

Where a Class Member selects Track 2, the Manager/Expert shall inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Class Member’s claim by reviewing the Claims Form and the Class Member’s CSC file.

There is no appeal of the Manager/Expert’s decision with respect to a Class Member’s eligibility to receive a share of the Aggregate Damages Award.

Where a Class Members selects Track 2, the parties are bound by the findings of fact made in the *Brazeau*, *Reddock*, and *Gallone* actions including causation of harm and the Manager/Expert shall inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Class Member’s claim by reviewing the Claims Form, the Class Member’s CSC file, and the affidavits, transcripts, and factums filed by the Class Member and Canada. The Referee Expert’s report shall be no more than ten pages in length.

Where a Class Member selects Track 2, after the Manager/Expert delivers his or her report to the court, either party may move without additional evidence for an Order determining the quantum of the Track 2 claim

Where a Class Member selects Track 2, the court may award costs not to exceed \$6,000.

Where the Class Member makes a successful claim under Track 2, Canada shall pay any award to the Administrator within 30 days after the final disposition of the claim.

Canada shall pay that Manager/Expert:

- (a) \$1,000 for a Track 1 or a Track 3 decision; and
- (b) \$5,000 for a Track 2 decision and report.

[129] The explanation for the approach of the *Draft D&I Protocol* begins by noting that there are issue estoppels and « *chose jugée implicite* »<sup>55</sup> from the common issues determinations in *Brazeau* and *Reddock*. The *Gallone* decision was based on the findings made in *Brazeau* and *Reddock*. Thus, the common issues phase made findings that are binding on Canada in all three cases. The *Draft D&I Protocol* does not reopen the common issues phase but rather properly employs it for the determination of individual issues.

[130] The issue estoppels and « *chose jugée implicite* » from *Brazeau* and *Reddock* are binding on Canada and establish that: (a) Canada breached the *Charter*; (b) an unlawful placement in administrative segregation - regardless of the duration of that placement causes - physical and psychological personal injuries to each and every Class Member; (c) the physical and mental harm caused by administrative segregation is likely greater for SMI Inmates; and (d) the physical and mental harm caused by administrative segregation and likely greater for both SMI Inmates and non-SMI inmates the longer the duration of the placement.

[131] Based on the factual findings in *Brazeau*, *Reddock* and *Gallone* and the legal findings in of the Ontario Court of Appeal in *Brazeau*, *Reddock*, and *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*,<sup>56</sup> the following are matters for which there are issue estoppels in Ontario and findings that result in « *chose jugée implicite* » or that have to be considered as relevant juridical facts in Québec<sup>57</sup>:

- a. Canada contravened the *Charter* rights of all Class Members and the Class Members suffered similar injuries of different intensities.
- b. Administrative segregation causes serious physical and serious psychological harm to any inmate placed in administrative segregation and the harm is particularly acute for those already suffering from serious mental diseases and disabilities.
- c. Administrative segregation causes the following effects: aggression, anxiety, cognitive dysfunction, delusions, depression, hallucinations, hopelessness, hypersensitivity, impaired memory and concentration, irritability, loss of control, panic attacks, paranoia, psychosis, rage, severe obsessional rituals, self-mutilation, significant impairment of ability to communicate, sleep disturbances, suicidal ideation and behaviour, withdrawal, and a sense of impending emotional breakdown.
- d. Negative health effects from administrative segregation can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.
- e. The harm from administrative segregation does not stop with the end of the placement but continues long after the inmate returns to the general population and in some inmates the harm is permanent.

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<sup>55</sup> Section 2848 of the *Québec Civil Code*; *162568 Canada inc. c. 4499450 Canada inc.*, 2018 QCCA 237 at para. 20-21; *Nasigoflu c. Complexe St-Ambroise inc.*, 2005 QCCA 559; *Pesant c. Langevin*, (1926) 41 B.R. 412, p.423.

<sup>56</sup> 2019 ONCA 243.

<sup>57</sup> *St-Marc-sur-Richelieu (Municipalité de) c. Lagacé*, 2009 QCCS 5013, at para. 48-53; *Solomon c. Québec (Procureur general)*, 2008 QCCA 1832 at para. 44-50, 55-54, 57.

f. 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*.

g. It has been widely recognized from 2011 that prolonged solitary confinement of any inmate caused serious harm and should be avoided.

[132] In addition, to the above binding issue estoppels or findings resulting in « chose jugée implicite » or having to be considered as relevant juridical facts, we agree with the expert report of Dr. Chaimowitz, filed on this motion, which Canada did not challenge, that the longer a person spends in solitary confinement the more severe the harm they suffer.

[133] Where we disagree with Dr. Chaimowitz and where we agree with Canada is that a mechanical *per diem* approach is not something that can be extrapolated from the issue estoppels in the immediate cases.

[134] General causation of harm is no longer an issue at the individual issues stage of *Brazeau, Reddock, and Gallone*. Apart from the general damages from the illegal placement in administrative segregation, specific causation of particular harms remains an individual issue<sup>58</sup>.

[135] The Class Members are entitled to receive general or moral damages for their similar injuries, but what remains to be determined at the individual issues stage is specific causation and the quantum of the compensation to be provided for the harm caused by the Class Member's unlawful placement into administrative segregation. We agree with Canada that the issue of quantum is idiosyncratic and cannot be determined by a mechanical application of a *per diem* rate.

[136] While the duration of placement in administrative segregation has already been proven on a class-wide basis to be a relevant factor in calculating the harm suffered, it still is an idiosyncratic factor. Comparatively speaking, some inmates might suffer more from a short duration placement than other inmates who had longer duration placements.

[137] The approach of the *Draft D&I Protocol* is that where a Class Member's placement is between 15 – 60 days, the Manager/Expert may make findings and conclusions for an award up to \$10,000 for the general or moral damages caused by the placement and up to an additional \$10,000 if the inmate is an SMI Class Member and report these findings to the court. If the evidence establishes as a matter of specific causation that the Class Member also experienced any one or more of: Post-traumatic stress disorder, Severe Clinical Depression, Self-injurious behavior, substantial degradation in Axis I Disorder (excluding substance use disorders), or substantial degradation of Borderline Personality Disorder (“BPD”), the Manager/Expert may make findings and conclusions up to \$20,000 more.

[138] The approach of the *Draft D&I Protocol* is that where a Class Member's placement is more than 60 days, the Manager/Expert may make findings and conclusions for an award up to \$20,000 for the general damages caused by the placement and up to an additional \$10,000 if the inmate is an SMI Class Member and report these findings to the court. If the evidence establishes as a matter of specific causation that the Class Member also experienced any one or more of: Post-traumatic stress disorder, Severe Clinical Depression, Self-injurious behavior, substantial degradation in

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<sup>58</sup> For a comparison of the applicable principles in civil law and *common law* with regards to causation, see the Québec Court of Appeal decision in *Imperial Tobacco Canada ltée c. Conseil Québécois sur le tabac et la santé*, 2019 QCCA 358, at para. 660-671 and 840. The decision also discusses general and specific causation but in the context of a specific legislation allowing causation to be established at the collective level of a population.

Axis I Disorder (excluding substance use disorders), or substantial degradation of Borderline Personality Disorder (“BPD”), the Manager/Expert may make findings and conclusions up to \$20,000 more.

[139] The approach of the *Draft D&I Protocol* for a Class Member who was placed in administrative segregation for less than 15 days is that if he or she is SMI Class Member, the Manager/Expert may make findings and conclusions for an award between \$0 and \$10,000 and if the evidence establishes as a matter of specific causation that the Class Member also experienced any one or more of: Post-traumatic stress disorder, Severe Clinical Depression, Self-injurious behavior, substantial degradation in Axis I Disorder (excluding substance use disorders), or substantial degradation of Borderline Personality Disorder (“BPD”), the Manager/Expert may make findings and conclusions up to \$20,000 more and report these findings to the court.

[140] Thus, under the *Draft D&I Protocol*:

- a. For a Class Member who was placed in administrative segregation for less than 15 days, and who is SMI eligible, the court on the motion to determine the quantum of the Track 2 claim could award between \$0 to \$30,000.
- b. For a Class Member who was placed in administrative segregation for between 15 and 60 days, the court on the motion to determine the quantum of the Track 2 claim could award between \$0 to \$30,000 for a non-SMI eligible Class Member.
- c. For a Class Member who was placed in administrative segregation for between 15 and 60 days, the court on the motion to determine the quantum of the Track 2 claim could award between \$0 to \$40,000 for a SMI eligible Class Member.
- d. For a Class Member who was placed in administrative segregation for more than 60 days, the court on the motion to determine the quantum of the Track 2 claim could award between \$0 to \$40,000 for a non-SMI eligible Class Member.
- e. For a Class Member who was placed in administrative segregation for more than 60 days, the court on the motion to determine the quantum of the Track 2 claim could award between \$0 to \$50,000 for a SMI eligible Class Member.

[141] The Manager/Experts, who have the professional qualifications to assess medical and psychiatric evidence and reports, are well placed (and perhaps better placed than a judge without similar training) to provide a report about the quantum of the individual issues awards, which will range between \$0 to \$50,000 by reviewing the Claims Form, the Class Member’s CSC file, and the affidavit material and factums filed both by the Class Member and also by Canada. As we shall explain further below, general causation not being an issue, a Manager/Expert is able to address the individual issues associated with specific causation and quantum based on the material filed by the parties and report those findings to the court.

[142] In our opinion, for Track 2 claims (which cannot exceed a recovery of \$50,000 and for which: (a) Canada’s liability has been established; and (b) general causation for general and moral damages has already been proven), cross-examination of the deponents is likely unnecessary and disproportionate, but the *Draft D&I Protocol*, nevertheless, provides a time-limited right to cross-examine.

[143] The procedure under the *Draft D&I Protocol* is proportionate, efficient, and fair to both the Class Member and to Canada. The Class Member must present individualized evidence in

support of his or her claim including evidence of specific causation of particular harms that are generally caused by an illegal placement in administrative segregation. Canada may file individualized evidence in response. For example, if Canada sought to argue that a Class Member did not mitigate damages because he or she did not follow medical advice, then Canada could file evidence with the Manager/Expert.

[144] It is an adverse costs regime, and the court may award costs not to exceed \$6,000. The procedure does not sacrifice justice on the altar of expediency. Apart from the issue of general causation, Canada can file evidence and a factum to dispute the quantum of the award based on idiosyncratic factors and is not denied due process. Canada has the right to raise legal and factual defences that address the idiosyncrasies of each Class Member's experience in administrative segregation. Impartial Manager/Experts have the expertise to assist the court in adjudicating the Track 2 claims.

[145] There is no adjudication of Track 1 claims which are about a distribution of an already adjudicated award. Judges will adjudicate the Track 3 claims, to which we now turn our attention.

### **7. Court Adjudicated Individual Issue Claims under Track 3 (*Distribution and Over-\$50,000 Track*)**

[146] Under Class Counsels' proposed Individual Issues Protocol, if a Class Member makes a claim for compensation for damages of more than \$100,000, the claim would be determined by the court pursuant to a motion procedure akin to a summary judgment motion.

[147] Under Canada's proposed Individual Issues Protocol, there is a Simplified Track, which is a summary motion track, where damages would be determined by a judge, for claims over \$35,000 and up to \$100,000. Under Canada's proposal for claims above \$100,000, the claim would proceed as a regular action to be determined by a judge. Thus, under Canada's proposal, a summary judgment procedure would just be for claims between \$35,000 and \$100,000. Under Class Counsel's proposal, the summary judgment process would be for claims over \$100,000.

[148] The design of the *Draft D&I Protocol* is closer to the proposal of Class Counsel than it is to Canada's. The design of the *Draft D&I Protocol* is that where a Class Member selects Track 3 (*Distribution and Over-\$50,000 Track*), a judge shall determine the Class Member's claim pursuant to a summary judgment procedure.

[149] In Québec, the « *court may determine special methods of proof and procedure* » pursuant to s. 600 of *Code of Civil Procedure*. Given the culture shift required from Canadian judges in *Hryniak v. Mauldin*<sup>59</sup>, justice Masse has no hesitation to conclude that she can determine the Class Member's claim pursuant to the summary judgement procedure applicable in Ontario on the basis of s. 600 or the *Code of Civil Procedure*.

[150] Track 3 of the *Draft D&I Protocol* has a summary judgment procedure for all claims over \$50,000 and unlike Canada's proposal, the *Draft D&I Protocol* would not preclude a summary judgment procedure for claims over \$100,000. Under the *Rules of Civil Procedure*, the summary judgment procedure already factors into its test for granting a summary judgment whether a regular trial is required; rule 20.04 (2) of Ontario's *Rules of Civil Procedure* already provides that the court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial

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<sup>59</sup> 2014 CSC 7, at para. 22-33.

with respect to a claim or defence. In other words, if the claim is not suitable for a summary judgment, then the courts will order a trial.

[151] The approach of the *Draft D&I Protocol* for court-adjudicated claims under Track 3 is as follows:

In this Protocol, “Roster” means the of group of Manager/Experts appointed by the parties or by the court:

- (a) to determine eligibility for a share of the distribution of the Aggregate Damages Award; and.
- (b) to inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Damages Award for Class Members who elect to make a Track 2 claim.

In the Claims Form, a Class Member shall elect to proceed on one of the following tracks:

- (a) Track 1 (Distribution and Release of Claim Track);
- (b) Track 2 (Distribution and Under-\$50,000 Track); or
- (c) Track 3 (Distribution and Over-\$50,000 Track.)

A Class Member whose claim is presumptively barred by a limitation period shall elect to proceed by Track 3.

In the Claims Form, a Class Members shall provide the following information:

- (a) his or her name;
- (b) his or her date of birth;
- (c) his or her Social Insurance Number;
- (d) his or her Prison Number;
- (e) his or her inmate classification;
- (f) the correctional institutions in which he or she was incarcerated;
- (g) the admission date and or transfer date to each of the correctional institutions in which he or she was incarcerated;
- (h) the date of placement and the release date for each placement in administrative segregation
- (i) his or her mailing address, email address, and phone numbers, if any;
- (j) for other than Incarcerated Class Members a direction as to how the Class Members should be paid his or her share of the distribution and his or her individual issues award
- (k) an acknowledgement that the Administrator is authorized to contact the Class Member to obtain further information;
- (l) if other than Class Counsel, the name and contact information for the lawyer retained to act for the Class Member;
- (m) a declaration that the information submitted in the Claims Form is true and correct.



Where the Class Member selects Track 3, he or she shall annex to his or her Claims Form a Statement of Claim.

Within twenty days of receipt of a Claims Form, the Administrator shall provide a copy of the Claims Form and any associated documents to:

- (a) a Manager/Expert from the Roster;
- (b) Class Counsel or the lawyer retained to act for the Class Member; and
- (c) Canada.

Within thirty (30) days of its receipt of a copy of the Claims Form, Canada shall send a copy of the Class Member's CSC file to the Manager/Expert assigned the claim.

A Class Members who selects Track 3 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

Where a Class Member elects to proceed on Track 3, his or her individual issues claim shall be determined in accordance with the Track 3 summary judgment procedure described in this Protocol.

Where a Class Member selects Track 3, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the Administrator and the parties.

There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

For Class Members who select Track 3, the Manager/Expert shall determine only the Class Member's eligibility to receive a share of the distribution of aggregate damages and the balance of the claim shall be determined in accordance with the procedures for Track 3.

Damages awarded under Track 3 shall accrue pre-judgment interest at the rate of 5%, calculated from March 3, 2017. Post-judgment interest shall accrue at the rate of 3%, from the date of the Damages award.

The Class Member's share of the gross aggregate damages award is a credit to the payment of the damages awarded under Tracks 3.

Where the Class Member selects Track 3, the claim shall proceed by an individual issues summary judgment motion in accordance with the Ontario *Rules of Practice* before a judge of the Ontario Superior Court of Justice save and except for Class Members of *Gallone*, whose summary judgment motion shall proceed before a judge of the Superior Court of Québec in accordance with s.600 of the Québec *Code of Civil Procedure* as follows:

- (a) Within twenty days after the receipt of the Claim Form and the Statement of Claim from the Administrator, Canada shall deliver its Statement of Defence;
- (b) Within twenty days after receipt of the Statement of Defence, the Class Member shall deliver:
  - (i) his or her Reply;
  - (ii) a Notice of Motion for Summary Judgment; and
  - (iii) his or her supporting affidavit(s) for the motion.

(c) Within ninety days after receipt of the Class Member's Notice of Motion for Summary Judgment, Canada shall deliver:

(i) an Affidavit of Documents , including the Class Member's CSC medical file and CSC inmate file;

(ii) its affidavits to respond to the summary judgment motion.

(d) Within thirty days after receipt of Canada's responding materials, the Class Member may deliver his or her reply affidavits, if any.

(e) After thirty days from the receipt of Canada's responding materials, the Class Member shall bring a motion to fix a timetable for the balance of the summary judgment motion.

[152] In our opinion, the scheme of the *Draft D&I Protocol* about the determination of individual issues is fair and reasonable and preferable to the approaches of either Class Counsel or Canada.

### **8. Retainer of Class Counsel and the Involvement of the Class Proceedings Fund and the Fonds d'aide aux actions collectives**

[153] The *Draft D&I Protocol* addresses the retainer of Class Counsel and the involvement of the Class Proceedings Fund as follows:

#### *Retainer of Class Counsel*

Unless the Class Member in his or her Claim Form provides the name and contact information for the lawyer retained to act for the Class Member, Class Counsel shall continue to have a solicitor and client relationship with the Class Member.

If a Class Member selects Track 1, then Class Counsel or the lawyer retained to act for the Class Member cannot charge for his or services for the Class Member with respect to the Track 1 claim.

If a Class Member selects Track 2, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member with respect to the Track 2 claim, such fee not to exceed 15% of the damages awarded plus reasonable disbursements.

If the Class Member selects Track 3, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member as may be approved by the court.

#### *Class Proceedings Fund and the Fonds d'aide aux actions collectives*

Where the Class Member selects Tracks 2 or 3, Class Counsel may continue to receive funding from the Class Proceedings Fund ("CPF") or the Fonds d'aide aux actions collectives, subject to its approval.

Where the Class Member selects Tracks 2 or 3, disbursements and indemnities may be provided by the CPF to Class Members of *Reddock* and *Brazeau* classes proceeding before the Ontario Superior Court subject to its approval.

[154] Class Counsels' Protocol for the Individual Issues stage of the class proceeding assumes that: (a) Class Counsel continue to have a lawyer and client relationship with the individual Class Members with attendant fiduciary responsibilities; and (b) the Contingency Fee Agreements with the Representative Plaintiffs continue to operate as do the arrangements with the Class Proceedings Fund with respect to the *Brazeau* and *Reddock* action and with the Fonds d'aide aux actions

collectives with respect to the *Gallone* action.

[155] The *Draft D&I Protocol* treats the retainers of Class Counsel and the involvement of the Class Proceedings Fund and the Fonds d'aide aux actions collectives somewhat differently than proposed by Class Counsel.

[156] The matter of the nature of Class Counsel's lawyer and client relationship with individual class members once a class action reaches the individual issues stage is largely unexplored legal territory in Ontario and Québec.<sup>60</sup>

[157] We would agree with Class Counsel that up until the individual issues stage of the Class Action, Class Counsel is entitled, subject to court approval, to charge a fee for his or her services to the Class in accordance with the contingency fee agreement between Class Counsel and the Representative Plaintiff, which agreement binds the Class Members insofar as Class Counsel is acting for the class (as it is on this motion to settle the Distribution and Individual Issues Protocols). In Québec, s.593 of the *Code of Civil Procedure* allows that fee agreement.

[158] In our opinion, once the action reaches the individual liquidation or recovery stage, the individual Class Member is the one (not the Representative Plaintiff) that gives Class Counsel instructions about these individual issues.

[159] At the individual issues stage, it does not follow that for the individual issues determinations, the individual Class Member is bound by the contingency fee agreement signed by the representative plaintiff. The individual Class Member has his or her own litigation autonomy. He or she does not need a representative plaintiff. The individual Class Member's risk assessments that underlie a contingency fee agreement are now totally different and idiosyncratic and the Class Member is now personally exposed to adverse costs awards.

[160] Once the class action reaches the individual issues stage, the individual Class Member, is free to hire the lawyer of his or her choice. Although hiring a lawyer other than Class Counsel is rarely done and likely would be a foolish decision, given what Class Counsel knows and has learned about the particular class action; nevertheless, in law and in practice, a Class Member is free to hire another lawyer to prosecute the individual issues phases of the action.

[161] This prospect may be a weakness in the Class action regime because other lawyers might poach on the crop of individual issues files harvested by Class Counsel, but it is a theoretical reality.

[162] The approach of the *Draft D&I Protocol* recognizes and responds to the new circumstances of the individual issues phase. The *Draft D&I Protocol* recognizes that it is highly likely that the Class Members will continue to retain Class Counsel, but the protocol acknowledges that a Class Member has the right to retain a different lawyer to prosecute the individual issues.

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<sup>60</sup> Some of these issues are discussed directly or indirectly in: *Cobourn and Watson's Metropolitan Home Ltd. (c.o.b. Metropolitan Home) v. Home Depot of Canada Inc.*, 2019 BCCA 308; *Belley c. TD Auto Finance Services Inc./Services de financement auto TD inc.*, 2018 QCCA 1727; *Trottier c. Canadian Malartic Mine*, 2018 QCCA 1075; *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879; *Filion c. Québec (Procureure générale)*, 2015 QCCA 352; *Imperial Tobacco Canada Ltd. c. Létourneau*, 2012 QCCA 2013; *Barry v. Pulley*, 2011 ONSC 927; *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, aff'g [2008] O.J. No. 4928 (Div. Ct.), aff'g [2008] O.J. No. 1536 (S.C.J.); *Société des loteries du Québec c. Brochu*, 2006 QCCA 1117. P.M. Perell, "Class Proceedings and Lawyers' Conflicts of Interest" (2009), 35 Adv. Q. 202. Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice : impact et évolution*, (Cowansville, Yvon Blais, 2006), p. 9.

The *Draft D&I Protocol* recognizes that while the contingency fee agreement between the Representative Plaintiff and Class Counsel continues to operate for class wide matters, it does not operate for individual Class Members. The *Draft D&I Protocol* addresses the matter of fees for the individual issues phase.

[163] The *Draft D&I Protocol* specifies that if a Class Member selects Track 1, then Class Counsel or the lawyer retained to act for the Class Member cannot charge for his or services for the Class Member with respect to the Track 1 claim. This makes sense because Class Counsel, has already been paid for achieving the Aggregate Damages Award and once the Distribution Protocol is approved by the Court, Class Counsel will be paid in costs for its services in regard for settling the scheme of distribution. For Class Counsel or a new lawyer to receive a fee based just on the individual Class Member's share of the Distribution Protocol is in a sense double billing the Class Member.

[164] The *Draft D&I Protocol* specifies that if a Class Member selects Track 2, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member with respect to the Track 2 claim, but the fee is not to exceed 15% of the damages awarded plus reasonable disbursements.

[165] The maximum recovery for a Track 2 is \$40,000 for a non-SMI Class Member and is \$50,000 for an SMI Class Member. Some of these claims may not be challenged by Canada or may be difficult to challenge. A fee of more than 15% of the damages awarded would not be fair or reasonable, particularly for Class Counsel who already has received almost \$14 million in Counsel fees in *Brazeau and Reddock* based on a much different risk assessment than that of a Track 2 claimant.

[166] The *Draft D&I Protocol* specifies that if a Class Member selects Track 3, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member as may be approved by the court. For Track 3 claims, a contingency fee agreement may be appropriate, but it will be a different agreement than the one between the Representative Plaintiff and Class Counsel.

[167] Before turning to the involvement of the Class Proceedings Fund and Fonds d'aide aux actions collectives, on the topic of retainers, we add that we believe that for the individual issues phase, the court has the jurisdiction to regulate the lawyer and client relationship and the fees of Class Counsel, or the fees of a new lawyer retained by an individual Class Member. The court could, for instance, specify that if a new lawyer was retained, the new lawyer would be obliged to share the fee recovered for the individual issues phase of the proceeding, much like an undertaking to protect a lawyer's account when there is a change of lawyer during a regular action.

[168] Beyond what is described above, the exercise of this regulatory jurisdiction is not necessary in the immediate case, but in other cases, this jurisdiction may be necessary to prevent a new lawyer from what amounts to an after-the-fact carriage fight to expropriate the work of Class Counsel that took the case to the individual issues phase.

[169] Poaching would be particularly unfair in a case where apart from costs, the common issues phase yielded no aggregate damages award and it remained for the individual issues phase for there to be any prize for Class Counsel apart from costs awards. In other words, this jurisdiction to regulate the retainers for the individual issues phase may be necessary to protect the integrity of the class action regime and to encourage Class Counsel to take on cases that may not yield a

recovery until after the individual issues stage, unless, of course, the case settles.

[170] Turning now to the involvement of the Class Proceedings Fund in *Brazeau* and *Reddock* and the Fonds d'aide aux actions collectives in *Gallone*, the courts were advised that they will continue to be involved. As we understand it, this involvement would be automatic with respect to the Fond but the involvement of the Class Proceedings Fund depends on it agreeing to continue to be involved for individual Class Members, which it has agreed to do in the immediate case.

[171] The Class Action Fund is always to be commended for facilitating access to justice as it appears to be doing in the immediate case, but for other cases, it should be noted that it does not automatically follow that the Fund is obliged to underwrite the individual issues phase of action.

## 9. Miscellaneous Matters

[172] Several miscellaneous matters about the *Draft D&I Protocol* should be noted.

[173] The *Draft D&I Protocol* adopts many provisions from the parties' draft protocols that would appear not to be controversial.

[174] While some aspects of the notice to the Class Members are addressed in the *Draft D&I Protocol*, the notice program and the claims form remain to be settled by supplementary order of the courts of Ontario and Québec.

[175] Some matters are left to be resolved outside the protocol. For example, the matter of reports from the Administrator is left, in part, to be governed by s. 24 (12)-(14) of the *Class Proceedings Act, 1992* or by order of the Superior Court of Québec pursuant to its legislation..

[176] The number of Manager/Experts remains to be determined. It may be desirable to make appointments in tranches once the take up of claims is better understood. Manager/Experts could be recruited from across Canada and there would be English-speaking, French-speaking and Aboriginal languages-speaking Manager/Experts.

[177] The *Draft D&I Protocol* specifies the remuneration to be paid to a Manager/Expert and that Canada shall pay the Manager/Experts. To be clear, for a Track 1 decision, which is just about for eligibility to a share of the Aggregate Damages Award, a Manager/Expert would be paid \$1,000 for each decision. For a Track 2 matter, which is about both eligibility and also an individual issues report, the Manager/Expert would be paid \$5,000 for each decision and report. For a Track 3 decision, which is again just about eligibility, a Manager/Expert would be paid \$1,000 for each decision.

[178] The *Draft D&I Protocol* specifies for Track 2 claims that in addition to the an affidavit from the Class Member, he or she may annex to the Claim Form no more than two affidavits of no more than 30 pages in length, including exhibits, from a person who would be qualified to be a Manager/Expert under this Protocol. There is a similar provision for Canada to file no more than two affidavits from a deponent who would be qualified to be a Manager/Expert under the Protocol, which is to say that the deponent must be licensed or registered to practice medicine (which would include psychiatry), psychology, psychotherapy, psychiatric nursing, or psychiatric social work. The idea here is that the Manager/Expert and the deponents will have a common scientific expertise and knowledge base.

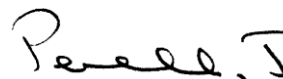
**D. Conclusion**

[179] In accordance with the Adjournment Endorsement, the parties shall have 30 days to show cause in writing why the *Draft D&I Protocol* should not be made final Orders for the respective courts. Those written submissions shall be simultaneously exchanged.

[180] Before releasing a final decision, the respective courts may provide further directions as to whether there should be oral submissions in addition to the written submissions. If we conclude that oral submissions are not necessary, then we shall release our final decision.



Masse, J.



Perell, J.

Released: November 25, 2020

## **Schedule "A": Individual Issues Protocol for *Brazeau***

This document sets out a proposed framework for the determination of compensatory and punitive damages owing to Class Members (or "**Claimants**") in this action as a result of being placed in administrative segregation, in breach of their *Charter* rights ("**Individual Claims**") as further particularized in the decision of Justice Perell dated March 25, 2019. This plan also contemplates the 15-day temporal threshold set out by the Court of Appeal for Ontario in *CCLA v. Canada* 2019 ONCA 243.

This plan shall govern the procedure for the final resolution of the Individual Claims pursuant to s. 25 of the *Class Proceedings Act, 1992*.

All Individual Claims must be delivered within five (5) years of the commencement of the operation of this litigation plan. This deadline may be extended by further order of the Court.

### **I. Monetary Limits**

The applicable procedure for the resolution of the Individual Issues shall be governed by the monetary amount of the Individual Claim, not including costs or prejudgment interest, based on the following two levels:

- Claims of \$100,000 or less
- Claims over \$100,000

Each Class Member shall make an irrevocable election to make a claim of \$100,000 or less or a claim of over \$100,000 in its Notice of Individual Claim (as outlined below). All Class Members who assert that any applicable limitations period was tolled by virtue of their mental illness, or for other reasons, must proceed by way of Individual Issues Trials (see Section IV below).

### **II. Uniform Procedures**

The following procedure shall be applicable to all claims, regardless of the amount at issue. For all Individual Claims, the Individual Issues Litigation Plan provides the following uniform procedures:

- (a) The Defendant shall deliver an all-inclusive offer ("**Settlement Offer**") for the Class Member's claim within 30 business days of receiving a Notice of Individual Claim.
- (b) The Class Member shall have 30 days from receipt of the Settlement Offer to accept or, alternatively, make a counteroffer. The Defendant will have 15 days from receipt to accept any counteroffer. If the Class Member's claim is not settled within 65 days, or if the Class Member rejects the Settlement Offer, then the matter shall proceed to Resolution.
- (c) If at any point an offer to settle is accepted, the Defendant shall provide payment of settlement funds to Koskie Minsky LLP, in trust, within 30 days. Koskie Minsky LLP shall make the settlement funds available to the claimant, less fees, disbursements and the Class Proceedings Fund levy, within 30 days of receipt of funds from Canada.
- (d) As a term of settlement, the Class Member will execute a release of all claims related to administrative segregation of the Class Member by the Defendant.

All damages shall accrue prejudgment interest at the rate of 5%, calculated from March 3, 2017. Post judgment interest shall accrue at the rate of 3%, from the date of the Damages Determination or the award of damages by the Ontario Superior Court of Justice. However, the Damages Grid shall not be adjusted to reflect inflation that takes place following the approval of this Individual Issues Litigation Plan.

This Individual Issues Litigation Plan may be amended by further order of the Court on such terms as it considers just.

### III Targeted Procedures

#### A. Claims of \$100,000 Or Less

1. Such claims shall proceed on a paper record. Punitive damages shall not be available to this group. Damages for such claims shall be calculated according to the Grid, defined below and such damages shall be completely determinative of all potential heads of damages.
2. The Claimant shall serve a Notice of Individual Claim on the Defendant and a Medical Adjudicator (defined below). A Notice of Individual Claim shall consist of an affidavit of less than ten (10) pages setting out: a) diagnoses at the time of segregation; b) the length of time in segregation; c) effects of segregation; d) current condition, including any lasting effects of segregation; and e) any other relevant facts relating to the Claimant's time in segregation.
3. The Defendant shall serve the Claimant's CSC medical file and relevant segregation records on Class Counsel, the Medical Adjudicator and the Claimant, along with a Defendant's Statement of Position less than seven (7) pages long, within 60 days of receipt of the Notice of Individual Claim.
4. The Claimant shall have 15 days to make reply submissions in the form of an affidavit of less than seven (7) pages.
5. The Medical Adjudicator shall cross-reference the Claimant's and Defendant's submissions against the medical file and segregation files. The Medical Adjudicator shall determine whether the Claimant is a member of the Class. In so doing, he or she will make the following determinations:
  - (a) whether mental diagnoses are on file and if so, whether those diagnoses are included in the class definition;
  - (b) whether the claimant was suffering from symptoms that satisfy Appendix "A" in the class definition and if so, describe what symptoms and when; and,
  - (c) The Medical Adjudicator shall apply their findings to the Damages Grid (set out below) and shall make a Written Recommendation of 10 pages or less.
6. The Medical Adjudicator shall draft a written recommendation ("**Written Recommendation**") which shall be served on the Referee within 60 days of receiving the Class Member's submissions, the Defendant's submissions and the medical file.
7. The Referee shall make a final, binding and non-appealable determination ("**Final Determination**"), having regard to the findings of fact and law in the Reasons and the Court of Appeal for Ontario's reasons in *CCLA v. Canada*, 2019 ONCA 243. The Final Determination shall state:
  - (a) whether the Claimant is a Class Member;
  - (b) If the Claimant is a Class Member, whether damages are available to the Claimant under the Damages Grids;
  - (c) If the Claimant was placed in segregation for less than 15 days, whether the facts surrounding the placement justify an award of *Charter* damages;
  - (d) whether the Claimant's entitlement to damages should be adjusted from the recommendation of the Medical Adjudicator, considering (a), (b) and (c).
8. The Referee shall deliver a final determination of damages ("**Damages Determination**") in reasons of five (5) pages or less to the Claimant, Class Counsel and the Defendant. The Damages Determination shall attach the Medical Adjudicator's Written Recommendation. In a circumstance where the Referee does not follow the recommendation of the Medical Adjudicator, the Referee shall explain his or her reasoning in the Damages Determination.
9. The Defendant shall make payments ("**Damages Payment**") to Koskie Minsky, LLP in trust, within 30 days of delivery of the Damages Determination.
10. If the Damages Determination is higher than the Settlement Offer, the Claimant shall receive \$2,000 in costs, in addition to the Damages Payment. If the Damages Determination is lower than the Settlement Offer, the Defendant shall receive \$2,000 in costs, reduced from the damages Payment. If the Damages Determination is less than \$2,000 the Claimant shall not be required to pay costs to the Defendant.



## B. Damages Grids

The Medical Adjudicator shall make a determination of the Claimant's General Assessment of Functioning ("GAF") score during their time in administrative segregation based on the Claimant's and Defendant's sworn affidavits and their review of the medical and segregation file.

Damages shall begin to accrue after fifteen (15) continuous days in segregation. For those who spent less than fifteen (15) continuous days in segregation, the Referee may have regard to the Claimant's individual circumstances and commence the quantification of damages before fifteen (15) days have elapsed.

There shall be no difference in the quantification of damages for "voluntary" or "involuntary" segregation.

The following per diem damages analysis shall apply:

- GAF score 40-50 - \$100 per day (up to 30 days) \$200 per day (30-60 days) \$300 per day (60-90 days) \$400 (90-120 days) \$500 per day (over 120 days)
- GAF Score 30-40 - \$200 per day (up to 30 days), \$300 per day (30-60 days), \$400 (60-90 days), \$500 per day (over 90 days)
- GAF Score 20-30 - \$300 per day (up to 30 days), \$400 per day (30-60 days), \$500 per day (over 60 days)
- GAF Score 10-20 \$400 per day (up to 30 days), \$500 per day (over 30 days).
- GAF Score 0-10 - \$500 per day.

In addition to the per diem award set out above, the Medical Adjudicator and/or Referee may award damages for additional injury resulting from segregation. The following Damages Grid may be used to assist in determining Claimant's damages for Psychiatric Harm, in claims for under \$100,000, but should not be understood to be an exhaustive list of possible injuries:<sup>61</sup>

<b>Injury</b>	<b>Low Range</b>	<b>Max/Cap</b>
<i>Post-traumatic stress disorder</i>	\$25,000	\$100,00
<i>Depression</i>	\$20,000	\$100,00
<i>Non-suicidal self-injurious behavior</i>	\$25,000	\$100,00
<i>Suicidal ideation</i>	\$20,000	\$100,00
<i>Suicide Attempt</i>	\$55,000	\$100,00

## C. Roster of Independent Medical Adjudicators and Referee

Class Counsel and the Defendant shall agree on a roster of five independent medical adjudicators and one Referee. Each independent Medical Adjudicator shall be a psychiatrist or psychologist in good standing with their respective colleges or professional associations. In the event the parties cannot agree on the roster of medical adjudicators and Referee, the parties shall attend before Justice Perrell for a case management conference to determine the issue.

The Cost of the claims process for claims of \$100,000 or less shall be borne by the Defendant.

## IV. Claims Over \$100,000 or more – Individual Issues Trials

1. If the Class Member elects to make a claim valued at over \$100,000, they shall proceed by way of "Individual Issues Motion". The Class Member shall serve the Defendant with a Notice of Claim, setting out the material facts relied on and the quantum of damages sought.
2. The Class Member shall receive production of all relevant documentation, including their medical records and segregation records from the Defendant, within 60 days of service of their Affidavit in Support of Claim.
3. The Claimant may challenge the sufficiency of the Defendant's productions by filing a motion with the Court

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<sup>61</sup> The Damages Grid is based on an assessment of the case law and the previous amounts awarded therein, as well as an assumed cap of \$100,000.

(“**Production Motion**”) within 15 days of receiving the productions.

4. If the Claimant wishes to make a claim for continuing psychological or physical damage or pecuniary loss, they must undertake to produce all relevant medical records and other evidence from after their release from administrative segregation (including post-release from custody). This documentation shall be included in the Claim Record.
5. The Class Member shall serve and file a claim record (“**Claim Record**”) within 90 days of receipt of records from the Defendant, and the Claim Record will include any evidence in support of their Individual Issues Motion.
6. The Defendant shall serve and file a responding claim record (“**Responding Claim Record**”) within 90 days of the receipt of the Claim Record. The Responding Claim Record shall contain all responding evidence.
7. Any Reply Claim Record shall be filed within 30 days of receipt of the Responding Claim Record. The Reply Claim Record shall contain reply evidence.
8. The Claimant shall make written submissions of 30 pages or less within 30 days of service of the Responding Claim Record or Reply Claim Record (if served). The Defendant shall make responding written submissions of 30 pages or less within 30 days of service of the Claimant's written submissions. The Claimant may make reply submissions of 10 pages or less within 10 days of service of the responding submissions.
9. The Individual Issues Trial shall be heard as a half-day motion before a judge of the Ontario Superior Court of Justice. The Court shall make an award of damages, if the Class Member is successful.
10. Class Counsel shall retain carriage of the Individual Issues Trials. Class Counsel may prosecute the Individual Issues Trials in a consortium with another law firm or firms. Class Counsel shall determine what counsel or firms are suitable to prosecute the Individual Issues Trials.
11. All Individual Issues Trials shall proceed on a paper evidentiary record pursuant to the *Rules of Civil Procedure* as a motion under *Rule 20*. All evidence, including expert evidence (if applicable), shall be tendered in affidavit form and cross-examinations shall take place out of Court.
12. In determining damages, the Court will have regard to, but is not bound by, the Damages Grid, and the Court may award punitive damages.
13. The Claimants will continue to receive funding from the Class Proceedings Fund (“**CPF**”) for the Individual Trials Phase. Disbursements and indemnities for individual issues shall be provided by the CPF. Costs of the Individual Issues Trials shall operate in the ordinary course according to the *Rules of Civil Procedure*.
14. All Class Members who assert that any applicable limitations period was tolled by virtue of their mental illness, or for other reasons, must proceed by way of Individual Issues Trials.

#### **V. Counsel Fees**

1. Class Counsel shall retain carriage of the determination of all Individual Claims. Class Counsel may prosecute the Individual Claims in a consortium with another law firm or firms. Class Counsel shall determine what counsel or firms are suitable to prosecute the Individual Claims.
2. The contingency fee set out in the retainer agreements between the representative plaintiffs and Class Counsel shall apply to all damages payable under this Individual Issues Litigation Plan. More specifically, a 33.3% counsel fee shall apply against all Damages Payments. Class Counsel shall receive its fee out of each Damages Payment. After the counsel fee, disbursements for the litigation of the individual claim shall be reimbursed and the 10% levy shall be paid to the CPF. The remainder of the Damages Payment shall be payable to the Claimant.
3. Class Counsel, acting on the instructions of a particular Class Member, may transfer carriage of their Individual Issues Motion to another law firm. Class Counsel shall retain an entitlement to 10% of the Damages Payment of such Class Members in the event a damages award becomes available.
4. Class Counsel may cease to act for a particular Class Member if Class Counsel determines that the Class Member is providing instructions that are not in their own best interest. In such circumstances, Class Counsel shall advise the Class Member in writing and will advise the Class Member to retain other counsel (but shall not be required to assist in the retention of new counsel). Class Counsel shall retain an entitlement to 10% of the Damages Payment of such Class Members in the event a damages award becomes available.

## **Schedule “B”: Canada’s Individual Issues Protocol**

This document (“**Protocol**”) sets out Canada’s proposed framework for the determination of individual claims including damages claims above and beyond the compensation already awarded through the aggregate damages awards in *Brazeau*, *Reddock*, and *Gallone*.

This Protocol shall govern the procedure for the final resolution of the Individual Claims pursuant to s. 25 of the *Class Proceedings Act, 1992*. It covers individual claims for compensation for harms suffered by Class Members (or “**Claimants**”) as a result of being placed in administrative segregation, contrary to their *Charter* rights (“**Claims**”). The procedure is further particularized in the Reasons for Decision of Justice Perell in *Brazeau* dated March 25, 2019 and May 28, 2020, and in *Reddock* dated August 29, 2019.

Where this Protocol specifies procedural rules under the Ontario *Rules of Civil Procedure*, comparable rules under the *Civil Code of Québec* will be applied in the *Gallone* proceeding (as required) at a later time.

### **I. Supervising Judge**

1. For the purpose of this Protocol, the Supervising Judge is the judge who decided the respective Class Action (*Brazeau*, *Reddock*, *Gallone*) (“**Supervising Judge**”). The Supervising Judge retains jurisdiction to resolve any dispute arising under this Individual Issues Protocol.

### **II. Claims Deadline**

2. Claimants wishing to file a Claim must do so within one year of the final resolution of the Claimant’s entitlement to their distribution of the aggregate award in either *Reddock*, *Brazeau*, or *Gallone*. (“**Claims Deadline**”).
3. Any Claim received after the Claims Deadline will not be accepted except with leave of the Supervising Judge.

### **III. Small Claims and Simplified Tracks**

4. There will be two separate tracks for all Claims under this Protocol: a Small Claims Track and a Simplified Track.

#### **Small Claims Track**

5. The following Claims must proceed in the Small Claims Track:

- (a) Claims up to (and including) \$35,000; and
- (b) where the only issue is quantum of damages above and beyond the aggregate damages already awarded.

6. Claims in the Small Claims Track must be limited to the quantum of damages for harm suffered and any consequential loss of opportunity suffered as a result of being placed into administrative segregation and cannot include any additional grounds of liability or tolling of limitation periods.

7. Claims under the Small Claims Track shall be adjudicated by a Referee chosen from a list of Referees agreed to by the parties. The Supervising Judge, with input from the parties, will predetermine a standard remuneration fees for Referees in the Small Claims Track. Canada agrees to pay for the remuneration fees of the Referees.

8. Referees will be responsible for determining:

- (a) Whether a Claim falls within the scope of the Referee’s authority under paragraphs 5 and 6 above;
- (b) Whether, and to what extent, the Claimant suffered additional harm beyond the base level of harm that justified the aggregate damages award;
- (c) If so, whether the additional harm was caused by the Claimant’s placement in administrative segregation;
- (d) Whether, and to what extent, the Claimant suffered any consequential loss of opportunity as a result of their placement;
- (e) Considering any relevant mitigating or aggravating factors and considering the amount of aggregate damages already received, whether the claimant is entitled to compensation above and beyond the aggregate damages already awarded;

- (f) If so, the quantum of such compensation; and
- (g) Whether the Claimant or Defendant is entitled to legal costs (limited to a maximum of 15% of the amount of the damages assessment) and reasonable disbursements.

9. Claims in the Small Claims Track shall be determined in writing based on the written record before the Referee.
10. Except with leave of the Supervising Judge, all Claims in the Small Claims Track shall proceed on a paper evidentiary record pursuant to the Ontario *Rules of Civil Procedure* as a motion under Rules 20 and 55.01. All evidence, including any expert evidence, shall be filed in affidavit form and cross-examinations (if any) shall take place out of court.
11. Referees shall assess monetary compensation for losses in relation to the Claim that it considers just, based on the principles of compensation for *Charter* damages applied by the courts.
12. Referees are required to give brief written reasons for their decisions and those reasons shall be deemed to be a report for the purpose of Rule 54 of the *Rules of Civil Procedure*.
13. Unless the Supervising Judge orders otherwise, Claimants who fail to submit a Summary Judgment Motion within two years of filing a Claim are deemed to be dismissed for delay.
14. Awards in the Small Claims Track cannot exceed \$35,000 plus legal costs (limited to a maximum of 15% of the amount of the damages assessment) and reasonable disbursements.
15. Any disagreement over a decision of a Referee is to be addressed by way of a confirmation motion before the Supervising Judge in accordance with Rule 54 of the *Rules of Civil Procedure*.

#### **b. Simplified Track**

16. Subject to paragraph 17, Claims for an amount over \$35,000, or where there are issues beyond the quantum of damages above and beyond the aggregate damages already awarded, must proceed in the Simplified Track.
17. Claims above \$35,000 up to (and including) \$100,000 will proceed by way of motion for Summary Judgment (Rule 20 of the *Rules of Civil Procedure*).
18. Claims above \$100,000 will proceed as an action in accordance with the *Rules of Civil Procedure*.
19. Class Counsel and Counsel for the Defendant may agree on the following for use in any Simplified Track Claim:
  - a common list of documents;
  - common affidavit(s) for CSC background information.
  - a common roster of agreed upon experts;
  - a common list of authorities,
20. For greater certainty, any Claims:
  - seeking to establish *Charter* violations beyond those found in a Claimant's class Order for Judgment (*Brazeau* - March 25, 2019 or *Reddock* – August 29, 2019, *Gallone* – September 10, 2020);
  - for punitive damages; or
  - seeking to rebut the limitations period (*Reddock* and *Brazeau*),
 must proceed in the Simplified Track.

#### **IV. Settlement of Claim**

21. Any claim may be identified by the parties for settlement.
22. Offers to settle are to be made in writing.
23. Rule 49 of the *Rules of Civil Procedure* shall apply to offers to settle, but legal costs associated with a settled claim in the Small Claims Track cannot exceed 15% of the award.

#### **V. Legal Principles**

24. All Claims are limited to claims for monetary compensation for harm, opportunity loss, and punitive damages resulting from placement in administrative segregation. Claimants may also challenge limitations periods. No other

forms of relief are available under the Protocol.

25. For all Claims, Claimants bear the burden of proof.

26. The standard of proof in all Claims is the civil standard of a balance of probabilities.

27. Unless a Claim is resolved by way of settlement, in order to be eligible for compensation, Claimants must prove that their placement into administrative segregation caused the alleged harms that are above and beyond the base level of harm established in the common issues phase of their class action.

28. All damages shall accrue pre-judgment interest at the rate of 1.285% calculated from the first relevant period in administrative segregation or from the date the Claimant's class claim was issued, whichever is later.

29. Under both the Small Claims and Simplified tracks, the parties retain the right to cross-examine affiants adverse in interest, including medical experts and reserve the right to have Claimants attend an independent medical examination.

#### **VI. Document Production**

30. Within 90 days of receipt of a Claim Form under the Small Claims or Simplified track for compensation under this Protocol, the Defendant must produce the following documents:

- (a) Claimant's case management records showing the number of placements in segregation, the institution(s) where the inmate was located and the total number of days spent in segregation;
- (b) Documents relating to the incidents or events that lead to the segregation placement;
- (c) Documents relating to admission, segregation review and discharge from segregation;
- (d) Relevant psychological and medical records.

31. In the Simplified Track, any issue relating to document production shall be resolved in the normal way under the *Rules of Civil Procedure*. In the Small Claims Track, any issue relating to documents productions shall be resolved by the Referee by way of motion in writing.

#### **VII. Decisions and Payments**

32. If settlement between the parties is reached, the Defendant shall pay the Claimant within 60 days of reaching an agreement.

33. Upon receipt of a final decision, the Defendant shall make the Damages Payment within 60 days of receipt of the decision. No post-judgment interest is payable.

#### **VIII. Referees**

34. A roster of Referees shall be developed with agreement of the parties, pursuant to Rule 54 of the *Rules of Civil Procedure*.

## **Schedule “C”: Class Counsels’ Distribution and Individual Issues Protocol**

### **PART I - GENERAL PRINCIPLES**

1. The procedures set forth herein shall govern the distribution of the aggregate damages awarded to the Classes in these class proceedings as well as the claims process for individual issues claims.
2. The Administrator shall:
  - (a) implement and conform to orders of the Courts and this Protocol; and
  - (b) employ secure, paperless, web-based systems with electronic registration and record-keeping where possible.

### **PART II - DEFINITIONS**

3. For the purpose of this Protocol, the following definitions apply:
  - (a) Administrator means Epiq, or such other administrator as the Courts may appoint from time to time on a motion by Class Counsel.
  - (b) Canada means the Defendant, the Attorney General of Canada.
  - (c) Claims Form means the electronic or paper claims form that a Class Member in either matter must complete and submit before the Claims Filing Deadline in order to be considered for benefits under this Distribution Protocol.
  - (d) Claims Filing Deadline means the date by which Claims (and any required supporting documentation) must be electronically submitted, sent via mail, or received in person at one of the Administrator’s office in order for Class Members to be considered for damages under this Distribution Protocol, which date shall be nine (9) months after the first publication of Notice in accordance with section 5(d), below.
  - (e) Class Counsel means McCarthy Tétrault LLP and Koskie Minsky LLP in *Reddock v. Canada*, Koskie Minsky LLP in *Brazeau v. Canada* and Trudel Johnston & Lespérance in *Gallone v. Canada*.
  - (f) Class Members and Classes are defined in the Reddock and Brazeau Certification Orders, there having been no valid opt-outs, and the Gallone Authorization Judgement.
  - (g) Courts means the Ontario Superior Court of Justice and the Québec Superior Court of Justice.
  - (h) Collective Damages Award means the award of aggregate damages, costs, and interest in favour of the Class, together with any applicable interest in favour of the Class, less:
    - (i) Class Counsel’s fees and disbursements as approved by the Courts;
    - (ii) The Class Proceedings Fund’s levy, only applicable to the Reddock and Brazeau actions; and
    - (iii) any other deductions approved by the Courts.
  - (i) Gallone Action means the class proceeding styled Gallone c. Procureur général du Canada before the Superior Court of Québec, File No. 500-06-000781-167.
  - (j) Incarcerated Class means all inmates who were detained in administrative segregation for more than 15 days from March 3, 2011 to present and remain incarcerated or otherwise in the custody of the Correctional Service of Canada.
  - (k) Individual Damages Award means the award of aggregate damages, costs, and interest in favour of the Class, together with any applicable interest in favour of the Class, less:
    - (i) Class Counsel’s fees and disbursements as approved by the Courts;
    - (ii) The Class Proceedings Fund’s levy, only applicable to the Reddock and Brazeau actions; and

(iii) Any other deductions approved by the Courts.

(l) Notice means the Notice of Judgment.

(m) Prolonged Segregation Class means all members of the Reddock Class and the Gallone Non-SMI subgroup.

(n) Roster means the of group of Medical Referees and/or Claims Referees selected by agreement among the parties, or failing that, at the direction of the Courts. The Medical Referees will have appropriate medical training, experience or knowledge and will be responsible for determining whether Claimants are SMI Class or Prolonged Segregation Class members. The Claims Adjudicators will be responsible for assessing the per diem entitlements of Claimants under the Simplified Track.

(o) SMI Class means all members of the *Brazeau* Class and the *Gallone* SMI subgroup.

### **PART III - DISTRIBUTION OF NOTICE**

4. Once nominated, the Administrator will set up a campaign to publicize and disseminate the Notice.

5. The Notice and Claims Form will be in a form to be approved by the Court on submission of Class Counsel no later than ten (10) days after the date of this Order,

6. The Notice can be adapted as necessary to the method of communication and target audience, with the consent of Class Counsel. For example, if some advertising campaign platforms require a shorter notice, the Administrator may adapt the content of the Notice to Class Members to better reach Class Members.

7. The advertising campaign will run in three phases: one at the start of the Claims Period, the second around the middle of the claims period, and the third approximately two months before the end of the claims period.

8. The advertising campaign shall include the following measures:

(a) Canada shall provide the Notice, together with a postage paid return envelope, to every person who is incarcerated in a federal correctional institution, and Canada shall make available reasonable facilities for Class members to complete the Claims Form;

(b) Class Counsel shall post the Notice, together with the French language translations of these documents, on Class Counsel and the Administrator's respective websites;

(c) The Administrator shall purchase 10 million impressions, targeted across Canada over a two-month period following the date of this Order, of digital banner advertisements linking to the Notice on websites such as Facebook, Google, YouTube, and the like.

(d) Within thirty (30) days of the Court approval of the Notice and Claims form, the Administrator shall place the Notice of Judgment in the national edition of the *Globe and Mail*, in ¼ of a page size, in the weekend edition, if possible;

(e) Within thirty (30) days of the Court approval of the Notice and Claims form, the Administrator shall place the French version of the Notice in *La Presse*, in ¼ of a page size, in the weekend edition, if possible;

(f) Within thirty (30) days of the Court approval of the Notice and Claims form, the Administrator shall place the Notice in the *Journal de Montréal* and *Journal de Québec*, in ¼ of a page size, in the weekend edition, if possible;

(g) Within thirty (30) days of the Court approval of the Notice and Claims form, the Administrator shall distribute the Notice to all offices of the organizations listed in Appendix A;

(h) Within thirty (30) days of the Court approval of the Notice and Claims form, the Defendant shall post the Notice and a reasonable quantity of copies of the Claims Form in a conspicuous place within the common area of each federal correctional institution, visible to Class Members, and provide reasonable facilities to complete the Claims Form;

(i) The Defendant shall provide a reasonable quantity of copies to every Federal Parole Office in Canada. Each parolee who attends in person at such offices shall be provided with a copy of the Notice. In addition, a copy of the Notice shall be posted in a conspicuous place within a visible area of the

Parole office, and the parole office shall provide reasonable facilities to complete the Claims Form.

9. Furthermore, to ensure extensive dissemination of the Notice, the Administrator shall:

- (a) Provide the Notice to any Class member who requests it, together with a postage paid return envelope;
- (b) Provide bilingual services and ensure that the Notice is available in both English and French;
- (c) Establish a toll-free support line to provide assistance to class members, family, guardians or agency staff, or other persons who make inquiries on their own behalf or on behalf of Class Members; and
- (d) Allow Class Members to attend at its offices in order to obtain, complete, or submit the Claims Form and receive any payment they are due, public health guidelines permitting.

#### **PART IV - THE CLAIMS PROCESS**

10. Class members shall have the opportunity to either claim compensation only from the Collective Damages Award or claim compensation from the Collective Damages Award and make a claim for an additional, Individual Damages Award.

11. The applicable procedure for the resolution of the Individual Damages Awards shall be governed by the monetary amount of the Individual Claim, not including costs and pre judgment interest, based on the following two levels:

- (a) Simplified Track: Claims of \$100,000 or less
- (b) Motion Track: Claims for more than \$100,000

12. All damages shall accrue pre-judgment interest at the rate of 5%, calculated from March 3, 2017. Post judgment interest shall accrue at the rate of 3%, from the date of the Damages Determination or the award of damages by the Ontario Superior Court of Justice or Québec Superior Court of Justice. However, the Damages Grid shall not be adjusted to reflect inflation that takes place following the approval of this Individual Issues Protocol.

13. This Protocol may be amended by further order of the Court on such terms as it considers just.

#### **The Claim**

14. Class Members may file Claims Forms until the Claims Filing Deadline. After the Claims Filing Deadline, Class Members may only file Claims Forms with leave of the Courts, which shall retain jurisdiction to allow late claims on such terms as are just.

15. Class Members who wish to be part of the Claims Process shall complete the Claims Form and return it to the Administrator. The Claims Form will ask:

- (a) Whether the claimant meets the conditions of membership in the Prolonged Segregation Class or the SMI class, and whether the claimant satisfied these conditions only in Québec and only after February 24, 2013;
- (b) Whether the Administrator is authorized to contact the claimant to obtain further information;
- (c) The claimant's contact details;
- (d) The claimant's desired means of payment, and;
- (e) A declaration that the information submitted in the Claims Form is true and correct.

16. The Administrator shall create an Online Claims Portal that Class Members can access in order to file a Claims Form and shall provide the necessary administrative support to enable Class Members to do so.

17. Class Members shall be encouraged to complete and submit a Claims Form electronically using the online claims portal. If the Class member does not have internet access or is otherwise unable to submit a Claims Form using the online claims portal, the Class Member may register over the telephone with the Administrator and the Administrator shall send the Class Member a hard copy Claims Form by mail.

18. Public health guidelines permitting, the Administrator will allow Class Members to submit Claims Forms in person at their offices.



### **Extension of the Claims Filing Deadline**

19. Class Counsel may move before the Courts to extend the Claims Filing Deadline if, in their opinion, doing so will further the fair and efficient administration of the Collective or Individual Damages Award and promote the best interests of the Class Members.

### **PART V - DETERMINATION OF CLASS MEMBERSHIP**

20. No later than 60 days after this adoption of this Protocol, Canada will provide Class Counsel, the Administrator and the Roster with the following information for all Class members::

- (a) The name of the inmate;
- (b) The inmate's Prison number;
- (c) The inmate's classification;
- (d) The admission date and release date of each placement in segregation;
- (e) The number of days spent in segregation per placement;
- (f) The name of the establishment where each placement in segregation occurred.

21. The information set out above will be provided in Microsoft Excel format or the like.

22. All information received from the Defendant, Class Counsel, or Class Members that is retained by the Administrator for the purposes of administering this Protocol, is protected under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000 c. 5.

23. A Roster of Medical Referees and/or Claims Referees will be selected by agreement among the parties, or failing that, at the direction of the Courts to be determined no later than ninety (90) days from the date of this Order. The Medical Referees will have appropriate medical training/experience and will be responsible for assessing whether Claimants are SMI Class or Prolonged Segregation Class members. The Claims Referees will be responsible for assessing the *per diem* entitlements of Claimants under the Simplified Track.

24. Upon receipt of completed Claims Forms, the Administrator will deliver those claims to Canada and Class Counsel on a rolling basis and no more than five (5) days from their receipt.

25. Within thirty (30) days of its receipt of the Claims Form or upon the appointment of the Roster, whichever is later, Canada will send a copy of the inmate's CSC file to the offices of the Roster.

26. Where the claimant has elected to proceed by way of the Simplified Track, Canada shall also provide the following information about the Class member to the Roster within thirty (30) days of its receipt of the Claims Form:

- (a) The admission date and release date of each of their placements in segregation;
- (b) The number of days spent in segregation per placement;
- (c) The name of the establishment where each placement in segregation occurred.

27. For each Claims Form claiming SMI damages, the question of the Claimant's membership in the SMI Class will be referred to a Medical Referee from the Roster.

28. The Medical Referee will review the Claimant's CSC file and Claims Form and apply the Class definitions to determine whether the Claimant is a SMI Class or Prolonged Segregation Class member. This determination will be completed within ninety (90) days of their receipt of the CSC file, and will be made with reasons no longer than five (5) pages in length.

29. With approval of the Courts, the Medical Adjudicators may adopt objective criteria to identify claimants who meet the Class definitions in order to streamline the classification process.

30. Class Counsel or Canada may appeal to the Courts from the decision of the Medical Adjudicator, but the standard of review will be palpable and overriding error and the Courts will target the disposition of the appeal in writing within sixty (60) days of receiving notice. There will be no further appeal.

## **DETERMINATION OF INDIVIDUAL DAMAGES AWARD**

### **Simplified track: claims of \$100,000 or less**

31. Such claims shall proceed on a paper record with data provided by Canada.
32. Such claims will be limited to general damages. By electing to pursue their claims in the Simplified Track, Claimants will be agreeing to release all other claims arising from their Administrative Segregation placements and will only pursue a claim of less than \$100,000 for pain and suffering directly attributable to the time spent in solitary confinement. For clarity, other heads of damages, including inter alia specific psychological injuries and lost income, as well as punitive damages will not be available in the Simplified Track.
33. Members of the Prolonged Segregation Class will receive compensation for stays that have lasted longer than 15 days. Unless the Court orders otherwise, these Claimants shall have their per diem damages calculated from the 16th day on.
34. Members of the SMI class shall receive compensation for stays of any duration during the class periods. Unless the Court orders otherwise, these Claimants shall have their *per diem* damages calculated from the 1st day on.
35. Any award of damages pursuant to the Simplified Track shall be capped at \$100,000 no matter the duration of the Claimant's stay or stays in Administrative Segregation.

(a) Claimants who elect to proceed by way of the Simplified Track will have their Claims for Individual Damage Awards assessed thirty (30) days of receipt of the Claims Form or the final determination of their SMI Class membership, as may be, whichever is later (the "Simplified Damages Determination") by a Roster Claims Adjudicator within applying the following principles: Damages for such claims shall be calculated on a per diem basis. The per diem quantum's will be as follows:

(i) \$300/day for the Brazeau class and SMI members of the Gallone class (SMI class);  
and

(ii) \$200/day for the Reddock class and non-SMI members of the Gallone class (Prolonged segregation class);

(b) Damages for such claim will be reduced by the sum of any awards made to them as part of the distribution of any Collective Damages Award; and

(c) Administrative Segregation placements will be considered one Continuous Placement in Administrative Segregation if:

(i) the placements are separated by 24 hours or less, or;

(ii) the placements are interrupted by a transfer to another institution and continued after the transfer.

### **Motion Track - Claims Over \$100,000 or more**

36. If the Claimant elects to make a claim for more than \$100,000, the claim shall proceed by way of "Individual Issues Motion". The Claimant shall serve the Defendant with a Notice of Claim, setting out the material facts relied on and the quantum of damages sought.

37. Class members have the right to terminate their solicitor-client relationship with Class Counsel if they wish to pursue an individual claim on the Motion Track against Class Counsel's recommendation.

38. If the Defendant have the instructions required for a settlement of a claim under the Motion Track, the following procedure shall be applicable to the Motion Track:

(a) the Defendant shall deliver an all-inclusive offer ("Settlement Offer") for the Claimant's claim within 30 business days of receiving a Notice of Individual Claim;

(b) The Claimant shall have 30 days from receipt of the Settlement Offer to accept or, alternatively, make a counter-offer. The Defendant will have 15 days from receipt to accept any counter-offer. If the Claimant's claim is not settled within 65 days, or if the Claimant rejects the Settlement Offer, then the matter shall proceed to Resolution by way of the Motion Track.

(c) As a term of settlement, the Claimant will execute a release of all claims related to Administrative Segregation of that Claimant by the Defendant.

39. Within 60 days of service of the Claimant's Affidavit in Support of the Claim, the Defendant shall produce to the Claimant all relevant documentation, including the Claimant's complete CSC medical file and segregation records.

40. The Claimant may challenge the sufficiency of the Defendant's productions by filing a motion with the Court ("Production Motion") within 15 days of receiving the productions.

41. At any point during this procedure, the Ontario Superior Court of Justice or the Québec Superior Court, as the case may be, shall retain the explicit ability to refer claims to a Referee with medical training pursuant to s. 25(1)(b) of the *Class Proceedings Act, 1992* and 158 of the *Québec Code of Civil Procedure* and article 600 of the *Québec Code of Civil Procedure* once the Court has set clear guidelines in its initial decisions.

42. The Claimant shall serve and file a claim record ("Claim Record") within 90 days of receipt of the productions from the Defendant, as set out above, or the dismissal of a Production Motion, and the Claim Record will include any evidence in support of their Individual Issues Motion.

43. If the Claimant wishes to make a claim for losses that continued after the conclusion of the sentence in which he or she was last detained in prolonged Administrative Segregation (the "Segregation Sentence"), the Claimant shall produce all relevant medical records and any other evidence from after their release from Administrative Segregation, including post-release from custody, on which they intend to rely. This documentation shall be included in the Claim Record.

44. The Defendant shall serve and file a responding claim record ("Responding Claim Record") within 90 days of service of the Claim Record. The Responding Claim Record shall contain all responding evidence. The Reply Claim Record shall only contain reply evidence.

45. Within 30 days of the expiry of the time to serve a Reply Claim Record, the Claimant shall serve and file written submissions of 30 pages or less. Within 30 days of the service of the Claimant's written submissions, the Defendant shall serve and file written submissions of 30 pages or less. Within 15 days of the service of the Defendant's written submissions, the Claimant may serve and file reply submissions of 10 pages or less within 10 days of service of the reply submissions.

46. If the Claimant is a member of the Reddock or Brazeau Classes and a member of the *Gallone* Class, the Individual Issues Motion shall be heard as a half-day summary determination before a judge of the Ontario Superior Court of Justice or the Québec Court of Justice, depending on the Claimant's residence. The Court shall determine the Claimant's entitlement to damages, if the Claimant is successful. Otherwise the Ontario Superior Court of Justice will hear the Individual Issues Motions in Reddock and Brazeau, and the Québec Superior Court of Justice will hear the Individual Issues Motions in *Gallone*.

47. All Individual Issues Motions shall proceed on a paper evidentiary record pursuant to the Rules of Civil Procedure as a motion under Rule 20 for Reddock and Brazeau and as directed by the Québec Superior Court under article 158 of the Québec Code of Civil Procedure for members of the *Gallone* class. All evidence, including expert evidence (if applicable), shall be tendered in affidavit form and cross-examinations shall take place out of Court.

48. The Defendant shall deduct from any award in favour of the Claimant any amount that the Claimant received as Collective Damages Award, provided however, that said deduction shall not exceed the amount of the Damages Payment.

49. Successful Claimants will be entitled to seek their costs, pursuant to the rules applicable to the court where the Motion is filed.

50. During the individual issues claims process, Claimants and Class Counsel will continue to receive funding from the Class Proceedings Fund ("CPF") and the Fonds d'aide aux actions collectives, subject to its approbation. Disbursements and indemnities for individual issues shall be provided by the CPF to members of the Reddock and Brazeau classes proceeding before the Ontario Superior Court.

51. Canada will pay any Individual Damages Award ordered by the Court to Koskie Minsky LLP, McCarthy Tetrault LLP or Trudel Johnston & Lespérance in trust, within 30 days of the final disposition of the Motion Track claim. Amounts owing to the Class Proceedings Fund or the Fonds d'aide aux actions collectives, amounts owing for disbursement reimbursement or amounts owing for counsel fees shall be paid out by counsel out of the Individual

Damages Awards.

52. The remainder of any amounts paid in respect of Individual Claims will be paid to the Claimant within 30 days of the receipt of funds by Class Counsel and the exhaustion of the Defendant's rights of appeal.

#### **PART VI - PAYMENT OF CLAIMS**

53. The Administrator will pay the Collective Damages Awards to all Claimants on a date no later than ninety (90) days after the close of the Claims Filing Deadline, or the final determination of any Claimants' SMI Class membership, whichever is later.

54. The Collective Damages Award will be calculated on a pro-rata basis for the Prolonged Segregation Class and the SMI class, respectively.

55. The Administrator will also pay the Individual Damages Awards for those who elect to proceed by way of the Simplified Track on that same date and as part of the same payment as the Collective Damages Awards. The quantum of these Individual Damages Award payments will be the quantum of the Simplified Damages Determination, less the levy and disbursements due to the Class Proceedings Fund or the Fonds d'aide aux actions collectives, and any counsel fees due to Koskie Minsky, LLP, McCarthy Tétrault LLP, or Trudel Johnston Lesperance. . Canada will be responsible for ensuring the Administrator has the funds required to make such payments possible.

56. Unless members of the Incarcerated Class direct otherwise, and so long as they remain incarcerated at a Federal Institution, the Administrator will pay any damages set out above directly to their prisoner account. Otherwise, claimants will be paid by their chosen means of payment, as specified in their Claims Form or indicated to the Administrator, whichever is most recent.

57. On the same date as the Collective Damages Awards and Individual Awards from the Simplified Track are paid to claimants, the Administrator will pay to the Class Proceedings Fund and the Fonds d'aide aux actions collectives dues as well as fees to Koskie Minsky, LLP, McCarthy Tétrault LLP, or Trudel Johnston as per the respective fees agreements.

#### **PART VII - COUNSEL REPRESENTATION**

58. By default, Class Counsel shall retain carriage of the determination of all Individual Claims. However, class members who ask for Individual Damages Award will have the right to terminate their solicitor-client relationship with Class Counsel if they wish to pursue their individual claims under the Motion Track against Class Counsel's recommendation.

#### **PART VIII - THE SUPERVISORY POWERS OF THE COURTS**

59. The Administrator shall administer this Protocol under the ongoing authority and supervision of the Courts and the Courts shall have jurisdiction to amend this Protocol as required in the interests of justice on a motion by Class Counsel or by Canada, or on either of the Courts' own motion.

#### **PART IX - INVESTMENT OF AGGREGATE AWARDS**

60. The Administrator shall hold the Collective Damages Awards in a guaranteed investment vehicle, liquid money market account or equivalent security with a rating equivalent to or better than that of a Canadian Schedule I bank (a bank listed in Schedule I of the *Bank Act*, S.C. 1991, c. 46), held at a Canadian financial institution.

61. The Administrator will account to the Courts at the conclusion of the distribution of the Collective and Individual Damages Awards, with copy to Class Counsel and Canada.

#### **PART X - COMMUNICATION, LANGUAGES AND TRANSLATION**

62. The Administrator shall establish a toll-free number for calls from Canada, with French and English options available.

63. The Administrator shall dedicate sufficient personnel to respond to Class Members' inquiries in English or French, as the Class Member elects.

64. All written communications from the Administrator to a Class Member shall be transmitted via email, if an email is provided, unless the Class Member indicates a preference to receive communications by regular mail.

**PART XI - UNDELIVERABLE MAIL**

65. Except as provided above in “Part III – Distribution of Notice”, the Administrator shall have no responsibility for locating Class Members for any mailing returned to the Administrator as undeliverable, unless the Class Member has provided an alternative form of communication, in which case the Administrator will attempt the alternative form of communication once and thereafter shall have no responsibility for locating Class Members.

66. The Administrator shall have the discretion, but is not required, to reissue payments to a Class Member that were returned as undeliverable, as the Administrator deems appropriate.

**PART XII - REPORTING**

67. The Administrator shall provide regular reports to Class Counsel regarding the administration of this Protocol.

68. The Administrator shall provide any reports requested by the Courts.

**PART XIII - PRESERVATION AND DISPOSITION OF CLAIM SUBMISSIONS**

69. The Administrator shall preserve, in hard copy or electronic form, as the Administrator deems appropriate, all documents relating to a Claim, until two years after all funds have been paid as set out above, and at such time the Administrator shall destroy the documents by shredding, deleting, or such other means as will render the materials permanently illegible.

**PART XIV - ASSISTANCE TO THE ADMINISTRATOR**

70. The Administrator shall have the discretion to enter into such contracts and obtain financial, accounting, and other expert assistance as are reasonably necessary in the implementation of this Distribution Protocol.

**PART XV - CONFIDENTIALITY**

71. All information received from the Defendant or Class Members, used and retained by the Administrator for the purposes of administering the Distribution Protocol, is protected under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000 c. 5. The information provided by Class Members is strictly private and confidential and will not be disclosed, except to Class Counsel, or with the express written consent of the relevant Class Member, or as required by law. Prior to implementing the Distribution Protocol, the Administrator shall execute an undertaking that confirms its commitment to abide by the obligations set out in this paragraph.

**FUNDING**

72. Canada shall be solely responsible for paying the cost of this Protocol, including the cost of Notice, distribution, the Referees and the Administrator.

**APPENDIX A**

- Elizabeth Fry Society
- John Howard Society
- Aboriginal Legal Services
- West Coast Prison Justice Society Prisoners’ Legal Services
- Association des services de réhabilitation sociale du Québec, and all Member Organisations
- All Halfway Houses across Canada

## **Schedule “D”: Draft Distribution and Individual Issues Protocol**

### **1. – General**

1.1 Pursuant to the *Class Proceedings Act, 1992*, and the *Québec Code of Civil Procedure*, this Protocol governs:

- (a) the distribution of the Aggregate Damages Award in:
  - i. *Brazeau v. Canada (Attorney General)* (“*Brazeau*”);
  - ii. *Reddock v. Canada (Attorney General)* (“*Reddock*”); and
  - iii. *Gallone c. Canada (Attorney General)* (“*Gallone*”); and,
- (b) the procedures for the determination of the individual issues in *Brazeau*, *Reddock*, and *Gallone*.

1.3. This Protocol may be amended by further order of the Court.

1.4 In this Protocol:

“Canada” means the Defendant, the Attorney General of Canada.

“Class Counsel” means (a) Koskie Minsky LLP in *Brazeau*; (b) McCarthy Tétrault LLP and Koskie Minsky LLP in *Reddock*; and (c) Trudel Johnston & Lespérance in *Gallone*.

“Court” means the Ontario Superior Court of Justice or the Superior Court of Québec.

1.5 For this Protocol, “Class Member” and “Class” are defined by the *Reddock* and *Brazeau* Certification Orders and by the *Gallone* Authorization Judgment.

1.6 For this Protocol, “Incarcerated Class Member” means a Class Member during the period from March 3, 2011 to present and who remains incarcerated or otherwise in the custody of the Correctional Service of Canada.

1.7 Nothing in this Protocol precludes the parties from settling a claim proceeding on Tracks 2 or 3 of the Protocol.

### **2. Retainer of Class Counsel**

2.1 Unless the Class Member in his or her Claim Form provides the name and contact information for the lawyer retained to act for the Class Member, Class Counsel shall continue to have a solicitor and client relationship with the Class Member.

2.2 If a Class Members selects Track 1, then Class Counsel or the lawyer retained to act for the Class Member cannot charge for his or services for the Class Member with respect to the Track 1 claim.

2.3 If a Class Member selects Track 2, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member with respect to the Track 2 claim, such fee not to exceed 15% of the damages awarded plus reasonable disbursements.

2.4 If the Class Member selects Track 3, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member as may be approved by the court.

### **3. Class Proceedings Fund and the Fonds d'aide aux actions collectives**

3.1 Where the Class Member selects Tracks 2 or 3, Class Counsel may continue to receive funding from the Class Proceedings Fund ("CPF") or the Fonds d'aide aux actions collectives, subject to its approval.

3.2 Where the Class Member selects Tracks 2 or 3, disbursements and indemnities may be provided by the CPF to Class Members of *Reddock* and *Brazeau* classes proceeding before the Ontario Superior Court subject to its approval.

### **4. Administrator**

4.1 "Administrator" means Epiq, or such other administrator as the courts may appoint from time to time on a motion by Class Counsel.

4.2 The Administrator shall invest the Aggregate Damages Award at a Bank listed in Schedule I of the *Bank Act*, S.C. 1991, c. 46.

4.3 The Administrator shall distribute the Notice and the Claims Form in accordance with a notice and distribution plan approved by the court.

4.4 Where mail to a Class Member is returned to the Administrator as undeliverable, the Administrator shall have no responsibility for locating the Class Member.

4.5. The Administrator shall provide a bilingual (English and French) toll-free support line to assist Class Members, family, guardians or agency staff, or other persons who make inquiries on behalf of Class Members.

4.6 No later than sixty (60) days after the approval of this Protocol, Canada shall provide the Administrator and Class Counsel with the following information in an electronic spreadsheet format (Microsoft Excel or the like) for each inmate incarcerated in a correctional institution during the Class Periods of *Brazeau*, *Reddock*, and *Gallone*:

- (a) his or her name;
- (b) his or her Prison Number;
- (c) his or her inmate classification;
- (d) the correctional institutions in which he or she was incarcerated;
- (e) the admission date and or transfer date to each of the correctional institutions in which he or she was incarcerated;
- (f) the date of placement and the release date for each placement in administrative segregation.

4.7 Upon receipt of a Claims Form, the Administrator shall examine the form to determine if it is complete, and if it is not complete, the Administrator shall complete the form, if possible, with the database of information provided by Canada and/or may contact the Class Member to obtain further information to complete the Form, if possible to do so.

4.8 Within twenty days of receipt of a Claims Form, the Administrator shall provide a copy of the Claims Form and any associated documents to:

- (a) a Manager/Expert from the Roster;

- (b) Class Counsel or the lawyer retained to act for the Class Member; and
- (c) Canada.

4.9 For Track 1 Claims, the Administrator shall pay the Class Member's share of the Aggregate Damages award within sixty days after the Roster of Manager/Experts has determined all timely submitted Claims Forms.

4.10 For Track 2 and Track 3 Claims, the Administrator shall hold the Class Member's share of the Aggregate Damages Award in trust pending the completion of the Class Member's Track 2 or Track 3 Claim, after which the Administrator shall pay the Class Member his or her share.

4.11 For Track 2 and Track 3 Claims, the Administrator shall pay:

- (a) any amounts owing to the Class Proceedings Fund or the Fonds d'aide aux actions collectives including reimbursement for disbursements;
- (b) Class Counsel's or the lawyer retained by the Class Member's fee; and
- (c) the balance of the damages award, along with the Class Member's share of the Aggregate Damages Award, to the Class Member.

4.12 Where there are unclaimed funds from the distribution of the Aggregate Damages Award, the Administrator shall make a *cy-près* payment as the court may direct.

4.13 The Administrator shall pay any monies owing to a Class Member of the Incarcerated Class to his or her prisoner account, unless the Class Member directs otherwise.

4.14 The Administrator may but is not required, to reissue payments to a Class Member that were returned as undeliverable.

4.15 The Administrator shall comply with the *Personal Information Protection and Electronic Documents Act*, S.C. 2000 c. 5.

4.16 After the distribution of:

- (a) the Aggregate Damages Assessment;
- (b) any awards for Track 2 or 3 Class Member Claimants; and
- (c) any *cy-près* payments, the Administrator shall apply to be discharged and shall file with the court a report containing their best information respecting the following:
  1. The total number of Class Members Claimants.
  2. The number of Class Members who received notice associated with the distribution, and a description of how notice was given.
  3. The number of Class Members who made a claim pursuant to Track 1, 2, or 3 respectively.
  4. The amounts distributed to Class Members and others and a description of how the awards were distributed.
  5. The administrative costs associated with the distribution of the award.

4.17 Upon being discharged as Administrator, the Administrator shall retain in hard copy or electronic form, all documents relating to a Claim for two years after which the Administrator shall destroy the documents.



4.18 The fees and expenses of the Administrator under this Protocol shall be paid by Canada as approved by the court.

## **5. Notice**

5.1. In this Protocol, “Notice” means the Notice of Judgment in *Brazeau, Reddock, and Gallone* in English and in French that has been approved by the court.

5.2 The cost of the Notice and the Notice Program shall be paid by Canada.

5.3 Class Counsel shall post the Notice and the Claims Form on its website.

5.4 The Administrator shall post the Notice and the Claims Form on its website.

5.5 The Administrator shall provide the Notice and the Claims Form to any Class Member who requests it, together with a postage paid return envelope.

5.6 Within thirty (30) days of the court approval of the Notice and Claims Form, the Administrator shall distribute the Notice and the Claims Form to all offices of:

- (a) Elizabeth Fry Society;
- (b) John Howard Society; Aboriginal Legal Services;
- (c) West Coast Prison Justice Society Prisoners’ Legal Services;
- (d) Association des services de réhabilitation sociale du Québec; and
- (e) Halfway Houses across Canada.

5.7 Canada shall provide the Notice, together with a postage paid return envelope, to every Incarcerated Class Member, and Canada shall make available reasonable facilities for Class Members to complete the Claims Form.

5.8 Within thirty (30) days of the Court approval of the Notice and Claims Form, Canada shall post the Notice and a reasonable quantity of the Claims Form in a conspicuous place within the common area of each federal correctional institution and provide facilities to complete the Claims Form.

5.9 Canada shall provide a reasonable quantity Claims Forms to every Federal Parole Office in Canada, and each parolee who attends at such offices shall be provided with a copy of the Notice. In addition, a copy of the Notice and the Claims Form shall be posted in a conspicuous place within a visible area of the Parole Office, and the Canada shall provide facilities at the Parole Office for parolees to complete the Claims Form.

## **6. Manager/Experts**

6.1 In this Protocol, “Roster” means the of group of Manager/Experts appointed by the parties or by the court:

- (a) to determine eligibility for a share of the distribution of the Aggregate Damages Award; and.
- (b) to inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Damages Award for Class Members who elect to make a Track 2 claim.

6.2 No later than ninety (90) days from the of the court approval of the Notice and Claims Form, Class Counsel and Canada shall constitute the Roster of Manager/Experts failing which the courts

shall appoint the Manager/Experts to constitute the Roster from a list of candidates submitted by Class Counsel and or Canada.

6.3 A Manager/Expert shall be:

- (a) a person licensed to practice medicine in any Canadian jurisdiction;
- (b) a person licensed to practice psychology in any Canadian jurisdiction;
- (c) a person registered as a psychotherapist in any Canadian jurisdiction;
- (d) a person registered as a psychiatric nurse in any Canadian jurisdiction; or
- (e) a person licensed as a psychiatric social worker in any Canadian Jurisdiction.

6.4 After a Manager/Expert's decision is released, Canada shall pay that Referee:

- (a) \$1,000 for a Track 1 or Track 3 decision; and
- (b) \$5,000 for a Track 2 decision and report.

## **7. Distribution and Individual Issues Protocols**

7.1. Aggregate Damages Award means the gross award of aggregate damages, costs, and interest made in *Brazeau*, *Reddock*, and *Gallone*, less:

- (a) Class Counsel's fees and disbursements as approved by the Courts;
- (b) the Class Proceedings Fund's levy, applicable to the *Reddock* and *Brazeau* actions;
- (c) the allocation to the Fond d'aide aux actions collective; and
- (d) any other deductions approved by the Courts

(for a net aggregate damages award of approximately \$28.0 million).

7.2 A share in Aggregate Damages Award is equal to the Aggregate Damages Award divided by the number of Class Members eligible to receive a share as determined by the Roster of Manager/Experts.

7.3. Claims Form" means the electronic or paper claims form in English or in French that a Class Member must complete and submit before the Claims Filing Deadline to participate in the distribution of the aggregate damages and to have his or her individual issues determined in *Brazeau*, *Reddock* and *Gallone*.

7.4. Claims Filing Deadline means the date by which the Claims Form (and the required supporting documentation) must be electronically submitted, sent via mail, or received in person by the Administrator, which date shall be one year after the first publication of Notice.

7.5 Before the Claims Filing Deadline, a Class Member may submit a Claims Form (and the required supporting documentation) to the Administrator.

7.6 After the Claims Filing Deadline, with leave of the court, Class Members may file Claims Forms for Tracks 2 or 3, and leave shall be granted only if the Class Member establishes that the failure to file a timely Claims Form was due to circumstances beyond his or her control or that provide a reasonable explanation for the delay.

7.7 In the Claims Form, a Class Member shall elect to proceed on one of the following tracks:

- (a) Track 1 (*Distribution and Release of Claim Track*).
- (b) Track 2 (*Distribution and Under-\$50,000 Track*).
- (c) Track 3 (*Distribution and Over-\$50,000 Track*).

7.8 A Class Member whose claim is presumptively barred by a limitation period shall elect to proceed by Track 3.

7.9. In the Claims Form, a Class Members shall provide the following information:

- (a) his or her name;
- (b) his or her date of birth;
- (c) his or her Social Insurance Number;
- (d) his or her Prison Number;
- (e) his or her inmate classification;
- (f) the correctional institutions in which he or she was incarcerated;
- (g) the admission date and or transfer date to each of the correctional institutions in which he or she was incarcerated;
- (h) the date of placement and the release date for each placement in administrative segregation
- (i) his or her mailing address, email address, and phone numbers, if any;
- (j) for other than Incarcerated Class Members a direction as to how the Class Members should be paid his or her share of the distribution and his or her individual issues award
- (k) an acknowledgement that the Administrator is authorized to contact the Class Member to obtain further information;
- (l) if other than Class Counsel, the name and contact information for the lawyer retained to act for the Class Member;
- (m) a declaration that the information submitted in the Claims Form is true and correct.

7.10 Where the Class Member selects Track 2, he or she may annex to his or her or her Claims Form:

- (a) an affidavit from the Class Member of no more than 30 pages in length, including exhibits, in support of the Track 2 Claim;
- (b) no more than two affidavits of no more than 30 pages in length, including exhibits, from a person who would be qualified to be a Manager/Expert under this Protocol;
- (c) the transcript of any cross-examinations; and,
- (d) a factum of no more than 30 pages.

7.11 Where the Class Member selects Track 3, he or she shall annex to his or her Claims Form a Statement of Claim.

7.12 Within thirty (30) days of its receipt of a copy of the Claims Form, Canada shall send a copy of the Class Member’s CSC file to the Manager/Expert assigned the claim.

7.13 Where the Class Member selects Track 2, Canada may also deliver to the Manager/Expert and to the Class Member:

- (a) an affidavit from a representative of the Canada Correctional Service of no more than 30 pages in length, including exhibits, in opposition to the Track 2 Claim;
- (b) no more than two affidavits of no more than 30 pages in length, including exhibits, from a person who would be qualified to be a Manager/Expert under this Protocol;
- (c) the transcript of any cross-examinations; and
- (d) a factum of no more than 30 pages..

*Track 1 Claims*

7.14 A Class Members who selects Track 1 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

7.15 Where a Class Member elects to proceed on Track I, he or she shall be deemed to have released Canada from all other claims arising from his or her placement(s) in administrative segregation.

7.16 Where a Class Member selects Track 1, the Manager/Expert shall determine the Class Member’s eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member’s CSC file and the Manager/Expert shall report his or her decision to the parties and the Administrator.

7.17 There is no appeal of the Manager/Expert’s decision with respect to a Class Member’s eligibility to receive a share of the Aggregate Damages Award.

*Track 2 Claims*

7.18 A Class Members who selects Track 2 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

7.19 Where a Class Member elects to proceed on Track 2, he or she shall be deemed to have released Canada from all claims arising from his or her placement(s) in administrative segregation save for the claims as set out in the damages grid set out below:

<b>Criteria for Award</b>	<b>Award</b>
15-60 days in administrative segregation	Up to \$10,000
More than 60 days in administrative segregation	Up to \$20,000
SMI Eligible	Up to \$10,000
Any one or more of: Post-traumatic stress disorder, Severe Clinical Depression, Self-injurious behavior, substantial degradation in Axis I Disorder (excluding substance use disorders), or substantial degradation of Borderline Personality Disorder (“BPD”)	Up to \$20,000

7.20 Where a Class Member selects Track 2, after the parties have delivered their affidavits, a deponent may be summonsed for an out of court cross-examination by the opposing party, with the duration of the cross-examination not to exceed 60 minutes.

7.20 Where a Class Member selects Track 2, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the Administrator and the parties.

7.21 There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

7.22 Where a Class Member selects Track 2, the parties are bound by the findings of fact made in the *Brazeau*, *Reddock*, and *Gallone* actions including causation of harm and the Manager/Expert shall inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the individual issues award by reviewing the Claims Form, the Class Member's CSC file, and the affidavits and factums filed by the Class Member and Canada.

7.23 The Manager/Expert shall report his or her decision as to eligibility to the Administrator and the parties and the Manager/Expert's report to the court shall be no more than ten pages in length.

7.24 Where a Class Member selects Track 2, after the Manager/Expert delivers his or her report to the court, either party may move for an Order confirming the Report of the Manager/Expert.

7.25 Where a Class Member selects Track 2, the court may award costs not to exceed \$6,000.

7.26 Damages awarded under Track 2 shall accrue pre-judgment interest at the rate of 5%, calculated from March 3, 2017. Post-judgment interest shall accrue at the rate of 3%, from the date of the Damages award

7.27 The Class Member's share of the gross aggregate damages award is a credit to the payment of the damages awarded under Tracks 2.

7.28 Where the Class Member makes a successful claim under Track 2, Canada shall pay any award to the Administrator within 30 days after the final disposition of the claim.

### *Track 3 Claims*

7.29 A Class Members who selects Track 3 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

7.30 Where a Class Member elects to proceed on Track 3, his or her individual issues claim shall be determined in accordance with the Track 3 summary judgment procedure described in this Protocol.

7.31 Where a Class Member selects Track 3, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the Administrator and the parties.

7.32 There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

7.33 For Class Members who select Track 3, the Manager/Expert shall determine only the Class Member's eligibility to receive a share of the distribution of aggregate damages and the balance of the claim shall be determined in accordance with the procedures for Track 3.

7.34 Damages awarded under Track 3 shall accrue pre-judgment interest at the rate of 5%, calculated from March 3, 2017. Post-judgment interest shall accrue at the rate of 3%, from the date of the Damages award

7.35 The Class Member's share of the gross aggregate damages award is a credit to the payment of the damages awarded under Tracks 3.

7.36 Where the Class Member selects Track 3, the claim shall proceed by an individual issues summary judgment motion in accordance with the Ontario *Rules of Practice* before a judge of the Ontario Superior Court of Justice save and except for Class Members of *Gallone*, whose summary judgment motion shall proceed before a judge of the Superior Court of Québec in accordance with s. 600 of the Québec *Code of Civil Procedure* as follows:

(a) Within twenty days after the receipt of the Claim Form and the Statement of Claim from the Administrator, Canada shall deliver its Statement of Defence;

(b) Within twenty days after receipt of the Statement of Defence, the Class Member shall deliver:

(i) his or her Reply,

(ii) a Notice of Motion for Summary Judgment, and

(iii) his or her supporting affidavit(s) for the motion.

(c) Within ninety days after receipt of the Class Member's Notice of Motion for Summary Judgment, Canada shall deliver:

(i) an Affidavit of Documents including the Class Member's CSC medical file and CSC inmate file;

(ii) its affidavits to respond to the summary judgment motion.

(d) Within thirty days after receipt of Canada's responding materials, the Class Member may deliver his or her reply affidavits, if any.

(e) After thirty days from the receipt of Canada's responding materials, the Class Member shall bring a motion to fix a timetable for the balance of the summary judgment motion.

7.37 Where a Class Member selects Track 3, the parties are bound by the findings of fact made in the *Brazeau*, *Reddock*, and *Gallone* actions.

## Schedule “E”: Ontario Statutory Provisions

### *Class Proceedings Act 1992, S.O. 1992, c. 6*

#### *Court may determine conduct of proceeding*

12. The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[...]

#### *Aggregate assessment of monetary relief*

24. (1) The court may determine the aggregate or a part of a defendant’s liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant’s monetary liability; and
- (c) the aggregate or a part of the defendant’s liability to some or all class members can reasonably be determined without proof by individual class members.

#### *Average or proportional application*

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

#### *Idem*

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

#### *Court to determine whether individual claims need to be made*

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

#### *Procedures for determining claims*

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

#### *Idem*

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

- (a) the use of standardized proof of claim forms;
- (b) the receipt of affidavit or other documentary evidence; and

- (c) the auditing of claims on a sampling or other basis.

*Time limits for making claims*

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

*Idem*

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.

*Extension of time*

(9) The court may give leave under subsection (8) if it is satisfied that,

- (a) there are apparent grounds for relief;
- (b) the delay was not caused by any fault of the person seeking the relief; and
- (c) the defendant would not suffer substantial prejudice if leave were given.

*Court may amend subs. (1) judgment*

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

*Individual issues*

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.

*Directions as to procedure*

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

*Idem*

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

- (a) dispense with any procedural step that it considers unnecessary; and
- (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.



*Time limits for making claims*

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

*Idem*

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

*Extension of time*

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).

*Determination under cl. (1) (c) deemed court order*

(7) A determination under clause (1) (c) is deemed to be an order of the court.

*Judgment distribution*

26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.

*Idem*

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.

*Idem*

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.

(4)-(6) Repealed: 2020, c. 11, Sched. 4, s. 23 (1).

*Supervisory role of the court*

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

*Payment of awards*

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate.

*Costs of distribution*

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.

*Return of unclaimed amounts*

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

*Duty of person, entity administering distribution*

(11) A person or entity administering the distribution of an award under section 24 or 25 shall do so in a competent and diligent manner.

*Report*

(12) No later than 60 days after the date on which an award made under section 24 is fully distributed, including any distribution under subsection (10) or section 27.2, the person or entity who administered the distribution shall file with the court a report containing their best information respecting the following:

1. The amount of the award.
2. The total number of class members.
3. Information respecting the number of class members identified in each affidavit filed under subsection 5 (3) in the motion for certification.
4. The number of class members who received notice associated with the distribution, and a description of how notice was given.
5. The number of class members who made a claim for monetary relief and, of them, the numbers of class members who did and who did not receive the relief.
6. The amount of the award distributed to class members and a description of how the award was distributed.
7. The amount and recipients of any distribution under subsection (10) or section 27.2.
8. The number of class members who opted out of the class proceeding.
9. The smallest and largest amounts distributed to class members, the average and the median of the amounts distributed to class members, and any other aggregate data respecting the distribution that the person or entity who administered the distribution considers to be relevant.
10. The administrative costs associated with the distribution of the award.
11. The solicitor fees and disbursements.
12. Any amount paid to the Class Proceedings Fund established under the Law Society Act or to a funder under a third-party funding agreement approved under section 33.1.

13. Any other information the court requires to be included in the report.

*Same*

(13) Once the court is satisfied that the requirements of subsection (12) have been met with respect to a filed report, the court shall make an order approving the report and append the report to the order.

*Same*

(14) If the regulations so provide, the person or entity who administered the distribution, or such other person or entity as may be prescribed, shall provide, in accordance with the regulations, a copy of the approved report to the person or entity specified by the regulations

*Judgment on common issues*

27. (1) A judgment on common issues of a class or subclass shall,

- (a) set out the common issues;
- (b) name or describe the class or subclass members;
- (c) state the nature of the claims or defences asserted on behalf of the class or subclass; and
- (d) specify the relief granted.

*Effect of judgment on common issues*

(2) A judgment on common issues of a class or subclass does not bind,

- (a) a person who has opted out of the class proceeding; or
- (b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

*Idem*

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

- (a) are set out in the certification order;
- (b) relate to claims or defences described in the certification order; and
- (c) relate to relief sought by or from the class or subclass as stated in the certification order.

***Rules of Civil Procedure, R.R.O. 1990, Reg. 194.***

**INTERPRETATION**

*General Principle*

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

**Proportionality**

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

*Matters Not Provided For*

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

[...]

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

[...]

DISPOSITION OF MOTION

*General*

[...]

20.04 (2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

*Powers*

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

*Oral Evidence (Mini-Trial)*

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

*Only Genuine Issue Is Amount*

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

*Only Genuine Issue Is Question Of Law*

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

[...]

WHERE TRIAL IS NECESSARY

*Powers of Court*

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

*Directions and Terms*

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

- (i) there is a reasonable prospect for agreement on some or all of the issues, or
- (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

[...]

[...]

## COURT APPOINTED EXPERTS

### *Appointment by Judge*

52.03 (1) On motion by a party or on his or her own initiative, a judge may, at any time, appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the action.

(2) The expert shall be named by the judge and, where possible, shall be an expert agreed on by the parties.

### *Contents of Order Appointing Expert*

(3) The order shall contain the instructions to be given to the expert and the judge may make such further orders as he or she considers necessary to enable the expert to carry out the instructions, including, on motion by a party, an order for,

(a) inspection of property under Rule 32; or

(b) the physical or mental examination of a party under section 105 of the Courts of Justice Act.

### *Remuneration of Expert*

(4) The remuneration of an expert shall be fixed by the judge who appoints the expert, and shall include a fee for the expert's report and an appropriate sum for each day that attendance at the trial is required.

(5) The responsibility of the parties for payment of the remuneration of an expert shall be determined in the first instance by the judge.

[...]

### *Report*

(7) The expert shall prepare a report and send it to the registrar and the registrar shall send a copy of the report to every party.

(8) The report shall be filed as evidence at the trial of the action unless the trial judge orders otherwise.

[...]

*Liability of Parties for Remuneration of Expert*

(11) The liability of the parties for payment of the remuneration of the expert shall be determined by the trial judge at the end of the trial, and a party who has paid the expert in accordance with a determination under subrule (5), if not the party determined to be liable for payment under this subrule, shall be indemnified by the party determined to be liable.

## APPLICATION OF RULES 54 AND 55

54.01 Rules 54 and 55 apply to references directed,

[...]

(b) under a statute, subject to the provisions of the statute.

## WHERE REFERENCE MAY BE DIRECTED

*Reference of Whole Proceeding or Issue*

54.02 (1) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference of the whole proceeding or a reference to determine an issue where,

- (a) all affected parties consent;
- (b) a prolonged examination of documents or an investigation is required that, in the opinion of the judge, cannot conveniently be made at trial; or
- (c) a substantial issue in dispute requires the taking of accounts.

[...]

## TO WHOM REFERENCE MAY BE DIRECTED

*Judge or Officer*

54.03 (1) A reference may be directed to the referring judge, to another judge with that judge's consent, to a registrar or other officer of the court or to a person agreed on by the parties.

*Person Agreed on by Parties*

(2) Where a reference is directed to a person agreed on by the parties, the person is, for the purposes of the reference, an officer of the court directing the reference.

(3) The judge directing a reference to a person agreed on by the parties may,

- (a) determine his or her remuneration and the liability of the parties for its payment;
- (b) refer that issue to the person to whom the reference is directed; or
- (c) reserve that issue until the report on the reference is confirmed.

## ORDER DIRECTING A REFERENCE

54.04 (1) An order directing a reference shall specify the nature and subject matter of the reference and who is to conduct it and may,

- (a) direct in general terms that all necessary inquiries be made, accounts taken and costs assessed;

- (b) contain directions for the conduct of the reference; and
- (c) designate which party is to have carriage of the reference.

[...]

(3) A referee has, subject to the order directing the reference, all the powers these rules give to a referee.

[...]

#### REPORT ON REFERENCE

54.06 A referee shall make a report that contains his or her findings and conclusions.

#### REPORT MUST BE CONFIRMED

54.07 (1) A report has no effect until it has been confirmed.

[...]

#### CONFIRMATION ON MOTION WHERE REPORT BACK REQUIRED

54.08 (1) Where the order directing a reference requires the referee to report back, the report or an interim report on the reference may be confirmed only on a motion to the judge who directed the reference on notice to every party who appeared on the reference, and the judge may require the referee to give reasons for his or her findings and conclusions and may confirm the report in whole or in part or make such other order as is just.

(2) Where the judge who directed the reference is unable for any reason to hear a motion for confirmation, the motion may be made to another judge.

#### CONFIRMATION BY PASSAGE OF TIME WHERE REPORT BACK NOT REQUIRED

##### *Fifteen-Day Period to Oppose Confirmation*

54.09 (1) Where the order directing a reference does not require the referee to report back, the report or an interim report on the reference is confirmed,

(a) immediately on the filing of the consent of every party who appeared on the reference;  
or

(b) on the expiration of fifteen days after a copy, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced, unless a notice of motion to oppose confirmation of a report is served within that time.

##### *To Whom Motion to Oppose Confirmation Made*

(2) A motion to oppose confirmation of a report shall be made to a judge other than the one who conducted the reference.

##### *Notice of Motion to Oppose Confirmation*

(3) A notice of motion to oppose confirmation of a report shall,

(a) set out the grounds for opposing confirmation;



(b) be served within fifteen days after a copy of the report, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced; and

(c) name the first available hearing date that is at least three days after service of the notice of motion.

*Motion for Immediate Confirmation*

(4) A party who seeks confirmation before the expiration of the fifteen-day period prescribed in subrule (1) may make a motion to a judge for confirmation.

*Disposition of Motion*

(5) A judge hearing a motion under subrule (2) or (4) may require the referee to give reasons for his or her findings and conclusions and may confirm the report in whole or in part or make such other order as is just.

[...]

GENERAL PROVISIONS FOR CONDUCT OF REFERENCE

*Simple Procedure to be Adopted*

55.01 (1) A referee shall, subject to any directions contained in the order directing the reference, devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference and may,

(a) give such directions as are necessary; and

(b) dispense with any procedure ordinarily taken that the referee considers to be unnecessary or adopt a procedure different from that ordinarily taken.

[...]

(3) At the hearing for directions, the referee shall give such directions for the conduct of the reference as are just, including,

(a) the time and place at which the reference is to proceed;

(b) any special directions concerning the parties who are to attend; and

(c) any special directions concerning what evidence is to be received and how documents are to be proved.

(4) The directions may be varied or supplemented during the course of the reference.

[...]

## Schedule “F: Québec Statutory Provisions

### *Québec Code of Civil Procedure, CQLR, c. C-25.01*

**17.** The court cannot rule on an application, or take a measure on its own initiative, which affects the rights of a party unless the party has been heard or duly called.

In any contentious matter, the court, even on its own initiative, must uphold the adversarial principle and see that it is adhered to until the judgment and during execution of the judgment. It cannot base its decision on grounds the parties have not had the opportunity to debate.

**18.** The parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application.

Judges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice

**19.** Subject to the duty of the courts to ensure proper case management and the orderly conduct of proceedings, the parties control the course of their case insofar as they comply with the principles, objectives and rules of procedure and the prescribed time limits.

They must be careful to confine the case to what is necessary to resolve the dispute, and must refrain from acting with the intent to cause prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith.

They may, at any stage of the proceeding, without necessarily stopping its progress, agree to settle their dispute through a private dispute prevention and resolution process or judicial conciliation; they may also otherwise terminate the proceeding at any time.

[...]

**157.** In order to ensure the orderly progress of a proceeding, the chief justice or chief judge may, on their own initiative, given the nature, character or complexity of the case, order that it be examined and, if warranted, case-managed as soon as the application is instituted and even before the case protocol is filed.

The chief justice or chief judge may also, for the same reasons, on their own initiative or on request, order special case management at any time and assign a judge as special case management judge. The special case management judge is responsible for deciding all incidental applications, convening a case management conference and a pre-trial conference if warranted, and issuing such orders as are appropriate, unless another judge is temporarily assigned because the special case management judge is unable to act. The special case management judge may also be assigned to preside over the trial and render judgment on the merits of the principal application.

**158.** For case management purposes, at any stage of a proceeding, the court may decide, on its own initiative or on request, to

(1) take measures to simplify or expedite the proceeding and shorten the trial by ruling, among other things, on the advisability of ordering the consolidation or separation of proceedings or the splitting of the proceeding, of better defining the issues in dispute, of amending the pleadings, of limiting the length of the trial, of admitting facts or documents, of authorizing affidavits in lieu of testimony or of determining the procedure and time limit for the disclosure of exhibits and other evidence between the parties, or by convening the parties to a case management conference or a settlement conference, or encouraging them to use mediation;

(2) assess the purpose and usefulness of seeking expert opinion, whether joint or not, determine the mechanics of that process as well as the anticipated costs, and set a time limit for submission of the expert report; if the parties failed to agree on joint expert evidence, assess the merits of their reasons and impose joint expert evidence if it is necessary to do so to uphold the principle of proportionality and if, in light of the steps already taken, doing so is conducive to the efficient resolution of the dispute without, however, jeopardizing the parties' right to assert their contentions;

(3) determine terms for the conduct of pre-trial examinations, if such examinations are required, including their number and their length when it appears necessary to exceed the time prescribed by this Code;

(4) order notification of the application to persons whose rights or interests may be affected by the judgment, or invite the parties to bring a third person in as an intervenor or to implead a third person if the court considers that that person's participation is necessary in order to resolve the dispute and, in family or personal status or capacity matters, order the production of additional evidence;

(5) rule on any special requests made by the parties, modify the case protocol or authorize or order provisional measures or safeguard measures as it considers appropriate;

(6) determine whether the defence is to be oral or written;

(7) extend the time limit for trial readiness; or

(8) issue a safeguard order, effective for not more than six months.

[...]

**234.** At any stage of a proceeding, if it considers that expert evidence is necessary in order to decide the dispute, the court, even on its own initiative, may appoint one or more qualified experts to provide such evidence. The court's decision defines the expert's mission, gives the necessary instructions as to how it is to be carried out, sets the time limit within which the expert must submit a report and rules on the expert fee and its payment. The decision is notified to the expert without delay.

[...]

**236.** Court-appointed experts act under the court’s authority to gather the evidence required to carry out their mission. They may examine any document or thing, visit any premises and, with the authorization of the court, take testimony under oath. They must preserve such testimony and certify its origin and integrity.

Experts are required to give the parties at least five days’ notice of when and where their operations are to begin.

[...]

**238.** An expert report must be brief but provide sufficient details to enable the court to make its own assessment of the facts set out in the report and of the reasoning that led to the conclusions drawn by the expert. It must mention the analytical methodology used.

Any testimony taken by the expert is attached to the report and forms part of the evidence.

The expert’s conclusions are not binding on the court or on the parties, unless the parties declare that they accept them.

[...]

**572.** As soon as an application for authorization to institute a class action is filed, the chief justice, unless the chief justice decides otherwise, assigns a judge as special case management judge to manage the proceeding and hear all procedural matters relating to the class action. The chief justice may assign a judge despite there being grounds for the judge’s recusation, provided the chief justice considers the situation, in the context of the case, does not undermine the impartiality of the judiciary.

After considering the interests of the parties and of the class members, the chief justice may determine the district in which the application for authorization is to be heard or the class action instituted.

[...]

**590.** A transaction, acceptance of a tender, or an acquiescence is valid only if approved by the court. Such approval cannot be given unless notice has been given to the class members.

In the case of a transaction, the notice must state that the transaction will be submitted to the court for approval on the date and at the place indicated. It must specify the nature of the transaction, the method of execution chosen and the procedure to be followed by class members to prove their claim. The notice must also inform class members that they may assert their contentions before the court regarding the proposed transaction and the distribution of any remaining balance. The judgment approving the transaction determines, if necessary, the mechanics of its execution.

[...]

**592.** If the judgment awards damages or a monetary reimbursement, it specifies whether members’ claims are to be recovered collectively or individually.

**593.** The court may award the representative plaintiff an indemnity for disbursements and an amount to cover legal costs and the lawyer's professional fee. Both are payable out of the amount recovered collectively or before payment of individual claims.

In the interests of the class members, the court assesses whether the fee charged by the representative plaintiff's lawyer is reasonable; if the fee is not reasonable, the court may determine it.

Regardless of whether the Class Action Assistance Fund provided assistance to the representative plaintiff, the court hears the Fund before ruling on the legal costs and the fee. The court considers whether or not the Fund guaranteed payment of all or any portion of the legal costs or the fee.

[...]

**595.** The court orders collective recovery of the class members' claims if the evidence allows a sufficiently precise determination of the total claim amount. The total claim amount is determined without regard to the identity of individual class members or the exact amount of their respective claims.

After determining the total claim amount, the court may order that it be deposited in its entirety, or according to the terms it specifies, with a financial institution carrying on business in Québec; the interest on the amount deposited accrues to the class members. The court may reduce the total claim amount if it orders an additional form of reparation, or may order reparation appropriate to the circumstances instead of a monetary award.

If execution measures prove necessary, instructions are given to the bailiff by the representative plaintiff.

**596.** A judgment that orders collective recovery makes provision for individual liquidation of the class members' claims or for distribution of an amount to each class member.

The court designates a person to carry out the operation, gives them the necessary instructions, including instructions as to proof and procedure, and determines their remuneration.

The court disposes of any remaining balance in the same manner as when remitting an amount to a third person, having regard, among other things, to the members' interests. If the judgment is against the State, the remaining balance is paid into the Access to Justice Fund.

**597.** If the individual liquidation of the class members' claims or the distribution of an amount to each class member is impracticable, inappropriate or too costly, the court determines the balance remaining after the collocation of the costs, fee and disbursements and orders that the amount be remitted to a third person it designates.

However, before remitting the amount to a third person, the court hears the representations of the parties, the Class Action Assistance Fund and any other person whose opinion the court considers useful.

[...]

**599.** A judgment ordering individual recovery specifies what issues remain to be decided in order to determine individual claims. It sets out the content of the judgment notice to class members, which must include explanations as to those issues and as to the information and documents to be provided in support of an individual claim and any other information determined by the court.

Within one year after the publication of the notice, class members must file their claim with the office of the court in the district where the class action was heard or in any other district the court specifies.

**600.** The court determines the claim of each class member or orders the special clerk to determine it according to the procedure it establishes. The court may determine special methods of proof and procedure for such purpose.

**601.** At the trial of an individual claim, the defendant may urge against a claimant a preliminary exception that this Title did not earlier permit against the representative plaintiff.

**CITATION:** Brazeau v. Canada (Attorney General), 2020 ONSC 7229

**COURT FILE NO.:** CV-15-53262500-CP

Reddock v. Canada (Attorney General), 2020 ONSC 7232

**COURT FILE NO.:** CV-17-570771-00CP

**DATE:** 2020/11/25

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**SUPERIOR COURT (Class Action Division)**

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

No.: 500-06-000781-167

**Between:**

**CHRISTOPHER BRAZEAU and DAVID KIFT**  
**Plaintiffs**

**- and -**

**ATTORNEY GENERAL OF CANADA**  
**Defendant**

Proceeding under the *Class Proceedings Act, 1992*

**And Between:**

**JULLIAN JORDEA REDDOCK**  
**Plaintiff**

**- and -**

**ATTORNEY GENERAL OF CANADA**  
**Defendant**

Proceeding under the *Class Proceeding Act, 1992*

**Between:**

**ARLENE GALLONE**  
**Plaintiff**

**c.**

**PROCUREUR GÉNÉRAL DU CANADA**  
**Defendant**

**Released:** November 25, 2020