

## A Class Action on Behalf of Federally-Sentenced Women (FSW) with Mental Health Issues

**Rebecca Anne Sutton**

*Clerk, Ontario Court of Appeal  
JD, University of Toronto Faculty of Law*

The inquiry into Ashley Smith’s in-custody death is playing a crucial role in opening up the typically inscrutable prison system and forcing the Correctional Service of Canada (CSC) to defend its policies and practices under intense public scrutiny. Yet there is a risk that Smith will be understood as an extreme outlier, rather than an indicator of a deeper problem. There remains a broader need for concrete and systemic reform of the prison system as it treats Federally-Sentenced Women (FSW) with mental health issues. In this analysis I will consider how civil litigation might be used in creative ways to seek remedies for this segment of the prison populations. Specifically, I will explore the viability of a class action lawsuit against CSC on behalf of FSW with mental health issues, with a sub-class of Aboriginal female prisoners. While there are admittedly a number of practical obstacles to bringing this type of lawsuit, a class action against the Crown offers an interesting combination of private and public law advantages as well as the potential for both individual recourse and systemic change.

**Keywords:** female prisoners; mental health; class action.

L’enquête sur le décès sous garde d’Ashley Smith joue un rôle fondamental dans la considération du système carcéral, généralement impénétrable, et force le Service Correctionnel du Canada (SCC) à défendre ses politiques et pratiques dans l’œil intéressé du grand public. Toutefois, il existe un risque que le cas Smith soit interprété comme un cas extrême plutôt que comme un indicateur d’un programme plus grave. Il demeure important de mettre en œuvre des réformes tangibles et systémiques du système carcéral et de son traitement des femmes purgeant une peine de ressort fédéral (FPPF) et souffrant de maladies mentales. Dans cette analyse, nous envisagerons comment les contentieux civils peuvent constituer un recours alternatif d’obtenir réparation pour ce segment de la population. Plus précisément, nous aborderons la viabilité d’un recours collectif contre SCC au nom des FPPF souffrant de maladie mentale en créant une sous-catégorie de prisonnières autochtones. Bien qu’il existe un nombre reconnu d’obstacles à l’introduction de telles actions, un recours collectif contre la couronne compte un agencement intéressant d’avantages découlant du droit public et d droit privé, ainsi que la possibilité de recours individuel et de changements systémiques.

**Mots clés :** prisonnières; santé mentale; recours collectif.

### Introduction

Ashley Smith’s tragic death while in federal custody has directed public attention to Canada’s treatment of prisoners with mental health issues. At the close of the recent Coroner’s inquest into her death, the jury described what happened to Smith as an example of how correctional and health care systems can “collectively fail to provide a mentally ill, high risk, high needs inmate with the appropriate care, treatment, and support” (Chief Coroner of Ontario, 2013). Importantly, the jury’s homicide verdict dispelled the notion that Smith’s death was a suicide. The inquest also established

that Smith's death was not simply the result of poor judgment by a few front-line staff, implicating decision-making processes at the highest level of the Correctional Service of Canada (CSC).

While there have been some positive developments in addressing mental health concerns for federally-sentenced women (FSW) in recent years, many of the conditions that contributed to Smith's death still prevail in Canada's prisons (Bingham and Sutton, 2012). As the jury's recommendations from the Smith inquest are not legally binding, it remains unclear whether it will galvanize any meaningful systemic reform. Something more is needed. In this paper I will propose a novel route through the courts: a class action lawsuit against CSC. This type of action offers an interesting combination of private and public law advantages, as well as the potential for both individual recourse and systemic change.

In the first section of this discussion, I will provide some background on FSW with mental health issues, and I will explain the rationale for a class action. I will then explore the legal foundation for class actions in Canada, and outline what a class action on behalf of FSW would potentially look like. While a class action against the Crown on behalf of FSW is no panacea, I will demonstrate that it should be seriously considered as a useful procedural vehicle for substantive reform.

### **Background on FSW with mental health issues**

No single event in recent history has brought more attention to the issue of mental health in corrections than the in-custody death of Ashley Smith. In 2007, 19-year-old Ashley Smith died in a segregation cell at Grand Valley Institute for Women (OCI, 2008). She suffered from serious mental health issues, and was in segregation under suicide watch (OCI, 2008). Following orders from management, CSC staff refrained from intervening when Smith asphyxiated herself after tying a ligature around her own neck. CSC fired the warden and deputy warden after the incident, but the negligence charges that were laid against prison guards and supervisors were eventually dropped. Smith's family initiated a lawsuit against CSC for negligence, which was reportedly settled out of court for eleven million dollars (Seglins, 2011). After a number of false starts, the inquest finally proceeded with eleven months of testimony involving more than 80 witnesses, and the jury returned a verdict of homicide (Chief Coroner of Ontario, 2013). The jury made a number of recommendations, such as ensuring that all female inmates are assessed by a psychologist within the first 72 hours of admission to prison.

Now that the inquest is over, the pressing question is what can and will be done by CSC to improve the treatment of FSW with mental health issues. There are approximately 580 federally-sentenced women (FSW) currently incarcerated in Canada, and Aboriginal women make up one third of the FSW population (OCI website). While much smaller than the male prisoner population, which numbers approximately 14,000, the FSW population is increasing at a faster rate: in the ten years leading up to March 2013, there was a 60 per cent increase in the FSW population (OCI website).<sup>1</sup> Rather than translating into better care, the Arbour Report found that the relatively small number of female prisoners has been one of the reasons for the historic disadvantage they have suffered in the federal corrections system (Arbour Report).

---

<sup>1</sup> In the ten years leading up to March 2013 there was a 60 per cent increase in the FSW population (OCI, 2013) and between 2001-2012 there was a 109 per cent increase in the Aboriginal FSW population between 2001-2012 (OCI website).

Mental health care, as defined in section 85 of the Corrections and Conditional Release Act (CCRA), is: “the care of a disorder of thought, mood, perception, orientation or memory that significantly impairs judgment, behavior, the capacity to recognize reality or the ability to meet the ordinary demands of life.” Women in Canada’s prisons are more likely than men to have mental health issues (CHRC at 5.1.2) and they are much heavier users of CSC’s mental health care services (OCI, 2013). Approximately one third of FSW have a mental health diagnosis prior to their incarceration; further, 29 per cent of FSW are identified upon intake as having mental health problems (OCI, 2011). According to CSC data, 69 per cent of FSW received institutional mental health care services in 2010-2011, as compared with 45 per cent of male offenders (OCI, 2012). In 2011-2012, 75 per cent of FSW received such services (OCI, 2013).

Dealing with mental health issues in the custodial context is an incredibly complex task, and it should be recognized that CSC has made some important efforts to secure strategic and resource allocation at all levels of the system. For example, CSC has gathered stakeholder feedback and used it to develop a *Mental Health Strategy for Women Offenders* (“Strategy”) which was launched in 2002 (CSC website). The *Strategy* describes the mental health needs of FSW, and outlines the treatment programs demanded by CSC legislation and the policy directives required to appropriately deal with the respective identified needs. CSC has invested approximately 90 million dollars since 2005 in order to implement the *Strategy*, and concerted efforts have been made to train front-line staff, strengthen delivery of mental health care within prisons, and to improve discharge planning for offenders with mental health issues (OCI, 2013). CSC has also been revising its approach to screening prisoners for mental health issues, and has developed a computerized mental health intake screening system (CoMHISS) for FSW (CSC website).

The concern at this juncture, however, is whether CSC’s efforts are in fact translating into better conditions of confinement. The OCI and a number of advocacy organizations have identified a worrisome gap between policy and public pronouncements, on the one hand, and operational reality, on the other. With respect to the CSC’s employment of qualified mental health professionals, OCI has highlighted a number of staffing, recruitment, and retention challenges (OCI, 2013).<sup>2</sup> Self-injury by inmates is another example here. The OCI recently assessed CSC’s mental health care initiatives in relation to the implementation of the *Strategy*, finding that these measures have resulted in “little substantive progress” since Smith’s death with respect to dealing with FSW who chronically self-injure (OCI, 2013b, p. 27). The OCI found that CSC responds to self-injurious behavior through a punitive or security approach—such as containment, isolation, and segregation—rather than addressing it as a mental health concern (OCI, 2013b, pp. 29-30). CSC’s use of a security or punitive approach as opposed to a mental health care approach was also highlighted in the report *Cruel, Inhuman, and Degrading: Canada’s Treatment of Federally-Sentenced Women with Mental Health Issues* (“IHRP Report”) (Bingham and Sutton, 2012). The IHRP Report established that Canada’s treatment of FSW violates international human rights law, emphasizing in particular:

- A mental health strategy that is overly focused on assessment rather than treatment, and blind to FSW’s past histories of abuse;
- Security classification tools that over-classify FSW with mental health issues and

<sup>2</sup> Nearly one third of CSC’s total psychological staff is either vacant or “under-filled”. In the latter scenario, a position such as a psychologist position is filled by a non-licensed incumbent staff member who is unable to provide the same range of services as a licensed psychologist (OCI, 2013)

- Aboriginal women such that they are housed in more secure environments than required to manage their risk; and,
- Excessive use of administrative segregation and institutional transfers to manage FSW with serious mental health issues, without judicial oversight (pp. 1-2).

In light of the identified problems in the treatment of FSW with mental health issues, four categories of CSC practice may serve to ground a civil claim: (1) the security classification system, (2) the use of administrative segregation, (3) the use of institutional transfers, and (4) the failure to provide mental health care. The “Issues Chart” in **Figure 1** provides further details on each of these areas.

### The rationale for a class action

In the words of Canada’s Correctional Investigator, “Canadian correctional history is marked by a pattern of crisis and retrenchment followed by reform and progress” (OCI, 2013, p. 3). Following on the heels of the Smith inquest, a high-profile class action lawsuit could offer one novel route towards institutional reform. In this section of the paper I will review the legal framework for a class action in Canada, and discuss how this type of lawsuit might assist FSW with mental health issues moving forward.

At the turn of the 21<sup>st</sup> century, a trilogy of Supreme Court cases greatly affected the law on class actions in Canada: *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) [*Dutton*], *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (SCC) [*Rumley*], and *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 (S.C.C.) [*Hollick*]. Writing for a unanimous court in *Dutton*, Chief Justice McLachlin stated that the rise of class actions in modern litigation is undeniable and that without class actions, “the doors of justice remain closed to some plaintiffs, however strong their legal claims” (para. 26). Next, in *Rumley*, the Supreme Court allowed a claim by survivors of institutional abuse to proceed as a class action, demonstrating the potential for class actions to provide redress for vulnerable individuals impacted by systemic negligence. The legacy of *Rumley* was clear in the 2004 case of *Cloud v. Canada (Attorney General)* [2004] O.J. No. 4924, 73 O.R. (3d) 401 (Ont. CA) [*Cloud*], where the Ontario Court of Appeal unanimously certified a class action by residential school survivors who were seeking damages for negligence, breach of fiduciary duty, assault, sexual assault, battery, and infringement of Aboriginal rights. The procedural advantages of class actions were emphasized in the third case in the trilogy, *Hollick*. In *Hollick*, the Supreme Court held that courts should take a broad and generous approach when interpreting the *Ontario Class Proceedings Act*.

The use of class actions in the U.S. context offers an important example of prisoner rights advocacy in Canada. As Douglas Elliot (2011) explains, class actions in the U.S. have empowered vulnerable groups and enabled the judiciary to hold government to account for social injustices. Class action litigation has played a particularly important role in reforming U.S. correctional institutions, including with respect to correctional mental health systems reform (Metzner, 2002, p. 19). Amy Laderberg explains how the class action lawsuit can help to enhance the credibility of vulnerable prisoners and give a sense of a systemic problem. Combining numerous complaints of sexual abuse, for example, permits characterization of the prison system as constituting a “sexualized environment” rather than a series of isolated individual incidents (Laderberg, 1998, pp. 326-327).

Elliot (2011) contends that several factors may impede class actions in the Canadian context from delivering on the same promise of access to justice as in the U.S. These include:

Canada's use of administrative tribunals rather than the private bar for enforcing statutory rights, jurisdictional impediments that existed prior to the landmark ruling in *Canada (Attorney General) v. Telezona*, [2010] 3 S.C.R. 585, 2010 SCC 62<sup>3</sup>, and the social barriers that Canada's marginalized groups continue to experience (Elliot, 2011). Yet he also notes that more recent cases such as *Canada v. Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429 (S.C.C.) [*Hislop*]; *Manuge v. Canada*, [2010] S.C.J. No. 67; and *City of Vancouver v. Ward*, [2010] 2 S.C.R. 28 [*Ward*], may indicate a shift towards a more hospitable climate. Class actions can complement political lobbying by advocates for marginalized populations by adding legal pressure (Elliot, 2011) and may also provide helpful cover to government actors to do the right, even if unpopular, thing.

The liability of the Crown in tort is now well established in Canada, and the process of bringing an action against the Crown has come to resemble that of bringing one against a private defendant (Hogg and Monahan, 2011, pp .24-25).<sup>4</sup> That being said, the Crown's behavior as a defendant in the class actions context may differ from that of private defendants in a number of important ways (Sossin, 2011). First, the Crown has access to large amounts of funds and may not be threatened by large damage awards. Second, the Crown may be averse to settlements and more aggressive in resorting to procedural tactics to avoid liability. Third, the Crown may use retroactive legislation to avoid liability for civil damages . Fourth, the Crown may be more driven by political imperatives, which tend to engender more short-term solutions, than economic ones. These observations are highly relevant to a possible class action against CSC. It might be expected that CSC will employ all of the procedural tactics at its disposal to prevent certification from happening, bringing motions and launching appeals whenever possible (Rudin, 2013).

### Model for a potential class action against the CSC

In this section of the paper I will outline a class action brought as a plaintiff's class proceeding (CPA at s.2(1)) in Ontario under the rules of this province. This could be run as a national opt-out class action out of Ontario. Through this type of action, residents of other provinces may be included in the class definition and potentially be bound by the court's judgment on common issues unless they opt-out in a prescribed manner and time.

The recent *Huronian* psychiatric facility class action offers a helpful model here. The Huronia Regional Centre was a facility located in Orillia Ontario that opened in 1876 and provided a residential program for disabled individuals until it closed in 2009. It was the first institution of its kind in Ontario, and it housed as many as 2,500 people at a time. In the late 2000's, with the assistance of litigation guardians, two former residents of Huronia brought a class action against the Ontario government to seek compensation for abuse and harm that the residents and their families suffered there. This class action was certified in July 2010, with legal claims relating to the government's negligence and breach of duty in the running of the facility. The class was defined as "all persons who resided at [Huronian] between January 1, 1945 and March 31, 2009 who were alive as of April 21, 2007" (the "Resident Class") and "all parents, spouses, children and siblings

<sup>3</sup> Prior to *Telezona*, the case of *Grenier v. Canada*, [2005] FCA 348, seemed to position public law as the primary vehicle for governmental accountability. The implication was that parties bringing an action against the Crown would first have to establish that the Crown's conduct was problematic through judicial review.

<sup>4</sup> In Canada, the federal statute currently governing the liability of the Crown is the *Crown Liability and Proceeding Act*, RSC 1985, c.C.50, and the relevant Ontario legislation is the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27.

of persons who resided at Huronia between March 31, 1978 and March 31, 2009, who were alive as of April 21, 2007” (the “Family Class”). Because this was an opt-out class action, any individual who fell into either of these categories would be a class member unless they decided to remove themselves. The common issues that were certified—for determination at the common issues trial—related to whether the government breached a duty of care and/or a fiduciary duty owed to the Resident class to protect them from actionable physical or mental harm (*Huronia Certification Order*, 2010).

Once the *Huronia* action was successfully certified, the next steps were to provide notice to the class members of certification, followed by the production of documents, examinations for discovery, and other procedural steps leading up to the determination of the substantive legal claims at the common issues trial. Rather than proceed to the common issues trial, however, *Huronia* was ultimately settled. I will return to the potential for a settlement below.

### *The Motion for Certification*

The most significant procedural hurdle in any class action is the certification motion (Baert and Mason-Case, 2009). As stipulated in s.2(1) of Ontario’s *Class Proceedings Act* (CPA), a person who commences a plaintiff’s class proceeding “shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding” and appointing a representative plaintiff. This stage of the process is not intended to test the merits of the action (*Hollick*, para. 16). It is focused rather on the form of the action and the question of whether it is appropriate for the suit to be brought as a class action (*Hollick*, para. 16). In this section of the paper I will outline how the five key certification requirements enumerated in s.5 of Ontario’s CPA could be addressed in a class action on behalf of FSW with mental health issues: cause of action, class definition, common issues, preferable procedure, and adequacy of representation. As affirmed by the OCA in *Cloud*, each one of these requirements must be addressed and satisfied in order for a motion for certification to succeed, although there may be issues of overlap and interdependency (*Cloud*, para. 48).

While there is no specific sub-provision in s.5 of the CPA relating to evidentiary requirements, some evidentiary basis must be shown for each of the s.5 requirements aside from the requirement that the pleadings disclose a cause of action (Watson, 2011, p.172). In *Andersen v. St. Jude Medical Inc*, [2003] O.J. No. 4314 [Anderson],<sup>5</sup> Cullity J. noted that, while evidence is not admissible for determining whether a given claim would be successful at trial, evidence might play a role in convincing a court that an issue would appropriately proceed as a class action. The evidence required in a given case will depend on the complexity of the factual and legal issues involved (Watson, 2001, p. 175). Gathering evidence in the prison setting is likely to pose serious challenges. In the context of a class action for FSW, the recent inquiry into Ashley Smith’s death will likely be helpful as it has generated volumes of records relating to conditions of confinement for this segment of the prison population. Also, Lorne Sossin (2011) notes that the work of public bodies such as regulatory agencies, auditors general, and public inquiries sometimes provides a foundation and factual record upon which class action may proceed. To this end, all of the reports and commissions mentioned above, such as the *Arbour Report* and the various OCI reports might provide further evidence.

---

<sup>5</sup> It should be noted this case has been appealed to the Ontario Court of Appeal.

### *Cause of action*

Section 5(1)(a) of the CPA requires that the pleadings or the notice of application discloses a cause of action. At the certification stage the inquiry is a much more superficial or cursory one. From *Abdool v. Anaheim Management Ltd.* (1995) 21 O.R. (3d) 453 (Div Ct), the principles to be applied in determining whether there is a cause of action are as follows: all allegations of fact must be accepted as proved unless patently ridiculous or incapable of proof; the defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed; the novelty of the cause of action will not militate against the plaintiffs; and, the statement of claim must be read as generously as possible (at p.460). Watson highlights how this approach to s.5(1)(a) has made it particularly difficult for government defendants to argue that claims in negligence are based on policy rather than operational decision-making at the certification stage (Watson, 2011).

In *Hislop*, the Certification Order outlined both *Charter* claims and claims in private law such as breach of fiduciary duty and unjust enrichment. In *Cloud*, the following causes of action were accepted by the OCA: claim for vicarious liability, claim for breach of fiduciary duty owed to members of the student class, claim for breach of fiduciary duty owed to family members and siblings, and claims for negligence. The G20 class action also combines tort and *Charter* claims, alleging systemic negligence, tort of unlawful imprisonment, and breach of a number of different *Charter* rights (G20 Class Action website).

For a class action on behalf of FSW with mental health issues, the following causes of action may apply: negligence, tort of unlawful imprisonment, breach of fiduciary duty, and a claim specific to the treatment of Aboriginal prisoners under the rubric of *R v. Gladue*, 1 S.C.R. 688.

While the focus of this paper is on civil claims, there is no impediment to including a *Charter* claim as a cause of action in this class action suit. Indeed, it may be desirable to run a *Charter* claim alongside a tort claim as was done in the *Hislop* and G20 class actions.

### *Class definition*

Section 5(1)(b) of the CPA requires that there be an identifiable class of two or more persons that would be represented by the plaintiff. The purpose of the class definition is to identify those persons who have a potential claim for relief, to define the parameters of the lawsuit so as to identify who is bound by the outcome, and to describe who is entitled to notice under the CPA (*Bywater v. Toronto Transit Commission* (1999) 43 OR (3d) 36, para. 10). The proposed class can include individuals who will not ultimately have a claim against the defendant (*Bywater*). This point is significant for the proposed class action, as some members of the class might not be found to have actually been harmed by CSC through segregation, security classification, or institutional transfer, for example.

As McLachlin C.J. stated in *Dutton* (para. 38), the proposed class must be capable of clear definition, with the members of the class being identifiable by stated, objective criteria that bear a “rational relationship” to the common issues. It is not necessary that every member of the class be named or known. McLachlin C.J. revisited these requirements in *Hollick* and confirmed that the class definition requirement is “not an onerous one” and that it cannot be defined in terms of the merits of the action (*Hollick*, para. 21). She stated that every class member does not need to share the same interest in the resolution of the common issue asserted, but the class will be found unnecessarily broad if it could be defined more narrowly “without arbitrarily excluding some people who share the same interest in the resolution of the common issue.”

In *Cloud*, the OCA determined that the proposed class of former residential school survivors, which was determined by attendance at the school during the specified time period of 1922-1969, was appropriate (*Cloud*, para. 47). The court found the proposed class was “circumscribed by their defining criteria” and was not impermissibly open-ended (*Cloud*, para. 47). A rational connection to the common issues was also established because all class members claimed breach of the same duties and that they all suffered at least some harm as a result. As mentioned above, class definitions similarly based on residence in the institution during a fixed time period were also advanced in the *Rideau* and *Huron* certification motions.

The class definition for the proposed action is: all current and future FSW with mental health issues. While the class definition may at first glance sound quite broad, this is in fact a very discrete and identifiable group: as stated at the outset of this paper, the entire population of FSW is currently less than 600 individuals. If we consider that approximately one third of female prisoners have identifiable mental health issues, we can expect the class of current FSW with mental health issues to number less than 200. While the female inmate population is growing at a faster rate than the male population, it can still be anticipated that the “future FSW with mental health issues” will be discrete and identifiable. Unique claims may also be advanced on behalf of Aboriginal women, both because of their unique experience of confinement, and because of special rights and entitlements afforded to Aboriginal prisoners in Canada’s legal system. In light of this, it may be appropriate to designate a separate subclass for the action as follows: All current and future Aboriginal FSW with mental health issues.

As will be explained below in relation to the ‘representative plaintiff’ criteria under s.5(1)(e) of the CPA, while the class definition will not likely prove too problematic in the motion for certification, finding appropriate individuals to represent the class and subclass will be much more challenging.

### *Common issues*

Section 5(1)(c) of the CPA requires that the claims of the class members raise common issues. A key function of this part of the certification test is to determine whether allowing the suit to proceed as a class action will help to avoid duplication of fact-finding or legal analysis (*Dutton*, paras. 39-40). In *Dutton*, McLachlin C.J. stated that an issue will be common only where it is necessary to resolve it in order to resolve each class member’s claim. It is not necessary that the common issues predominate over non-common issues or that the resolution of common issues would be determinative of each class member’s claim (*Dutton*, paras. 39-40). McLachlin C.J. returned to this in *Hollick* and emphasized that for an issue to be common it must be a “substantial...ingredient” of each class member’s claims (para. 18). Most importantly, “success for one class member must mean success for all” (*Dutton*, paras. 39-40). *Cloud* confirmed that a liberal approach is to be taken to determining commonality. In *Cloud*, the OCA followed *Hollick* in finding that it was not fatal that apart from the common issues there were numerous issues that needed to be resolved individually (*Cloud*, para. 58).

In the context of a negligence claim in *Rumley*, Chief Justice McLachlin found that the issues of breach of duty of care were common to the class of former residents at a residential school for blind and deaf students because all class members “share an interest in the question of whether the appellant breached a duty of care” (*Rumley*, para. 27). In the *Huron* proceeding, Cullity J. found that the claims advanced were similar to those in *Cloud* and *Rumley* in that they were essentially systemic (*Huron Certification Order*, paras. 162, 164). Cullity J. stated, “They are

based on the manner in which Huronia was maintained and administered by the Crown and no attempt is made to differentiate between the treatment and the claims of individuals who were resident there...”(*Huronia Certification Order*, para. 164).

In *Rumley* the Supreme Court also held that the appropriateness and amount of punitive damages could be resolved as a common issue for all class members. On the note of damages, it is crucial to include aggregate damages as a common issue in the proposed class action. One key reason for this procedurally is that it will affect the ‘preferable procedure’ inquiry: the potential for aggregation of damages strengthens the case that a class action is the most efficient way to go about addressing the issue.

Arguably, claims relating to vicarious liability should not be included as common issues. As Garry Watson (2011, p. 145) explains, allegations of vicarious liability will “invariably lead to a raft of individual issues and no common issues”; it is preferable to plead systemic negligence as was the case in *Rumley*. In the prison context, vicarious liability claims would make it necessary to determine for each individual in the class whether they were harmed by a prison officer. Unlike a negligence claim, assessment of common issues would not take care of the key inquiries. While McLachlin C.J. noted in *Rumley* that alleging systemic negligence might make the individual issues component of case more difficult, she agreed with the BC Court of Appeal’s finding that the respondents “are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so” (Referring to *Rumley v. British Columbia* (1999), 72 B.C.L.R. (3d) 1 (C.A.), p.9).

The following common issues for the proposed action may be advanced:

For the main class (all current and future FSW with mental health issues):

- By its operation or management of federal prisons, did the defendants owe a duty of care to class members?
- What was the standard of care owed by the defendant to class members?
- Did the defendants breach those duties?
- Did the defendants owe a fiduciary duty to class members?
- Did the defendants breach this duty?
- If the court finds a breach of duty of care and/or a breach of fiduciary duty, can the court make an aggregate assessment of damages suffered by all class members as part of the common issues trial?
- If the court finds a breach of duty of care and/or a breach of fiduciary duty, are other remedies available such as aggravated or punitive damages, or potentially a declaration or injunction?
- Did the defendants commit the tort of unlawful imprisonment?

For the subclass (all current and future Aboriginal FSW with mental health issues), in addition to the common issues outlined for the main class:

- Do the defendants have responsibility to apply *Gladue* principles and uphold the Honour of the Crown in implementing the *CCRA* to members of the subclass?
- Was this obligation violated in the defendant’s treatment of members of the subclass?
- Is a remedy in the form of declaration or an injunction possible?

When the claims are framed in this way, it can be argued that resolving the common issues will go some distance toward resolving all of the legal claims advanced on behalf of FSW with mental health issues. In the case of the negligence claims, for example, issues of causation and harm will have to be resolved on an individual basis, but determining whether there is a duty of care, to whom it is owed, what the standard is, and whether there has been a breach will resolve a large part of the claims. It can be expected in practice that CSC will vigorously argue that there are insufficient common issues to ground a class proceeding, so great care must be taken in framing the case in order to satisfy the s.5(1)(c) criteria.

### *Preferable procedure*

As required by s. 5(1)(d) of the *CPA*, a class proceeding must be the preferable procedure for the resolution of the identified common issues. This criterion is often the key point of contention in a motion for certification (*Baxter v. Canada*, [2006] O.J. No.4968, 83 O.R. (3d) 481 (S.C.J), para. 24 [*Baxter*]).

The principles relating to the preferability inquiry are outlined in *Hollick*. The analysis should be conducted through the lens of the three key advantages of a class proceeding, that is: judicial economy, access to justice, and behavioral modification (para. 27). ‘Preferable’ means whether a class action offers a fair, efficient and manageable option for advancing the claim, and whether a class action is preferable to other procedures for resolving the class members’ claims. It is necessary to look at the common issues in context and to consider their relationship to the claims as a whole (*Markson*, para. 69).<sup>6</sup>Importantly, courts have been willing to consider aggregate assessment of damages as a way of addressing the preferability problems posed by individual damage claims (Watson, 2011, p. 151).

In the certification proceeding for a class action relating to the Rideau Regional Centre in Smiths Falls, Ontario, the claimants drew attention to the fact that many class members were disabled, elderly, and physically as well as cognitively vulnerable (*Statement of Claim, Rideau*, para. 118). With respect to access to justice, they stated that certification would “ensure the class has meaningful redress in an arena where the inherent inequalities of bargaining power between these parties may be equalized in an efficient, case-managed environment” (*Statement of Claim, Rideau*, para. 119). The claimants pointed out that the legal costs of proceeding individually against an adversary such as the province of Ontario would be far in excess of the claims for damages made by individual members and thus make it impossible for them to bring the actions individually (*Statement of Claim, Rideau*, para. 118). With respect to judicial economy, the claimants also argued that if individual trials were required the class members would each have to prove the legal relationship between themselves and the Crown and the scope of the duty owed (*Statement of Claim, Rideau*, para. 128).

There are a number of obstacles impeding FSW with mental health issues from making individual claims, including: resource issues; logistical issues associated with an individual action from prison; fear of being viewed as antagonizing the prison system in which they still live; mental health issues. While such arguments are helpful on the ‘preferable procedure’ front, it should be noted that these same factors add to the difficulty in identifying a representative plaintiff.

---

<sup>6</sup> There were questions following *Hollick* as to how the preferability analysis should be conducted but subsequent appellate level cases have consistently taken a liberal approach (Watson, 2011, p.151).

### *Adequacy of representation*

Section 5(1)(e) of the CPA requires the identification of a representative plaintiff who: (i) would fairly and adequately represent the interests of the class; (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Section 5(2) of the CPA stipulates that the subclass will require its own representative plaintiff if members of the subclass have claims that raise common issues not shared by all class members, so that “the protection of the interests of the subclass members requires that they be separately represented.” As explained above, many of the FSW most adversely affected by the lack of mental health services in prison are Aboriginal. A strategic decision will have to be made as to whether there should be separate representative plaintiffs for the class and subclass, with one being non-Aboriginal and the other Aboriginal.

In *Dutton*, McLachlin C.J. stated that the proposed representative need not be typical of the class, nor the best possible representative, but “the court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class” (para. 41). To this end the court will also consider whether the representative plaintiff could bear any costs incurred to the representative in particular.

As Doug Elliot points out, one of the most challenging aspects of class action litigation is identifying a suitable representative plaintiff “willing to expose themselves to significant risks, stress and loss of privacy in exchange for little or no reward” (Elliot, 2011, p.18). He specifically mentions the prison context, where the potential plaintiff may be in an ongoing relationship of vulnerability with the defendant and thus fearful of repercussions of getting involved with playing this prominent role in a claim (Elliot, 2011, p.19). This same problem may not exist for other class members, who can remain anonymous at least until an action is successful and it is time to collect their claim (Elliot, 2011, p.19).

Ironically, the very characteristics of FSW with mental health issues that support the argument that a class action is a preferable procedure (i.e. their vulnerability) are the same characteristics that make the search for a representative plaintiff difficult. Given that one of the goals in bringing a class action is to induce systemic change at the institutional level, it is important for the court and the public to find the representative plaintiff sympathetic. This could be challenging in any type of prison litigation, especially where an FSW is in maximum security, classified as a dangerous offender, and/or has committed serious crimes. Such seemingly negative attributes could potentially engender a loss of sympathy for the representative and also make the litigation process difficult to manage, particularly where the plaintiff suffers from serious mental health issues. Yet, it is individuals in circumstances such as these who will be more likely to have experienced actual harm from segregation, lack of mental health care, security over-classification, and institutional transfers while in prison. To the extent that the court and the public find female offenders more palatable than male offenders, it may be helpful that the proposed class is all-female.

### **Possible Remedies for Class Members**

In the event that the motion for certification is successful, the class action suit would proceed to a common issues trial where the common issues identified above would be litigated. Alternatively,

the Crown might settle, and all class members who did not opt-out will be eligible to receive financial compensation. Sossin explains that a motion for certification could yield significant leverage towards a settlement, because it involves a low standard of proof (Sossin, 2011, p.6). The Supreme Court in *Hollick* also outlined how a successful certification motion could increase pressures on a defendant to settle, specifying: the various costs associated with defending a certified class action, the defendant's enhanced exposure to damages, and the potential adverse publicity that arise in protracted class action litigation. The case of *Corless v. KPMG LLP*, [2008] O.J. No.3092, (cited in Watson, 2011, p. 164) offers an example of how class actions can work effectively through settlement where the defendant concedes early on in the process that there is a valid claim. The *Huronia* action, which resulted in a \$35 million dollar settlement, offers another example here. The agreement included a formal apology by the Ontario Premier and a commitment by the provincial government to invest up to \$5 million in programs to help people with developmental disabilities (*Huronia Settlement Agreement*).

It remains possible that CSC could settle an action by FSW with mental health issues following a successful motion for certification, perhaps especially if there is significant media coverage and publicity around the claim. That being said, CSC would likely only do so if it reasonably believes the plaintiff class might be able to succeed on the merits, and specifically that individual issues of causation and harm will be established. The unfortunate reality is that if CSC has serious doubts about the plaintiffs' prospects for success at trial, the pressure of the media and public scrutiny may not suffice to push it to settle.

*Baxter v. Canada* is an example of a class action that resulted in a large settlement but still involved lengthy court battles and complex procedural battles. This multi-jurisdictional class action relating to Indian Residential Schools generated the largest class action settlement in Canadian history, of several billion dollars (*Baxter*, para. 7). Yet the Crown settled only after extensive efforts to litigate thousands of underlying claims of individual class members. Winkler J. found that compromise settlements such as this one provide an "inadequate forum for dealing with the underlying issues" (*Baxter*, para. 11).

If the Crown does not settle and the action proceeds to trial, a successful class action may lead to a remedy of a declaration (declaring the rights of FSW with mental health issues) or an injunction (requiring CSC to do or refrain from doing something). Undoubtedly, the key offering of the class action approach, in terms of a potential remedy, is the aggregation of damages. Section 24 of the CPA addresses the issue of aggregate assessment of monetary relief. The provision states that a court may determine the aggregate or a part of a defendant's liability to class members and give judgment to that effect 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 member can reasonably be determined without proof by individual class members.

In *Cloud*, the OCA considered s. 24 and held that claims for an aggregate assessment of damages and punitive damages are properly assessed as common issues (para. 70). The case of *Markson* also awarded aggregate damages under s.24, clarifying that it was not necessary to determine liability by the defendant to the whole class before this was done—it is about the defendant's *potential* liability to the whole class.

The value of a damages award (or compensation through a settlement) in this context is two-fold. First, FSW with mental health issues as a group could receive some financial compensation for the way they have been treated in prison. Second, the payment of money by CSC

to individual female prisoners or FSW as a group would be a tangible indicator that the shortcomings of the prison system are very real. A judicial declaration stating that CSC has fallen short in mental health care, or the remedy of an injunction preventing CSC from resorting to certain practices—such as excessive transfers of FSW with mental health issues between institutions without proper follow-up care—could also have an important impact in this context.

### Conclusion

Undeniably, there is a greater likelihood of success for one federally-sentenced woman who suffers from mental health issues in bringing a single tort claim against CSC, in comparison with a class action on behalf of all FSW with mental health issues. At the same time, the class action format, with all its attendant risks and complexities, could offer a more substantial and lasting remedy for a larger number of FSW and generate a much higher profile case. While bringing a class action on behalf of this segment of the prison population is not without its complications, this procedural vehicle should be seriously considered as a way of enforcing the rights of female prisoners with mental health issues.

### About the Author

Rebecca Anne Sutton is a clerk in the Ontario Court of Appeal and holds a JD from the University of Toronto Faculty of Law. She can be reached at [rebecca.a.sutton@gmail.com](mailto:rebecca.a.sutton@gmail.com).

### References

- Abdool v. Anaheim Management Ltd.* (1995) 21 O.R. (3d) 453 (Div Ct).
- Anderson v. Goord*, 87 CV 141 (N.D.N.Y).
- Andersen v. St. Jude Medical Inc.*, [2003] O.J. No. 4314.
- Attis v. Canada* (Minister of Health) (2007), 46 C.P.C. (6th) 129, (Ont. S.C.J.).
- Baert, K. and Mason-Case, S. (2009). Innovative Class Proceedings: Recent Trends. *6<sup>th</sup> Annual Symposium on Class Actions*, Toronto: Osgood Hall Law School of York University. [<http://www.kmlaw.ca/upload/Innovative%20Class%20Proceedings%20-%20Recent%20Trends.pdf>].
- Baxter v. Canada*, [2006] O.J. No.4968, 83 O.R. (3d) 481 (S.C.J).
- Berryman, J. (2011). Nudge, Nudge, Wink, Wink: Behavioral Modification, Cy-Pres Distributions and Class Actions. In *Assessing Justice: Appraising Class Actions Ten Years After Dutton*, Hollick and Rumley. Toronto: Lexis Nexus.
- Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666, 2006 SCC 19.
- Bywater v. Toronto Transit Commission* (1999), 43 OR (3d) 36.

*Canada v. Hislop*, [2007] 1 S.C.R. 429 (S.C.C.).

Canadian Association of Elizabeth Fry Societies (CAEFs) (2006). 10th Anniversary of the Arbour Commission Report. [<http://www.elizabethfry.ca/abr10e.pdf>].

CAEFs (2003). Submission to the Canadian Human Rights Commission for the Special Report on Discrimination on the Basis of Sex, Race and Disability Faced by Federally Sentenced Women. [[http://www.elizabethfry.ca/chrc/CAEFS\\_SUBMISSION\\_TO\\_CHRC\\_INQUIRY\\_accountability.pdf](http://www.elizabethfry.ca/chrc/CAEFS_SUBMISSION_TO_CHRC_INQUIRY_accountability.pdf)]

Canadian Human Rights Commission (200). Backgrounder 2: Recommendations of the Special Report. [ [http://www.chrc-ccdp.ca/legislation\\_policies/fsw2-eng.aspx](http://www.chrc-ccdp.ca/legislation_policies/fsw2-eng.aspx)].

Chief Coroner of Ontario (2013). *Inquest: Touching the Death of Ashley Smith: Jury Verdict and Recommendations*.

*City of Vancouver v. Ward*, [2010] 2 S.C.R. 28.

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

*Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924, 73 O.R. (3d) 401 (Ont. CA).

Commission of Inquiry into Certain Events at Kingston's Prison for Women (1996). *Public Works and Government Services Canada*. Ottawa.

*Corless v. KPMG LLP*, [2008] O.J. No.3092.

*Corrections and Conditional Release Act*, SC 1992, c 20 s 85.

Correctional Service of Canada (2010). Internal Audit of the Implementation of the Aboriginal Accountability Framework 2009/2010, 20-32.

Correctional Service of Canada (1995). Regional Facilities for Women Offenders (archived). [<http://www.csc-scc.gc.ca/text/pblct/rht-drt/14-eng.shtml>].

*Criminal Code*, RSC 1985, c. C-46.

*Defazio v. Ontario (Ministry of Labour)*, [2007] O.J. No.902 (S.C.J.).

Department of Justice (2002). *Six Degrees from Liberation, Legal Needs of Women in Criminal and other matters*. [[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03\\_la20-rr03\\_aj20/p11.html#foot160](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la20-rr03_aj20/p11.html#foot160)].

Elliot, D. (2011). Fringe Benefits: Class Actions for Marginalized People in Canada. In *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick and Rumley*. Toronto: Lexus Nexus.

*Eng v. Goord*, 80 CV 385S (W.D.N.Y.).

G20 Class action, [www.g20classaction.ca].

Hannah-Moffatt (2009). Gridlock or mutability: Reconsidering ‘gender’ and risk assessment”.  
*Journal of Criminology and Public Policy*, 8, 209-219.

Hogg, P. and Monahan, P. (2011). *Liability of the Crown*, 4<sup>th</sup> Ed. Toronto: Carswell.

*Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 .

*Hislop* Certification Order, [http://www.reolaw.ca/pdf/certification\_order.pdf].

Kalajdzic, J. (2011). Accessing Justice: Appraising Class Actions Ten Years after *Dutton, Hollick & Rumley*. *Supreme Court Law Review*, 53, 2d.

Laderberg, A. (1998). The "Dirty Little Secret": Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse. *William and Mary Law Review*, 40, 323-363.

Linden, A. (1983). Reconsidering Tort Law as Ombudsman. In Steel and Rodgers-Magnet (Eds.)  
*Issues in Tort Law*. Toronto: Carswell.

Malkin, I., The Role of the Law of Negligence in Preventing Prisoner’s Exposure to HIV While in Custody. [http://www.heart-intl.net/HEART/120104/GovernmentsResponsibilityin.htm].

Metzner, J. (2002). Class Action Litigation in Correctional Psychiatry. *Journal of American Psychiatry Law*, 30, 19-29.

Monture-Angus, P. (1999). Women and Risk: Aboriginal Women, Colonialism and Corrections Practice. *Canadian Woman Studies Journal*, 19, 24-29.

Rudin, J. (2007). Aboriginal Peoples and the Criminal Justice System.  
[http://www.archives.gov.on.ca/en/e\_records/ipperwash/policy\_part/research/pdf/Rudin.pdf].

Sossin, L. (2011). Revisiting Class Actions Against the Crown: Balancing Public and Private Legal Accountability for Government Actors. *Supreme Court Law Review*, 10.

Wesley, M. (2012). Marginalized: The Aboriginal Women’s Experience in Federal Corrections. *Public Safety Canada*. [http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/mrgnlzd/index-eng.aspx].

*Manuge v. Canada*, [2010] S.C.J. No. 67.

*Marilyn Dolmage as Litigation Guardian of Marie Slark and Jim Dolmage as Litigation Guardian of Patricia Seth v. Her Majesty the Queen in Right of the Province of Ontario*, [[http://www.kmlaw.ca/site\\_documents/080659\\_certorder\\_30jul10.pdf](http://www.kmlaw.ca/site_documents/080659_certorder_30jul10.pdf)] [“*Huronian Certification Order*”].

*Marilyn Dolmage as Litigation Guardian of Marie Slark and Jim Dolmage as Litigation Guardian of Patricia Seth v. Her Majesty the Queen in Right of the Province of Ontario*, [[http://www.kmlaw.ca/site\\_documents/080659\\_SettlementAgreement\\_17sep13.pdf](http://www.kmlaw.ca/site_documents/080659_SettlementAgreement_17sep13.pdf)] [“*Huronian Settlement Agreement*”]

*Markson v MBNA Canada Bank*, 2012 ONSC 5891.

Office of the Correctional Investigator (2006). Report finds evidence of systematic discrimination against Aboriginal inmates in Canada’s prisons. Ottawa.

Office of the Correctional Investigator (2008). *A Preventable Death*. Ottawa.

Office of the Correctional Investigator (2009). *Annual Report of the Office of the Correctional Investigator, 2008-2009*. Ottawa.

Office of the Correctional Investigator (2010). *Annual Report of the Office of the Correctional Investigator, 2009-2010*. Ottawa.

Office of the Correctional Investigator (2011). *Annual Report of the Office of the Correctional Investigator: 2010-2011*. Ottawa.

Office of the Correctional Investigator (2012). *Annual Report of the Office of the Correctional Investigator: 2011-2012*. Ottawa.

Office of the Correctional Investigator (2013a). *Annual Report of the Office of the Correctional Investigator: 2012-2013*. Ottawa.

Office of the Correctional Investigator (2013b), *Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women*, September 30, 2013, [<http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20130930-eng.pdf>].

Public Safety Canada (2010). *Corrections and Conditional Release Statistical Overview*. [<http://www.publicsafety.gc.ca/res/cor/rep/2010-ccrso-eng.aspx>].

*R v. Gladue*, [1999] 1 S.C.R. 688.

*Rumley v. British Columbia* (1999), 72 B.C.L.R. (3d) 1 (C.A.).

*Rumley v. British Columbia*, [2001] S.C.J. No.67, [2001] 3 S.C.R. 184 (SCC).

- Joint Submission (2013). Rights Violations Associated with Canada's Treatment of Federally-Sentenced Indigenous Women. *Joint Submission to the United Nations Special Rapporteur on the Rights of Indigenous Peoples*.  
[[http://ihrp.law.utoronto.ca/utfl\\_file/count/HOME/Joint%20Submission%20to%20the%20UNSR%20Indigenous%20Rights%20Sept%202013.pdf](http://ihrp.law.utoronto.ca/utfl_file/count/HOME/Joint%20Submission%20to%20the%20UNSR%20Indigenous%20Rights%20Sept%202013.pdf)].
- Seglins, D. (May 4, 2011). Ashley Smith Family Settles \$11M Suit. *CBC News*.  
[<http://www.cbc.ca/news/canada/story/2011/05/03/ashley-smith-family-settles-suit.html>].
- Watson, G. (2011). Class Actions: Cases and Materials. Coursepack, University of Toronto Faculty of Law.
- Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.).
- Zinger, I. (2013). Mental Health in Federal Corrections: Reflections and Future Directions. *Health Law Review*, 20, 2.

**Figure 1: Issues Chart re: FSW with mental health issues**

Issue	Context	All FSW with mental health issues	Aboriginal FSW with mental health issues
<b>(1) CSC’s use of segregation for FSW with mental health issues;</b>	-For Canada to uphold its international and domestic human rights commitments there needs to be “an absolute prohibition on the practice of placing mentally ill offenders and those at risk of suicide or serious self-injury in prolonged segregation.” <sup>1</sup>	<ul style="list-style-type: none"> <li>- Disproportionate use of segregation on FSW as a way of dealing with mental health issues;</li> <li>- Disruption of treatment when in segregation;</li> <li>- Segregation for prolonged periods without judicial review; Segregation inappropriate for prisoners with mental health issues as it exacerbates symptoms.<sup>2</sup></li> </ul>	-Disproportionate use of the Management Protocol <sup>3</sup> or, following its disbandment, over-use and harsher terms of segregation for Aboriginal FSW identified as high risk than non-Aboriginal FSW.
<b>(2) CSC’s failure to provide adequate (mental) health care</b>	<p>-Canada’s Correctional Investigator has stated: “...prisons are not hospitals, but some offenders are patients”.<sup>4</sup></p> <p>-K.J., an Aboriginal FSW with serious mental health issues, sees a psychologist for 20 minutes per week.<sup>5</sup></p> <p>-Ms. Worm was unable to access treatment for her post-traumatic stress disorder while in segregation.<sup>6</sup></p>	<ul style="list-style-type: none"> <li>- Lack of appropriate and available mental health care resources in prisons; Lack of integration of gender and mental health considerations across other areas of programming;<sup>7</sup></li> <li>- Failure to recruit, hire, train, monitor, and supervise competent staff in areas of psychology and psychiatry;</li> <li>- Lack of continuity of mental health care while in segregation or upon institutional transfer; monitoring mental health of prisoners without treating it;<sup>8</sup></li> <li>- Lack of financial and human resources devoted to implementing CSC’s mental health strategy.<sup>9</sup></li> </ul>	<ul style="list-style-type: none"> <li>- The restriction of maximum-security FSW from accessing the Aboriginal Healing lodge impedes Aboriginal FSW with mental health issues from accessing culturally-appropriate care;</li> <li>- Failure to take into account past histories of abuse;</li> <li>- Lack of Aboriginal-specific mental health care services within prisons that are culturally-appropriate.</li> </ul>

<sup>1</sup> Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator, 2011-2012* (Ottawa: Office of the Correctional Investigator, 2012) [OCI Annual Report 2012].

<sup>2</sup> See *Anderson v. Goord*, 87 CV 141 (N.D.N.Y.); *Eng v. Goord*, 80 CV 385S (W.D.N.Y.) which sought injunctions requiring mental health care for individuals in the SHU’s as well as alternative housing for prisoners for whom isolated confinement was “psychiatrically contraindicated”.<sup>2</sup> Jeffrey L. Metzner also notes a general consensus among clinical psychiatrists that placement of inmates with serious mental illness in segregation units is contraindicated, “because many of these inmates’ psychiatric conditions will clinically deteriorate or not improve”. See Jeffrey L. Metzner, “Class Action Litigation in Correctional Psychiatry”, *J Am Acad Psychiatry Law*, 2002; 30(1), pp.19-19 at p. 25 [Metzner].

<sup>3</sup> Canadian Association of Elizabeth Fry Societies, (2006). *10th Anniversary of the Arbour Commission Report*, at p.4, [http://www.elizabethfry.ca/abr10e.pdf. at 4].

<sup>4</sup> OCI Annual Report 2012, supra note 1.

<sup>5</sup> See Elizabeth Bingham and Rebecca Sutton, “Cruel, Inhuman, and Degrading? Canada’s Treatment of Federally-Sentenced Women with Mental Health Issues”, *IHRP*, June 2012, [http://media.thestar.topscms.com/acrobat/ba/55/3c47d5da4a599c0f879c56e3e6.pdf] [IHRP Report].

<sup>6</sup> *Ibid* at p.58.

<sup>7</sup> *Ibid* at p.24.

<sup>8</sup> See American Civil Liberties Union, “ACLU of Indiana, Indiana Protection and Advocacy Services Win U.S. District Court Decision Regarding Inhumane Treatment of Prisoners”, January 3, 2013, [http://www.aclu.org/prisoners-rights/aclu-indiana-indiana-protection-and-advocacy-services-win-us-district-court].

<p><b>(3) CSC's use of its security classification system on FSW with mental health issues.</b></p>	<p>- Canada's Correctional Investigator: the number of mental health care interventions exceeded 69% of the total population of woman offenders.<sup>10</sup></p>	<ul style="list-style-type: none"> <li>- No security assessment tool specifically designed for women;</li> <li>- No security assessment tool specifically designed for prisoners with mental health issues;</li> <li>- Mental health needs of FSW interpreted as security risks, resulting in over-classification (especially for Aboriginal FSW);</li> <li>- Use of classification tools that have middle-class bias embedded in questions relating to employment, marriage, and addiction history.<sup>11</sup></li> </ul>	<ul style="list-style-type: none"> <li>- Security classification tools are culturally inappropriate because they take an overly-individualized approach<sup>12</sup> and translate Aboriginal women's experiences of marginalization outside of prison into risk factors,<sup>13</sup> resulting in over-classification of Aboriginal women;</li> <li>- The blanket policy of not allowing maximum security women to access the healing lodge instead of basing decisions on a case-by-case assessment;<sup>14</sup></li> </ul>
<p><b>(4) CSC's use of institutional transfers for FSW with mental health issues</b></p>	<p>-Ashley Smith was transferred 17 times in less than one year before her death in custody. -When prisoner K.J. was transferred to Grand Valley Institute she was taken off her psychiatric medication and placed on new medication. She noted her mental health treatment was routinely changed upon transfer between institutions.<sup>15</sup></p>	<ul style="list-style-type: none"> <li>- Disproportionate use of transfers as a way of dealing with mental health issues;</li> <li>- Disruption in mental health care treatment upon transfer; Inappropriate use of transfers as a way of avoiding oversight for over-use of segregation.</li> <li>- No statutory limit on the number of transfers to which one prisoner can be subject.<sup>16</sup></li> <li>- No clear process by which FSW can access external review of repeated transfers or transfers away from home.<sup>17</sup></li> </ul>	<ul style="list-style-type: none"> <li>- Institutional transfer may cause re-traumatization by replicating child welfare and guardianship transfers that inter-generational residential school survivors were subjected to.<sup>18</sup></li> </ul>

<sup>9</sup> "Needs Assessment of Federal Aboriginal Women Offenders", CSC, at p.30, [[http://www.csc-scc.gc.ca/text/rsrch/reports/r156/r156\\_e.pdf](http://www.csc-scc.gc.ca/text/rsrch/reports/r156/r156_e.pdf)].

<sup>10</sup> OCI Annual Report 2012, supra note 1 at Section IA.

<sup>11</sup> Department of Justice, *Six Degrees from Liberation, Legal Needs of Women in Criminal and other matters*, [[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03\\_la20-rr03\\_aj20/p11.html#foot160](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la20-rr03_aj20/p11.html#foot160)].

<sup>12</sup> Patricia Monture-Angus, "Women and Risk: Aboriginal Women, Colonialism and Corrections Practice," *Canadian Woman Studies Journal*, 1999, Vol. 19, pp. 24-9 [Monture-Angus].

<sup>13</sup> Canadian Human Rights Commission, "Backgrounder 2: Recommendations of the Special Report", [[http://www.chrc-ccdp.ca/legislation\\_policies/fsw2-eng.aspx](http://www.chrc-ccdp.ca/legislation_policies/fsw2-eng.aspx)]. As argued by CAEFS, CSC's assessment instruments are culturally inappropriate and translate Aboriginal women's marginalized experiences outside of prison into risk factors. See Submission of CAEFS to the Canadian Human Rights Commission for the Special Report on Discrimination on the Basis of Sex, Race and Disability Faced by Federally Sentenced Women (May 2003), [[http://www.elizabethfry.ca/chrc/CAEFS\\_SUBMISSION\\_TO\\_CHRC\\_INQUIRY\\_accountability.pdf](http://www.elizabethfry.ca/chrc/CAEFS_SUBMISSION_TO_CHRC_INQUIRY_accountability.pdf)]

<sup>14</sup> *Ibid.*

<sup>15</sup> *IHRP Report*, supra note 5 at p.16.

<sup>16</sup> *Ibid* at p.38.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid* at p. 36.