Federal Court Cour fédérale

**Date: 20250508**

**Docket: T-2158-18**

**Citation: 2025 FC 849**

**Vancouver, British Columbia, May 8, 2025**

**PRESENT: Case Management Judge Kathleen Ring**

**CLASS PROCEEDING**

**BETWEEN:**

**JOE DAVID NASOGALUAK**

**Plaintiff**

**and**

**ATTORNEY GENERAL OF CANADA**

**Defendant**

# ORDER

## I. Overview

[1] This motion is brought by the representative Plaintiff in a certified class proceeding for an Order imposing his proposed discovery plan, or a discovery plan with similar terms to be determined by the Court. Alternatively, the Plaintiff requests an Order providing directions to the parties regarding document discovery in this matter.

[2] Broadly speaking, a discovery plan is an upfront roadmap developed by the parties for how the discovery process will unfold. It may include a wide range of matters regarding how potentially relevant documents will be identified, preserved, gathered, compiled or processed, organized for review, reviewed, disclosed, and then produced in litigation.

[3] The parties have reached agreement on many aspects of the proposed discovery plan, and they are commended for doing so. Two key issues remain in dispute on this motion.

[4] On the first issue, the parties disagree on whether the Defendant must produce use of force data in the form of Subject Behaviour/Officer Response reports ["SB/OR Reports"], and related Occurrence Details reports and Personal ID data, entered by RCMP Officers in relation to specific instances of the use of force in the Territories. The Plaintiff contends that this data should be produced to allow the class to prove their claim under section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The Defendant resists production of this data on the basis that it is not relevant to the "top-down" claim certified in this matter, is unreliable for the purposes sought, and requires disproportionate time and resources for production.

[5] The second issue relates to the appropriate time period for production by the Defendant. The Plaintiff submits that the Defendant should initially produce use of force data from December 19, 2012 onwards, and all other relevant documents from January 1, 2000 onwards. The Plaintiff views this as a significant concession as the certified class period runs from 1928 to the present. The Defendant takes the position that production should be limited to June 23, 2015 onwards. According to the Defendant, this aligns with the "presumptive" limitation bar that applies to this

claim. That being said, the Defendant acknowledges that certain documents should be provided from 2010 forward.

[6] For the following reasons, I conclude that the Plaintiff's Proposed Updated Discovery Plan shall be approved in part. The Defendant shall produce some of the Disputed Data. The timeframe for the Defendant's production shall commence on December 19, 2012 for the Use of Force Data, and on January 1, 2025 for the Other Documents (the capitalized terms in this paragraph are defined below).

## II. **Facts**

### A. ***General Background to the Action***

[7] The underlying claim is brought as a class proceeding by the representative Plaintiff on behalf of "all Aboriginal Persons [defined as the Indian, Inuit, and Métis peoples of Canada] who allege they were assaulted at any time while being held in custody or detained by RCMP Officers in the Territories [defined as the Northwest Territories, Nunavut and the Yukon Territory], and were alive as of December 18, 2016": Amended Certification Order dated June 2, 2023.

[8] The Amended Statement of Claim dated December 19, 2018 [Amended Claim] defines the "Class Period" as the period from January 1, 1928 (when, it is pleaded, the federal Crown first entered into formal Police Services Agreements with the Territories) to the present.

[9] The relief sought in the Amended Claim includes, among other things, declaratory and monetary relief for systemic negligence in the funding, oversight, operation, supervision, control, maintenance and support of its RCMP detachments and officers in the Territories, breach of fiduciary duty, and violations of sections 7 and 15 of the *Charter*.

[10] Justice McVeigh certified the action as a class proceeding on June 23, 2021: *Nasogaluak v Canada (Attorney General)*, 2021 FC 656 [*Nasogaluak FC*].

[11] The Defendant appealed the certification order. In their Reasons for Judgment, the Federal Court of Appeal noted that the "core allegations" in the action are found at paragraphs 4 to 6 of the Amended Claim (*Canada (Attorney General) v Nasogaluak*, 2023 FCA 61 at para 6 [*Nasogaluak FCA*]):

> 4. Aboriginal Persons are regularly assaulted by RCMP Officers because they are Aboriginal. The Defendant has long known that these events commonly take place in the Territories, and has taken no action to prevent them.
> 5. The RCMP has exclusive jurisdiction over its RCMP Officers in the Territories. The Defendant establishes, funds, oversees, operates, supervises, controls, maintains, and supports the RCMP, RCMP Detachments, and RCMP Officers in the Territories. The RCMP is responsible for the epidemic of police assaults that take place in the Territories.
> 6. The lives of Class Members have been permanently impacted, or in many cases ended, as a result of the Defendants' negligence, breach of fiduciary duty and *Charter* breaches.

[12] The Federal Court of Appeal largely rejected the Defendant's grounds of appeal with two exceptions. First, the appellate court agreed with the Defendant that the pleading of breach of fiduciary duty failed to disclose a reasonable cause of action. Second, they agreed that no foundation had been laid for certifying a common question relating to aggregate damages. Accordingly, the Federal Court of Appeal allowed the appeal in part, set aside the certification order, and remitted the certification order to the Federal Court to be amended in light of these two deficiencies: *Nasogaluak FCA* at para 12.

[13] Justice McVeigh issued an Amended Certification Order on June 2, 2023, in accordance with the Federal Court of Appeal's ruling. The Order states the following questions are certified as common issues in the proceeding:

a) By its operation or management of the RCMP, did the Defendant breach a duty of care it owed to the Class to protect them from actionable physical or psychological harm?

b) By its operation or management of the RCMP, did the Defendant breach the right to life, liberty and security of the person of the Class under section 7 of the *Charter*?

c) If the answer to common issue (b) is yes, did the Defendant's actions breach the rights of the Class in a manner contrary to the interests of fundamental justice under section 7 of the *Charter*?

d) Did the actions of the Defendant breach the right of the class to the equal protection and equal benefits of the law without discrimination based on race, religion or ethnicity under section 15 of the *Charter*?

e) If the answer to common issue (b), (c), or (d) is "yes", were the Defendant's actions saved by section 1 of the *Charter*, and if so, to what extent and for what time period?

f) If the answer to common issue (b), (c), or (d) is "yes", and the answer to common issue (e) is "no", do those breaches make damages an appropriate and just remedy under section 24 of the *Charter*?

g) Does the Defendant's conduct justify an award of punitive damages?

h) If the answer to common issue (g) is "yes", what amount of punitive damages ought to be awarded against the Defendant?

[14] By Order of Justice McVeigh dated June 4, 2024, made on consent of the parties, the Plaintiff was required to provide a draft discovery plan to the Defendant, and the parties were to meet to discuss and resolve any issues on the discovery plan by September 12, 2024. Discussions ensued, but the parties were unable to agree upon all the terms of a discovery plan. Accordingly, the Plaintiff brought this motion.

B. ***The Current Motion***

[15] At the inception of this motion, the Plaintiff sought production of three sets of data held by the RCMP on the use of force by RCMP Officers in the Territories, from 2012 to the present (Plaintiff's Motion Record at pages 294 and 295):

> (a) Subject Behaviour/Officer Response Reports, and related occurrence and entity data, entered by RCMP Officers in relation to specific instances of the use of force;
>
> (b) Data in the Serious Incident Tracking Database, which records information regarding "member-involved shootings"; and
>
> (c) Electronically stored data for public complaint investigations alleging improper use of force.

[16] Both parties filed evidence on the motion. The Plaintiff filed an affidavit of Dr. Scot Wortley affirmed November 1, 2024 [the "Wortley Affidavit"], an expert witness for the Plaintiff, as well as an affidavit of a law clerk attaching the relevant pleadings. The Wortley Affidavit explains the type of use of force data that would, in his view, be relevant. He also describes the type of statistical analysis that he would conduct to assess whether RCMP use of force incidents have a disproportionate effect on Indigenous people living in the Territories.

[17] The Defendant filed an affidavit of Gregory Dale sworn November 22, 2024 [the "Dale Affidavit"]. Corporal Dale describes the categories of documents sought by the Plaintiff, and he describes the scope of those documents as being "extremely broad." Corporal Dale opines that the time and resources required for the RCMP to comply with such an obligation would be "enormous." Based on his experience with RCMP records, and information provided to him from other officials in the RCMP, he construes many of the records sought by the Plaintiff as having little to no relevance to the action.

[18] The Plaintiff cross-examined Corporal Dale, and the Defendant cross-examined Dr. Wortley. Excerpts from both cross-examinations are included in the parties' motion records.

[19] The issues in dispute on this motion were narrowed by both parties following the exchange of affidavit evidence and cross-examination. By the date of the hearing, the parties had narrowed the scope of disputed use of force documents to category (a) listed above. The Defendant has agreed to produce data in the Serious Incident Tracking Database (*i.e.*, category (b)). The Plaintiff has removed the public complaint investigation files (*i.e.*, category (c)) from the list of "Common Issues Documents" to be produced by the Defendant.

[20] The motion was heard at a special sitting of the Court by videoconference on January 16, 2025.

[21] During the hearing, the Court requested that the parties confer and submit an updated proposed discovery plan that incorporated all the changes that had been agreed upon by the parties and highlighted the text that remained in dispute for the purposes of this motion. The Plaintiff submitted a further updated proposed discovery plan dated January 20, 2025 [the "Plaintiff's Proposed Updated Discovery Plan"].

## III. **The Court has Jurisdiction to Decide this Motion**

[22] Both parties agree that the Court can decide this motion. Although this issue is not in dispute, it is appropriate to briefly address it as there is no specific provision in the *Federal Courts Rules*, SOR/98-106 [*Rules*] requiring a discovery plan, nor any apparent jurisprudence of this Court regarding the adjudication of disputes relating to a discovery plan.

[23] As a class proceeding, this matter has been automatically conducted as a specially managed proceeding pursuant to Rule 384.1, and Justice McVeigh and I were assigned to act as Case Management Judges. Both parties submit that as a Case Management Judge, I have jurisdiction to impose a discovery plan or in the alternative, give directions regarding document discovery, pursuant to Rule 385 of the *Rules*.

[24] Rule 385 sets out the powers of a Case Management Judge. Among other things, it authorizes the Case Management Judge to "give any directions or make any orders that are necessary for the just, most expeditious and least expensive outcome of the proceeding."

[25] The Federal Court of Appeal has observed that a Case Management Judge has a wide margin of discretion in the management of the court process and in making orders respecting the conduct of class proceedings under Rule 385, bearing in mind that the powers conferred thereunder must be exercised in accordance with procedural fairness: *Salt River First Nation #195 v Tk'emlúps te Secwépemc First Nation*, 2024 FCA 53 at para 40; *Jensen v Samsung Electronics Co., Ltd.*, 2019 FC 373 at para 22.

[26] Rule 385 sits alongside Rule 3 which provides that the *Rules* are to be interpreted and applied "so as to secure the just, most expeditious and least expensive outcome of every proceeding."

[27] Moreover, this Court's *Case and Trial Management Guidelines for Complex Proceedings and Proceedings under the PM(NOC) Regulations*, November 28, 2024 [the "*Guidelines*" or the "*Complex Proceedings Guidelines*"], which would apply to this class proceeding, explicitly state that the topics for early discussion with the Case Management Judge should include "the potential utility, content and timing of discovery plans" (page 4).

[28] I agree with the parties that, given the Court's encouragement in the *Guidelines* for parties to develop a discovery plan, there should be a mechanism to resolve disputes that come up in discovery planning. This is particularly so in this case, having regard for the Order of Justice McVeigh dated June 4, 2024, made on consent of the parties, which requires the Plaintiff and Defendant to exchange draft discovery plans.

[29] In light of the wide latitude granted to a Case Management Judge under Rule 385, I conclude that I have jurisdiction to decide this motion, and to give such directions or make any orders as are necessary to adjudicate the disputes between the parties regarding the discovery plan.

[30] It serves the interests of justice to interpret Rule 385 broadly to allow parties to seek adjudication of their interlocutory disputes regarding discovery plans when legitimate disagreements arise. A well-thought-out discovery plan will typically reduce costs in the long run because parties avoid the added time and expense of having to "re-do" an aspect of the discovery process after initial production has occurred. As the Alberta Court of King's Bench recently observed (*H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd.*, 2024 ABKB 424 at para 24 [*H2 Canmore*]):

> The benefit of up-front and ongoing planning and consultation efforts is clear. It maximizes the potential for relevant, material, proportionate, efficient, and useful records disclosure and production. It also minimizes the risk of increased cost and delays caused by wasteful, inefficient, unhelpful, and incomplete processes.

[31] Courts have also recognized that, while a well-crafted discovery plan is intended to minimize the need for court intervention, there will be situations in which it is reasonable to seek direction from the Court: *Lecompte v Doran*, 2010 ONSC 6290 at paras 3 and 14-15; *H2 Canmore* at para 39; *Kaymar Rehabilitation v. Champlain CCAC*, 2013 ONSC 1754 at para 38.

[32] The present case is one of those situations where judicial intervention is required to resolve the outstanding disputes between the parties regarding the scope of the Defendant's document production.

## IV. **The Applicable Legal Principles on this Motion**

[33] As I understand the parties' submissions, the Plaintiff and Defendant do not dispute the legal principles that the Court must take into account on this motion. As such, my summary of the applicable legal principles is intended simply to place this motion into its proper legal context.

[34] Part 5.1 of the *Rules,* which governs class proceedings, contains no specific rules dealing with discovery plans or discovery of documents more generally. Therefore, by virtue of Rule 334.11, the rules applicable to the discovery of documents in actions apply, as do the rules applicable to all proceedings in this Court. As will be seen from the following overview of these rules and related jurisprudence, the primary considerations for the Court in determining the proper scope of the Defendant's documentary discovery on this motion are relevance and proportionality.

[35] Rules 222 to 233 deal with discovery of documents in actions. Rule 223 provides that every party shall serve an affidavit of documents setting out all "relevant" documents in or previously in their possession, among other requirements.

[36] Rule 222 (2) provides that, for the purposes of discovery, a document is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case.

[37] When interpreting relevance under the *Rules,* a party producing an affidavit of documents is obliged to disclose a document if it is reasonable to suppose that the document contains

information which may directly or indirectly enable the moving party either to advance his own case, or to damage that of his adversary. A document can properly be said to contain such information if it may fairly lead him to a "train of inquiry" that may have either of these two consequences: *Apotex Inc. v Canada*, 2005 FCA 217 at paras 15 and 16; *Novopharm Ltd. v Eli Lilly Canada Inc.*, 2008 FCA 287 at paras 61 to 65 [*Eli Lilly*].

[38] The moving party is not required to establish that the documents sought will necessarily lead to useable information. The test is whether there is a reasonable likelihood, as opposed to an outside chance, that a document sought for production would lead to information that is relevant under Rule 222(2): *Eli Lilly* at paras 61 to 63.

> Formal relevance is to be determined by reference to the issues of fact which separate the parties, as defined by the pleadings: *Merck Frosst Canada Inc. v Canada (Minister of Health)*, (1997), 146 FTR 249, at para 7.
>
> In the context of a class proceeding that is at the post-certification stage, as in this case, the general rule is that the discovery of documents will be tied to the common issues, and that documents relevant to the common issues must be produced. Departure from this approach is the exception: Paradis Honey Ltd. v Canada (Agriculture and Agri-Food), 2018 FC 814 at paras 19 and 23.

[39] In addition to relevance, the other overarching consideration on this motion is the principle of proportionality which was codified in the *Rules* in 2022. Rule 3(b) requires the Court to interpret and apply the applicable rules "with consideration being given to the principle of proportionality, including consideration of the proceeding's complexity, the importance of the issues involved and the amount in dispute."

[40] The principle of proportionality encourages judges to apply the *Rules* in ways that are proactive in preventing, eliminating or minimizing conduct that causes delay and cost: *Lukács v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 55 at para 9; *Viiv Healthcare Company v Gilead Sciences Canada, Inc.*, 2021 FCA 122 at para 18.

[41] In *Hryniak v Mauldin*, 2014 SCC 7 at para 33 [*Hryniak*], the Supreme Court observed that the concept of proportionality is necessarily a comparative exercise:

> A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

[42] As previously noted, the Court's *Complex Proceedings Guidelines* encourage parties to discuss a discovery plan with the Case Management Judge. The *Guidelines* expressly direct that "all discussions should be guided by the principle of proportionality" (page 4).

[43] The Plaintiff also relies on excerpts from the Regulatory Impact Analysis Statement accompanying the amendment to Rule 3(b), which explains that the principle of proportionality was introduced into the *Rules* in part to "improve access to justice and promote more equitable outcomes," and to create "a level playing field". The Plaintiff also points to the statement that "in appropriate circumstances, a party may rely on proportionality to request a less onerous procedure (for example for a relatively minor matter or remedy) or a more comprehensive or intensive procedure (for example for a relatively important matter)": Regulatory Impact Analysis Statement, (2021) C Gaz II, Vol 155, No 26 at 4274 and 4275.

[44] In this case, the agreed upon portions of the parties' proposed discovery plans reflect the parties' consensus that relevance and proportionality are key considerations (paras 5 and 6), and that "the intended scope of documentary discovery for the purposes of this Discovery Plan is defined by the pleadings and the Common Issues, and the individual issues relating to the representative plaintiff that are relevant to the Common Issues" (para 15).

[45] While the parties agree upon the legal principles to be considered, they disagree on the application of those legal principles to the documents in dispute on this motion.

## V. **Analysis**

### A. **Should the Disputed Data be Produced by the Defendant?**

[46] By the date of the hearing, the parties had narrowed the scope of disputed documents to the first category of use of force documents being sought, which the Plaintiff described as "Subject Behaviour/Officer Response Reports, and related occurrence and entity data, entered by RCMP Officers in relation to specific instances of the use of force" (Plaintiff's Motion Record at page 294).

[47] In the Plaintiff's Proposed Updated Discovery Plan, the Plaintiff describes this disputed category of use of force documents in the following terms:

> 16. In addition to the documents listed in paragraph 17, below, Canada will produce all Subject Behaviour/Officer Response reports completed in M, V, and G divisions pertaining to the period from December 19, 2012, to the present, together with information identifying the specific geographic areas that the "Collator Codes" in those reports refer to. Thereafter, Class Counsel will provide to Canada a list of the Occurrence Numbers associated with a sample of 1/3 of the Subject Behaviour/Officer Response reports produced, for which Canada will provide:

> (a) Occurrence Details Reports; and
>
> (b) The Personal ID information from PROS for each Involved Person listed on the Occurrence Details, or for the Involved Person subject to the use of force, if immediately identifiable, including any race-based data entered.
>
> [collectively, the "Disputed Data"]

[48] The parties disagree on whether the Disputed Data is relevant and whether its production accords with the principle of proportionality.

[49] On the question of relevance, at the oral hearing, the Plaintiff advanced an overarching argument that the class proceeding was certified by the Court on the basis that the RCMP's use of force data would be produced to allow a statistical analysis of the use of force in the Territories. The Plaintiff contends that the disposition of this motion must be congruent with the Federal Court of Appeal's "ruling" that Dr. Wortley's report is an appropriate methodology for proving a section 15 *Charter* claim on a class-wide basis.

[50] In my view, on a plain reading of the Federal Court of Appeal's Judgment, the Court did not adjudicate the Defendant's disclosure obligations, nor did it "approve" of Dr. Wortley's proposed methodology. The Federal Court of Appeal merely observed that Dr. Wortley deposed that he "would analyze documents available through the discovery process, using models he described …": *Nasogaluak FCA* at para 105.

[51] Turning to the Plaintiff's main argument, he submits that the Disputed Data is relevant to the certified common issue relating to the section 15 *Charter* claim. The Plaintiff asserts that statistical evidence, which his expert intends to generate from the Disputed Data, is highly relevant

in an adverse impact discrimination case such as this to demonstrate that the impugned state action has a disproportionate impact on the members of the class on the basis of their race.

[52] The Defendant argues that the Disputed Data is not relevant because it pertains to individual use of force incidents, and the claim was certified on the basis that it was a "top-down" claim that did not depend on individualized circumstances. The Defendant notes that the Federal Court of Appeal described the theory of the Plaintiff's case as being "one of 'top-down' liability, in which higher-level decisions created the conditions in which lower-level misconduct could occur": *Nasogaluak FCA* at para 8.

[53] The Defendant also points to Justice McVeigh's reliance in the certification decision on a passage from the Ontario Court of Appeal's decision in *Francis v Ontario*, 2021 ONCA 197 at para 110, which states: "[w]hile individual circumstances may ultimately be relevant to the proof of individual levels of damages, they are not required for proof of a breach of the duty of care on a system-wide basis, nor are they required for determining a base level of damages applicable to all": *Nasogaluak FC* at para 38.

[54] I reject the Defendant's argument that the Disputed Data is not relevant because this is a "top-down" claim. While individual circumstances are not required for proof of a breach of the duty of care for the Plaintiff's systemic negligence claim, I find that the Disputed Data is relevant to proving the Plaintiff's section 15 *Charter* claim, and specifically to prove disproportionate impact, having regard for well-established jurisprudence discussed below.

> To prove a violation of section 15(1), a claimant must show that the impugned law or state action (1) creates a distinction based on enumerated or analogous grounds, on its face or in its impact, and

> (2) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage: R. v Sharma, 2022 SCC 39 at para 28 [Sharma]; Fraser v Canada (Attorney General), 2020 SCC 28 at para 27 [Fraser].

[55] In this case, the Amended Claim alleges that class members have been discriminated against based on, among other things, their race and their national, spiritual, religious and ethnic origin. The Plaintiff pleads that the Defendant's conduct is discriminatory "on its face, in its effect, and in its application" (para 70) [my emphasis], and includes the RCMP (1) allowing its agents to target Aboriginal Persons during their time in custody, (2) allowing its agents to use excessive force on Aboriginal Persons in custody, and (3) acting carelessly, recklessly or wilfully blindly, or deliberately accepting or actively promoting, a policy of discrimination against Aboriginal Persons in custody in the Territories: *Nasogaluak FCA* at para 78.

[56] Insofar as the Plaintiff frames the section 15 *Charter* claim as being one of adverse impact discrimination, the Supreme Court has held that whether impugned state action created or contributed to a disproportionate impact on the claimant group based on a protected ground necessarily entails drawing a comparison between the claimant group and other groups or the general population: *Sharma* at para 31. The Supreme Court has recognized the use of statistical evidence in proving that a law has a disproportionate impact on members of a protected group (*Fraser* at para 58, without citations):

> Courts will also benefit from evidence about the outcomes that the impugned law or policy (or a substantially similar one) has produced in practice. Evidence about the "results of a system" may provide concrete proof that members of protected groups are being disproportionately impacted […]. This evidence may include statistics, especially if the pool of people adversely affected by a criterion or standard includes *both* members of a protected group *and* members of more advantaged groups […].

[my emphasis]

[57] The Supreme Court has also been careful not to dictate rigid evidentiary requirements with respect to statistical evidence, observing in *Fraser* at para 59 (without citations):

> There is no universal measure for what level of statistical disparity is necessary to demonstrate that there is a disproportionate impact, and the Court should not, in my view, craft rigid rules on this issue. The goal of statistical evidence, ultimately, is to establish "a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance" […]. The weight given to statistics will depend on, among other things, their quality and methodology […].
>
> [my emphasis]

[58] In this case, the Disputed Data is relevant because it can be used to glean statistical evidence about the "results of a system" which can then be analyzed by the Plaintiff's expert, Dr. Wortley, to assess whether the RCMP's conduct regarding the use of force had a disproportionate impact on the class members.

[59] The Defendant argued at the hearing that the Disputed Data is not relevant to the section 15 *Charter* claim because it does not connect the impugned state conduct and the alleged adverse impacts (*i.e.,* causation). I reject this argument. Even if the Defendant is correct that the Disputed Data does not prove causation (on which I make no finding on this motion), this does not mean that the Disputed Data is not relevant. The Disputed Data is not required to be germane to all elements of a section 15 *Charter* claim to be relevant. It only needs to be relevant to one issue. I find the Disputed Data is relevant to the issue of whether there is a disparate pattern of harm to the class members.

[60] The Defendant also argues that the SB/OR Reports, which comprise part of the Disputed Data, are of little relevance to determining whether the Defendant has breached section 15 of the *Charter* because in most cases the SB/OR Reports lack key information – *i.e.*, race. The SB/OR Reports set out the particulars of a use of force incident. However, there is no field on the form to record the racial identity of the subject of the use of force, and information about a subject's racial identity is not systematically recorded using SB/OR Reports.

[61] While the SB/OR Reports may not themselves routinely contain information about the race, that fact alone does not make the reports irrelevant. The SB/OR Reports contain relevant information regarding use of force incidents. Moreover, as explained below, the SB/OR Reports contain additional information (*e.g.*, Occurrence numbers) which, when linked with other data in the possession of the Defendant can sometimes indicate the racial identity of the individual upon whom force was used (the exact frequency is currently unknown).

[62] The Dale Affidavit indicates that every SB/OR Report includes the related "Occurrence No." Further information regarding a relevant use of force occurrence, including possible information on race, may be accessed by entering the "Occurrence Number" into the RCMP's data management system known as the Police Occurrence Reporting System ["PROS"].

[63] An Occurrence Details Report is created, in PROS, "for every incident of any consequence between an RCMP Officer and a member of the public": Dale Affidavit at para 32. The Occurrence Details Report includes a list of Involved Persons. Each entity listed under the Involved Persons heading is linked to Personal ID Information in PROS. In entering occurrence information, details are entered of the Involved Persons. Every time an officer records or edits an individual's details in PROS, a drop-down field is available for the officer to enter an individual's racial identity. The

options provided are “Asian, Black, Caucasian, Eur-Asian, First Nation, Hispanic, Indian not FN, Inuit, Metis, Mid East, and Oth n/whi”: Dale Affidavit at para 24.

[64] The evidence before the Court is that although race-based information on Involved Persons does not generally appear on Occurrence Detail Reports, a user can print or export the Occurrence Details Report, and click to access and then export the Personal ID information of each individual involved, including any race-based data that was entered when that individual’s details were entered into PROS.

[65] The Defendant contends that the Disputed Data is of little relevance because even though RCMP officers have the option to select an individual’s racial identity from a drop-down field, they are not required to enter race-based information in PROS. Instead, in accordance with the RCMP’s Bias-Free Policing Policy, observable physical descriptors (including racial identity) may be used, but only when it is part of a specific person’s description and is based on sufficiently trustworthy and relevant information.

[66] Corporal Dale testified on cross-examination that race-based data “could be” in that person’s Personal ID Information, but only if it has been entered: Dale Transcript at pages 43 and 44. Further, the Defendant’s evidence is that, in a review of RCMP member involved shootings, race-based information was only available in PROS for 1/3 of such shootings nationally.

[67] In my view, the fact that race-based information may not be available in respect of every use of force occurrence does not defeat the Plaintiff’s motion. The Plaintiff is not required to establish that the Disputed Data will necessarily lead to useable information. As earlier stated, the test is whether there is a reasonable likelihood, as opposed to an outside chance, that the documents

sought for production would lead to information that is relevant under Rule 222(2): *Eli Lilly* at paras 61 to 63.

[68] Based on the material before the Court, I find that there is a reasonable likelihood that some of the Disputed Data will lead to useable information. Subject to the restrictions set out below, I am satisfied that the SB/OR Reports contain information which, when coupled with relevant portions of the associated Occurrence Details Reports, and relevant portions of the Personal ID Information, may fairly lead the Plaintiff to a "train of inquiry" that may enable him to advance the section 15 *Charter* claim, particularly the aspect of that claim which requires the Plaintiff to demonstrate a disparate pattern of harm to the class members as compared to non-Indigenous persons who were held in custody or detained by RCMP Officers in the Territories.

[69] I find it reasonable to impose three restrictions on the scope of the Disputed Data to be produced by the Defendant. First, paragraph 16(b) of the Plaintiff's Proposed Updated Discovery Plan seeks disclosure of "the Personal ID information from PROS for each Involved Person listed on the Occurrence Details, or for the Involved Person subject to the use of force, if immediately identifiable, including any race-based data entered" [my emphasis].

[70] I agree with the Defendant that it is overly broad to seek the Personal ID Information for every Involved Person listed in the Occurrence Details Report. An "Involved Person" for an occurrence in PROS can include suspects, witnesses, complainants, and victims of crime. In my view, what is relevant for the purposes of the Plaintiff's section 15 *Charter* claim, is the racial identity of the person who was the subject of the use of force incident associated with the occurrence, not every Involved Person.

[71] Having reviewed the SB/OR Report form, it is evident that there is a field for the "Subject Involved" in the use of force incident (*i.e.,* the person upon whom the use of force was directed) [the "Subject Involved"], and this is key information that would be routinely entered on the form. Once the Subject Involved is identified, a search can be conducted in PROS for the related Occurrence Details Report, and for any information in the Personal ID Information for their racial identity. Accordingly, this Order will limit the Defendant's required disclosure to select Personal ID information (as discussed below) relating to the Subject Involved.

[72] Second, paragraph 16(b) of the Plaintiff's Proposed Updated Discovery Plan seeks disclosure of "the Personal ID information from PROS for each Involved Person listed on the Occurrence Details, or for the Involved Person subject to the use of force, if immediately identifiable, including any race-based data entered" [my emphasis].

[73] The Plaintiff has not persuaded the Court that *all* Personal ID Information from PROS regarding the Subject Involved is relevant. In my view, the name of the Subject Involved in the Personal ID Information would need to be disclosed to the Plaintiff, in order to establish the link between the Subject Involved and the related Occurrence Details Report and Personal ID Information for that person. Likewise, any race-based information regarding the Subject Involved would obviously need to be disclosed.

[74] However, the Plaintiff has not satisfied the Court that other personal information (*e.g.*, birthdate, address, alias) contained in the Personal ID Information is relevant to the section 15 *Charter* claim. Had official existing statistical evidence been available from Statistics Canada, the RCMP or otherwise, it would have been stripped of any personal identifying information of particular individuals.

[75] As such, this Order will limit the Defendant's requisite disclosure to the following Personal ID information from PROS for the Subject Involved: (a) name of the Subject Involved; and (b) any race-based data entered for that individual.

[76] Third, paragraph 16(a) of the Plaintiff's Updated Proposed Discovery Plan seeks disclosure of the entire "Occurrence Details Reports" associated with the identified SB/OR Reports. Corporal Dale discusses "Occurrence Reports" at para 38(b) of his affidavit:

> Occurrence reports cover the RCMP's entire involvement in an incident. While use of force may be one aspect of an incident, the occurrence reports may include many pages of unrelated material. For example, where force was used to effect the arrest of an individual as part of a murder investigation, the occurrence reports related to a murder investigation could be hundreds or thousands of pages and may include hundreds or thousands of hours of audio and video recordings. Many of the pages and hours of recording would not be related to the use of force;

[77] According to the transcript of the cross-examination of Corporal Dale, the "Occurrence Details Report" contains a snapshot of the occurrence, whereas the general occurrence report would attach the entire files of the investigation, including any audio and video files.

[78] At the hearing, counsel for the Plaintiff advised the Court that after receiving the Dale Affidavit and cross-examining him on his affidavit, the Plaintiff revised the language in their proposed discovery plan to request an "Occurrence Details Report", instead of the complete "Occurrence Report," in an effort to make their request more proportionate and manageable.

[79] That being said, it remains unclear to the Court whether the "Occurrence Details Report" provides a snapshot of the RCMP's *entire* involvement in an occurrence, albeit in summary form. If so, and if force was only used in one aspect of the overall occurrence, I agree with the Defendant

that the portions of the Occurrence Details Reports that contain information that is not related to the use of force incident are irrelevant to the Plaintiff's claim and should not be required to be produced by the Defendant.

[80] Turning to the Defendant's remaining arguments, they contend that the Disputed Data is not relevant because it concerns the broad use of force generally, whereas the Plaintiff's claim concerns alleged "excessive" force used by RCMP members in the Territories. The Defendant relies on section 25 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], which authorizes police officers to use reasonable and lawful force in the performance of their duties. According to the Defendant, the requested documents do not make an assessment of whether the force used was excessive, and they will not demonstrate whether the force used in a particular case was excessive, nor prove patterns in this regard.

[81] The Plaintiff submits that the Defendant has mischaracterized the Plaintiff's pleadings regarding excessive use of force. The Plaintiff says that his pleadings on "excessive force" are intended to capture claims that the RCMP used force far more on Indigenous people in the Territories than on the population of non-Indigenous people (*i.e.*, frequency), *and* that the amount of force used against Indigenous people was more than that used against non-Indigenous people.

[82] Insofar as the Defendant is arguing that the Disputed Data is irrelevant because it does not establish excessive force, in the legal sense contemplated by section 25 of the *Criminal Code*, I find the Defendant's argument to be ill-founded. Unquestionably, the Disputed Data will contain information about the RCMP's use of force against persons in custody in the Territories. Whether the use of force was excessive, as a matter of law, is a question for determination by the trial judge.

It is not a basis upon which to conclude that the Disputed Data is irrelevant and therefore not producible in the first instance.

[83] Finally, the Defendant opposes producing the Disputed Data on the basis that it is unreliable for the purposes sought by the Plaintiff. The Defendant says that the data is not consistently recorded, the source of the information on race is unreliable, and race-based data is not monitored for accuracy.

[84] As David M. Paciocco and Lee Stuesser ("Paciocco and Stuesser") explain in *The Law of Evidence*, 6th ed (Toronto: Irwin Law Inc, 2011), it is important not to confuse the "relevance" and "weight" of evidence. "While relevance describes the tendency of evidence to support logical inferences, the concept of 'weight' relates to how 'probative' or influential the evidence is" (at page 32).

[85] At its core, I find that the Defendant's argument regarding the lack of reliability of the Disputed Data relates to the quality of the evidence to be gleaned from the Disputed Data, and the weight to be ascribed to that evidence, not the relevance of the Disputed Data. On this motion, the Court's role is limited to determining the relevance of the Disputed Data and whether its production is proportional. The weight to be given to the Disputed Data, if any, will be for the trial judge to determine, having regard to all the circumstances.

[86] In summary, and for the foregoing reasons, I conclude that some of the Disputed Data, as described above, is relevant to the certified common issue relating to the Plaintiff's section 15 *Charter* claim.

[87] The next question is whether the Plaintiff's request for the Disputed Data, as presently framed, is proportional. The Defendant argues that, to the extent that the Court finds the Disputed Data to be relevant, the Plaintiff's request for all SB/OR Reports for M, V, and G Divisions since December 19, 2012, and one third of the associated Occurrence Detail Reports and Personal ID Information is overly broad and disproportionate. According to the Defendant, linking the SB/OR Reports to the PROS information is a manual exercise and will be burdensome. Corporal Dale attests in his affidavit that the time and resources required for the RCMP to comply with the Plaintiff's requested disclosure would be "enormous" (para 6).

[88] To provide some perspective on the scope of the Plaintiff's request, the Defendant's affiant states that approximately 2,300 SB/OR Reports have been completed in the Territories since 2015. Approximately 3,300 such reports (45% more) have been completed since 2012: Dale Affidavit at para 21.

[89] Some of the proportionality considerations set out in Rule 3(b) clearly weigh in favour of robust disclosure by the Defendant. This matter involves a complex certified class proceeding that raises important issues regarding alleged *Charter* violations and systemic state misconduct and seeks damages in the amount of 500 million dollars. I am also mindful of the Supreme Court's caution regarding "the evidentiary hurdles and the asymmetry of knowledge (relative to the state) that many claimants face" in advancing section 15 *Charter* claims: *Sharma* at para 49. Here, it is precisely due to this asymmetry that the Plaintiff seeks production of the Disputed Data from the Defendant.

[90] At the same time, the principle of proportionality also encourages the Court to be proactive in preventing, eliminating or minimizing conduct that causes delay and cost. As the Supreme Court

teaches, the question in this regard is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication: *Hryniak* at para 33.

[91] The Plaintiff has made several efforts to reduce the scope of their disclosure request. They have modified their request to seek the Occurrence Details Reports, rather than the complete Occurrence Reports with attachments. Further, they request that the Defendant provide the associated Occurrence Details Reports and Personal ID information from PROS for only a sample of one-third of the SB/OR Reports, rather than the associated materials for all the SB/OR Reports.

[92] Moreover, the scope of the Defendant's required disclosure has been further reduced by this Court's ruling on this motion regarding the scope of relevant Disputed Data, as set out above.

[93] During the hearing of the motion, I explored other possible options to ensure that the disclosure is proportional, including whether data on "draw and display events" could be eliminated. However, the Plaintiff takes the position that "draw and display events" are relevant to the common issues. The Plaintiff was amenable to a sampling exercise (*e.g.*, a random sampling of every third SB/OR Report), but only if the Defendant agreed not to challenge the sampling method or sampling size at trial. The Defendant did not confirm such agreement during the hearing.

[94] Taking into account all of the relevant considerations, including the factors set out in Rule 3(b), and the other considerations set out above, I conclude that the scope of the proposed disclosure set out in paragraph 16 of the Plaintiff's Updated Proposed Discovery Plan, as amended by this Order, is proportionate in the circumstances.

[95] Finally, I will briefly address the "alternative position" advanced by the Defendant at the hearing in the event the Court found that some or all the Disputed Data is relevant. The Defendant

proposed an incremental approach whereby the Court would only provide directions on the production of the SB/OR Reports for a particular period at this stage. The parties could then discuss the most efficient means of providing the Occurrence Details Reports and Personal ID information.

[96] I disagree with the Defendant's alternative position. The parties have made full written and oral submissions on the production of all the Disputed Data, and I intend to address all those documents in this Order.

[97] In conclusion, the Defendant shall produce the following Disputed Data: (a) The SB/OR Reports; (b) the portions of one-third of the associated Occurrence Details Reports that contain information that is related to the use of force incident; and (c) select Personal ID Information relating to the associated Subject Involved, namely that person's name and any race-based data entered.

[98] An amended version of paragraph 16 of the Plaintiff's Proposed Updated Discovery Plan, consistent with these Reasons, is set out in the Order below.

## B. **What is the Appropriate Time Period for which Documents should be Produced?**

[99] The Defendant submits that the timeframe for production of its use of force data, which includes documents such as the Serious Incident Tracking Database and any Disputed Data that it is required to produce by virtue of this Order [the "Use of Force Documents"], should be June 23, 2015, to the present. It contends that a start date of June 23, 2015, aligns with the presumptive limitation bar that applies to the Plaintiff's claim.

[100] The Defendant relies on section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, which provides that actions against the federal Crown that arise outside a province are

subject to a six-year limitation period. It also relies on this Court's recent decision in *Jacques v Canada*, 2024 FC 851 at para 60 for the proposition that the limitation period continued to run in this proposed class proceeding until the date of certification, June 23, 2021.

[101] The Defendant acknowledges there are relevant documents from prior to 2015, including reports, audits, responses, policy, and training documents [the "Other Documents"], and has agreed to produce the Other Documents from January 1, 2010, to the present.

[102] The Plaintiff submits that the Defendant is obliged under the *Rules* to produce documents from January 1, 1928, to the present, which reflects the class period as defined in the Amended Claim. However, the Plaintiff has agreed, in his Proposed Updated Discovery Plan, to initially limit the period for which documents will be produced in the following manner:

> (a) Use of Force Documents are sought from December 19, 2012 (being six years prior to the commencement of this action), onwards; and
>
> (b) Other Documents are requested from January 1, 2000, onwards.

[103] The Plaintiff argues that there is conflicting caselaw in this Court on the tolling of a limitation period in a class proceeding. He relies on this Court's decision in *Hinton v Canada (Minister of Citizenship and Immigration)*, 2008 FC 7 at paras 16 and 17 as authority for the proposition that once an action has been certified as a class proceeding, the limitation period is tolled for all class members as of the date that the action was commenced.

[104] The Plaintiff asserts that the position he has taken in the Proposed Updated Discovery Plain is not a concession on the limitation periods applicable to any class members' claims, or the relevance of earlier documents. Rather, it is an effort to reduce the burden for the Defendant of discovery in this action.

[105] The two main factors that govern my analysis on the appropriate timeframe for the Defendant's production are relevance and proportionality.

[106] As regards the relevance of the Use of Force Documents prior to June 23, 2015, the Defendant argues that they are not relevant because no class members can obtain a remedy for any asserted wrong pre-dating June 23, 2015. Otherwise stated, any alleged misconduct by the RCMP as against the class members prior to June 23, 2015, is statute-barred.

[107] While the Defendant has pled various limitations defences in its Statement of Defence, the Plaintiff ardently disputes the Defendant's position that the limitation period was tolled as of the date of the certification order. The Defendant's position effectively relies on this Court answering this hotly disputed legal issue in its favour on this motion. However, that is not the role of the Court on this motion. I agree with the Plaintiff that this motion, which seeks a determination on the proper scope of the Defendant's document production, is not an appropriate forum to adjudicate the merits of the Defendant's limitations defence.

[108] As the parties join issue on the question of when the limitation period is tolled, I conclude that the Use of Force Documents from December 19, 2012 onwards are relevant, based on the pleadings and the certified common issues, and their production accords with the principle of proportionality.

[109] As regards the timeframe for production of the Other Documents by the Defendant, the Plaintiff submits that the Defendant should produce the Other Documents from the year 2000 onwards. For its part, the Defendant only agrees to produce the Other Documents from 2010 forward. With respect, I did not find either party's argument on this issue to be particularly persuasive. In the circumstances, I conclude that the Defendant shall be required to produce the

Other Documents from January 1, 2005, onwards. I find this to be a reasonable timeframe in the circumstances, as it will provide the Plaintiff with 20 years of documents, including reports, audits, policy and training documents, that relate to the Plaintiff's systemic claims.

[110] For these reasons, I conclude that the Defendant shall produce the Use of Force Documents from December 19, 2012 onwards. The Defendant shall produce the Other Documents from January 1, 2005 onwards.

### C. **Protection of Third-Party Personal Information**

[111] The Defendant submits that the requested Disputed Data contains personal and private information of third parties who are not class members. For example, the SB/OR Reports will include instances of use of force by the RCMP on non-Indigenous persons. Likewise, Personal ID Information for each Involved Person listed on the PROS Occurrence Details Report would include the names, addresses and birthdates of all persons involved in an occurrence.

[112] The Defendant opposes producing unredacted third-party personal information. If required to produce the SB/OR Reports and the related Occurrence Detail Reports and Personal ID Information, the Defendant agrees to produce any race-based data contained in these documents. However, it opposes production of any other personal information, including names, aliases, birthdates or other identifying information for Involved Persons.

[113] The Defendant's concerns have been addressed, in part, by this Order as the Court has ruled that only select Personal ID Information of the Subject Involved is relevant. The Personal ID Information of other Involved Persons is not relevant, and the Defendant is not required to disclose such information.

[114] Insofar as third-party personal information may be contained in Disputed Data that is producible pursuant to this Order, I note that the Plaintiff's Proposed Updated Discovery Plan already contains the following provisions to address third-party privacy concerns:

> Confidentiality
>
> > 25. The parties will take steps to preserve the confidentiality of the documents produced in this action, including negotiating in good faith and obtaining a protective order to prevent the public disclosure of sensitive business, technical or personal information. Confidential documents need not be produced until such a protective order is entered.
> >
> > 26. Where the producing party produced a redacted document where the redactions are confined to personal information (where the personal information is not relevant to the issues or individuals in the action), the producing party is not required to produce an unredacted document.

[115] There is no indication on the face of the Plaintiff's Proposed Updated Discovery Plan, or the Defendant's earlier Proposed Discovery Plan (dated January 10, 2025) that the above-noted provisions are in dispute between the parties.

[116] In any event, no submissions were made to the Court as to why a protective order, as contemplated by paragraph 25 of the Plaintiff's Updated Proposed Discovery Plan could not adequately address the Defendant's concerns.

[117] In my view, it is premature for the Court to make an Order regarding redactions at this juncture, as there was no formal motion before the Court requesting such relief, and the issue was not fully argued on this motion. The Defendant is at liberty to bring a motion on this issue if the parties are unable to resolve it through further discussion.

## VI. **Conclusion**

[118] For these reasons, the Plaintiff's motion is granted in part. The Defendant shall produce some of the Disputed Data as specified in this Order. The Defendant shall produce the Use of Force Documents from December 19, 2012 onwards. The Defendant shall produce the Other Documents from January 1, 2005 onwards.

[119] Neither party has sought its costs of this motion and so none shall be awarded: *Exeter v Canada (Attorney General)*, 2013 FCA 134.

**THIS COURT ORDERS that**:

1. Paragraph 16 of the Plaintiff's Updated Proposed Discovery Plan shall be amended to read as follows (amendments identified with underlining or strikethroughs):

> 16. In addition to the documents listed in paragraph 17, below, Canada will produce all Subject Behaviour/Officer Response reports completed in M, V, and G divisions pertaining to the period from December 19, 2012, to the present, together with information identifying the specific geographic areas that the "Collator Codes" in those reports refer to. Thereafter, Class Counsel will provide to Canada a list of the Occurrence Numbers associated with a sample of 1/3 of the Subject Behaviour/Officer Response reports produced, for which Canada will provide:
>
> > (a) The portions of the Occurrence Details Reports that relate to the use of force incident; and
> >
> > (b) The following Personal ID information from PROS ~~for each Involved Person listed on the Occurrence Details, or~~ for the Involved Person subject to the use of force:~~, if immediately identifiable, including~~ their name and any race-based data entered.

2. The Defendant shall produce all information contained in the RCMP's Serious Incident Tracking Database from December 19, 2012 to the present.

3. The Defendant shall produce the Use of Force Documents from December 19, 2012 to the present.

4. The Defendant shall produce the Other Documents from January 1, 2005 to the present.

5. This Order is made without prejudice to the Defendant to seek such further order or directions as it deems necessary regarding redaction of third-party personal information, if the parties are unable to resolve this issue through further discussion.

6. There shall be no order as to costs of this motion.

7. The parties shall confer and submit a jointly proposed timetable for next steps in the class proceeding, including any anticipated motions, by June 9, 2025. If the parties are unable to agree upon a proposed timetable, they shall submit their dates and times of mutual availability for a case management conference by June 9, 2025, along with separately proposed timetables.

"Kathleen Ring"
Case Management Judge