Federal Court  Cour fédérale

Date: 20220511

Docket: T-1523-19

Citation: 2022 FC 694

Ottawa, Ontario, May 11, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SHARLENE HUDSON AND
BRINDA WILSON-DEMUTH

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

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I. Overview

[1] The Plaintiff, Sharlene Hudson, was employed by the Correctional Service of Canada [CSC] as a correctional officer from 1986 until 2012, when she took medical leave. She retired from CSC in 2017. According to the Amended Statement of Claim, throughout her employment with CSC, Ms. Hudson was subjected to gender-based harassment, discrimination, and sexual assault by several of her male colleagues and superiors.

[2] The Plaintiff, Brinda Wilson-Demuth, was employed by CSC from 1992 until 2018. She initially worked as a psychologist in Prince Albert, Saskatchewan and Kitchener, Ontario. She was then appointed an Assistant Warden in Prince Albert, Saskatchewan and Bath, Ontario, and subsequently a Warden at the Grand Valley Institution in Kitchener. In 2007, Ms. Wilson-Demuth was posted to Ottawa as Director General, Women Offender Sector, and held this post until 2012. She became Director of Departmental Security in 2016 and Director General of Security the following year. She left CSC in March 2018.

[3] According to the Amended Statement of Claim, throughout her career with CSC, Ms. Wilson-Demuth was subjected to gender-based harassment and discrimination by male colleagues and superiors, and she experienced adverse differential treatment by her male colleagues.

[4] The Plaintiffs allege that CSC, through its operations and management, encouraged and condoned sexualized harassment, sexualized discrimination, sexual assault, and sexual violence

against female employees in the workplace. The Plaintiffs also allege that CSC failed to provide a reasonable avenue of redress for women who experienced this misconduct.

[5] The Plaintiffs assert that CSC implemented a flawed complaints procedure in which female employees were required to report misconduct to the perpetrators themselves, or to friends or colleagues of the perpetrators. They say that CSC encouraged and condoned retaliation against female employees who reported misconduct, and the impugned acts and omissions of the Defendant are pervasive and institutional in nature.

[6] The Plaintiffs ask this Court to certify this proceeding as a class action on behalf of the following classes:

> Class Members: All female current and former employees of the Correctional Service of Canada.
>
> Secondary Class Members: All persons who have a derivative claim, in accordance with applicable family law legislation, arising from a family relationship with a Class Member.

[7] The Defendant opposes certification of the proposed class action. The Defendant says this Court is without jurisdiction to adjudicate the Plaintiffs' claims; the Amended Statement of Claim fails to disclose reasonable causes of action; the proposed classes cannot be identified or are overly broad; there are no common issues of fact or law; and a class action is not the preferable procedure for resolving the Plaintiffs' claims.

[8] In addition to opposing certification of this proposed class proceeding, the Defendant has brought a motion pursuant to Rule 221(1)(a) of the *Federal Courts Rules*, SOR/98-106 [Rules] to strike the Amended Statement of Claim in its entirety, without leave to amend, on the ground that it fails to disclose any reasonable causes of action.

[9] For the reasons that follow, the Plaintiffs have not established that this Court has jurisdiction to determine the claims advanced in the Amended Statement of Claim. For similar reasons, they have not satisfied the requirement in Rule 334.16(1)(d) that a class proceeding be the preferable procedure for resolving their complaints. The motion for certification must therefore be refused.

[10] Given the Court's lack of jurisdiction, the Amended Statement of Claim must be struck in its entirety without leave to amend.

II. Background

A. *Facts Relied upon by the Plaintiffs*

[11] According to the Plaintiffs, CSC's toxic workplace is aptly described in an organizational assessment of the maximum security Edmonton Institution commissioned in March 2017:

> You may recall the 1988 movie version of "The Blob". "The Blob" starts out as a small gelatinous substance of unknown origins. It first swallows a drifter walking down the road and gets bigger. Then it slithers on into the town and swallows increasingly more people and becomes more dangerous and toxic as it grows. As it

> grows, it becomes more impossible to fight. Many of the people who become part of it are good people but helpless against its power. Many feel they can't fight it alone and have just given up. Some are still on the outside but the stress of trying to remain outside the Blob's power is wearing them down. Some grow weary and are also eventually consumed by it. […]
>
> As with most Hollywood movies, in the end the monster is defeated. In real life, the only way things can change is if resources are provided, people step up and new patterns emerge.

[12] The Plaintiffs allege that CSC's toxic workplace culture has been known for years, yet CSC has failed to address the issues or take meaningful steps to eliminate them.

[13] The 2012-2013 Annual Report of the Correctional Investigator noted that 31.8% of CSC employees who participated in a 2012 survey said they had been harassed in the workplace during the previous year, most commonly by their immediate supervisors or colleagues in the same work unit. The Plaintiffs note that these are the same people to whom CSC employees would be expected to present their grievances and complaints. Survey results also indicated that female CSC employees were more likely than their male colleagues to experience harassment in the CSC workplace.

[14] The 2017-2018 Annual Report of the Correctional Investigator identified the need for organizational change within CSC, and stated: "staff practices that undermine or degrade human dignity – sexual harassment, bullying, discrimination – can lead to a toxic work culture. A workplace that runs on fear, reprisal and intimidation is highly dysfunctional; it is the antithesis of modeling appropriate offender behaviour."

[15] A report published by the Auditor General of Canada in 2019 reached the following conclusion:

> Overall, we found that the Canada Border Services Agency's and Correctional Service Canada's approaches to dealing with harassment, discrimination, and violence in the workplace did not do enough to promote and maintain respectful workplaces. The organizations knew that these problems were present in the workplace, yet neither organization had developed a comprehensive strategy to address them, including a way to measure and report on their progress toward reducing harassment, discrimination, and workplace violence. We surveyed employees in both organizations and found that they had serious or significant concerns about organizational culture, and that they feared reprisal if they made complaints of harassment, discrimination, or workplace violence against fellow employees or supervisors. They also had serious or significant concerns about a lack of civility and respect in their workplaces.

[16] The March 2017 organizational assessment of Edmonton Institution described its workplace as a "toxic environment that runs on fear, intimidation, and bullying [that] can only be described as a culture of fear, mistrust, intimidation, disorganization, and inconsistency. Rarely is anyone held accountable for their actions".

[17] After Ms. Hudson reported to a supervisor that she was being subjected to persistent sexualized harassment, discrimination, and abuse in the CSC workplace, she found a dead mouse in her mailbox. She understood this to mean that that she was perceived as a "rat" for reporting misconduct. She did not report any further incidents of harassment or abuse to CSC management.

[18] Ms. Wilson-Demuth says that her complaints about sexualized harassment and discrimination in the CSC workplace were routinely dismissed by senior officials, some of whom were themselves perpetrators of the misconduct. Ms. Wilson-Demuth was once advised by a Commissioner of CSC that, as a woman at CSC, she was "expected to put up with a fair amount of abuse".

[19] Both Ms. Hudson and Ms. Wilson-Demuth say they have suffered severe consequences as a result of the adverse treatment they experienced in the course of their employment at CSC, ranging from depression and anxiety to post-traumatic stress disorder. Counsel for the Plaintiffs report that they have been contacted by women from across Canada who say they were subjected to gender-based harassment, discrimination, sexual assault, and sexual violence in the CSC workplace.

[20] The Plaintiffs' motion record contains affidavits from 10 current and former CSC employees whose testimony is intended to illustrate the systemic nature of CSC's operational failures and its "paramilitaristic culture of misogyny". The affidavits also describe the harm caused by CSC's conduct, and the inability of class members to obtain effective redress for the alleged misconduct.

[21] The Plaintiffs have adduced two expert reports. The first is authored by Dr. Jennifer Berdahl, Professor of Sociology at the University of British Columbia and faculty affiliate of VMware Women's Leadership Innovation Lab at Stanford University. The second is authored by Dr. Angela Workman-Stark, Associate Professor of Human Resource Management and

Organizational Behaviour, and Associate Dean, Operations and Innovation, in the Faculty of Business at Athabasca University.

[22] According to Dr. Berdahl, women in traditionally male-dominated organizations:

> […] often suffer from harassment and discrimination at the hands of other members, who are in the majority and usually more powerful and better connected. […] Thus, male-dominated professional societies and unions may fail to investigate gender-based harassment and discrimination and not protect women that try to file a complaint from retaliation.

[23] Dr. Angela Workman-Stark has observed similar dynamics in other traditionally male-dominated workplaces, such as the Royal Canadian Mounted Police [RCMP], the Calgary Police Service, and the Canadian Armed Forces. In her opinion, hostility towards women appears to be more prevalent in military and paramilitary working environments, including corrections. A common theme is a "cult or masculinity" that dismisses "feminine" characteristics as indicative of weakness in these "hypermasculine" environments.

[24] The Plaintiffs say that the evidence they have adduced in support of the motion for certification establishes the following:

(a) the internal grievance and complaint process at CSC is "corrupt", and complaints are routinely dismissed or rejected without due process or are withdrawn by the complainant or are still pending years later;

(b) in 2018, despite the fact that thousands of CSC employees reported being the victim of harassment and discrimination within the last 12 months in the Public Service Labour Relations Survey, the total number of grievances brought by

female CSC employees in 2018 was only 56 – and of those, only 3 were upheld – and Canada's director of labour relations for CSC had no explanation for why so few grievances had been upheld;

(c) in 2019, despite the fact that thousands of CSC employees reported being the victim of harassment and discrimination within the last 12 months in the Public Service Labour Relations Survey, the total number of grievances brought by female CSC employees in 2019 was only 36 – and of those 36, none were upheld;

(d) the fear of retaliatory abuse is "deeply engrained in the culture of CSC", and many female CSC employees are afraid to file a grievance for fear of repercussions, including further gender-based harassment, discrimination, or sexual assault;

(e) in 2018 and 2019, about half of employees at CSC reported having been the victim of harassment in the prior 12 months but not filing a grievance or formal complaint because they were afraid of reprisal – and Canada's director of labour relations for CSC admitted that this is a cause of concern and that there needs to be "safe spaces for people to come forward" so the allegations "can be properly looked into and addressed";

(f) in 2018 and 2019, 64% and 63% (respectively) of CSC employees did not file a grievance for the harassment that they endured because they did not think it would make a difference;

(g) there are no practical forms of redress for female CSC employees – for example, looking at CSC's internal procedure for investigation and resolution of harassment complaints – including sexual harassment – between 2013 to 2021, less than ten percent of female CSC employees who brought complaints under the Treasury Board's harassment policy had their complaints upheld;

(h) the issues raised in this proceeding are national in scope and endemic of CSC as an organization;

(i) CSC employees and managers condone a workplace culture that encourages the degradation and sexualization of female CSC employees;

(j) the culture of CSC is dominated by an "oath of silence" that discourages the reporting of incidents of discrimination, harassment, and assault;

(k) there has been a lack of confidentiality in the chain of command that, combined with a failure to take allegations of sexual harassment and assault seriously, has led to the ostracization of those who complained;

(l) the President of the Union of Canadian Correctional Officers at the Nova Institution for Women has deposed that "a lack of faith in the grievance process is a reason why many female CSC workers do not file grievances after being subjected to gender-based harassment or discrimination in the workplace", and many complaints are determined to be "unfounded";

(m) a Class Member did not report her personal experiences of gender-based harassment or discrimination, or those she witnessed, because she felt that no one in CSC management would support her if she reported this conduct, and she feared that she would experience retaliation as a consequence of reporting it; and

(n) a CSC workplace report indicated that employees feel management uses investigations against them for "punitive" reasons and to create a "witch hunt" to blame employees.

B. *Facts Relied upon by the Defendant*

[25] The Defendant disputes Dr. Berdahl's and Dr. Workman-Stark's depiction of CSC as a male-dominated and homogenous workplace. Both historically and presently, women outnumber men at CSC. Workplace environments and cultures vary widely depending on the office, institution or facility, and none may be fairly described as "paramilitaristic". According to the Defendant, CSC is a vast organization consisting of many different workplaces. CSC employs a total of 20,604 people who perform a wide range of functions across the country.

[26] CSC operates under three levels of management: National Headquarters [NHQ], Regional Headquarters [RHQ], and institutional/district parole offices. NHQ is located in Ottawa and is responsible for overall planning, policy development and administration for the organization. NHQ comprises twelve sectors, each with its own senior executive management and specific sphere of responsibility.

[27] An RHQ is located in a city in each of the five regions (Atlantic, Quebec, Ontario, Prairie and Pacific). The regions are further divided along provincial lines. RHQs are responsible for overseeing the operations of correctional institutions and the supervision of offenders in their respective regions. Each RHQ has a Regional Deputy Commissioner responsible for the management of CSC operations, implementation of correctional policy, and the provision of advice on criminal justice matters within their region.

[28] CSC manages 43 institutions, 14 community correctional centres and 92 parole offices across Canada. These include men's institutions, women's institutions, Indigenous healing lodges, community correctional centres, and regional treatment centres. Institutions are further categorized based on type (maximum, medium or minimum security, multi-level and clustered), and vary in size, infrastructure, control measures, offender population and culture.

[29] A broad spectrum of work is carried out through institutions and facilities by various employees, including, *inter alia*: correctional officers; primary workers; parole officers; health professionals; correctional program officers; Indigenous correctional program officers; Inuit correctional program officers; social program officers; education and training staff; tradespeople;

and office support staff. Other institutional staff include those who work in management services, finance, sentence management, chaplaincy, electronics, infomatics and laundry services.

[30] A significant organizational change took place at CSC between 1995 and 2004, with the opening of six separate women's institutions. Before 1995, there was only one women's institution in Canada. Now there are women's institutions in each region.

[31] CSC maintains a database of current and former employees that includes all indeterminate, term, casual and student employees who have worked at CSC at any time since 1998. As of May 12, 2021, this included 55,905 individuals, 29,222 (or approximately 52%) of whom were identified as female. In addition, female staff outnumber male staff in several employment groups, including the largest employment group, which is approximately 74% female.

[32] On average, approximately 76% of the staff at the six women's institutions operated by CSC are identified in the database as female. Women are employed at all levels of the institutions.

[33] None of the RHQs are located in or connected to penitentiaries. With very limited exceptions, NHQ and RHQ staff do not attend institutions as part of their regular work, and inmates do not attend NHQ or RHQ. At NHQ and RHQ, staff work in office buildings in an environment that is similar to other federal government departments. They do not wear uniforms

and they are not directly responsible for the security of the premises. Many NHQ and RHQ staff have worked from home during the COVID-19 pandemic.

[34] The Defendant says that the nature of the institution, facility or office plays an important role in determining the work environment and culture. The environment in maximum security institutions is centered on security, as inmate behaviour is most heavily restricted in these locations. In minimum security institutions, the environment is less structured, and inmates have more freedom of movement and responsibilities for daily living activities. There are no armed correctional officers inside minimum security institutions.

[35] There is also wide variability among multi-level institutions, for example:

(a) Women's institutions accommodate pregnant women and children under five years of age. They have playgrounds and child-friendly quarters, and minimum and medium security inmates live in housing units with communal living areas, where they are responsible for fulfilling their daily needs.

(b) Indigenous healing lodges are managed in collaboration with Indigenous communities, and aim to address inmates' needs through ceremonies, contact with elders and interaction with nature.

(c) Regional treatment centres are a hybrid between penitentiaries and psychiatric treatment centres, as they admit individuals who are not able to receive care in mainstream institutions due to mental or physically disabilities.

[36] Community Correctional Centres [CCCs] and parole offices are community-based facilities. CCCs are apartment-style “halfway houses” that are home to offenders on various forms of release. There are no correctional officers at CCCs. If safety concerns arise, CCC staff rely on commissionaires on site or local police. Offenders attend parole offices to meet with their parole officers.

C. *Unionization of CSC Employees*

[37] With limited exceptions, CSC employees are appointed to their positions pursuant to s 29 of the *Public Service Employment Act*, SC 2003, c 22. Appointments may be made on an indeterminate, term, casual, seasonal, or part-time basis. Ms. Hudson and Ms. Wilson-Demuth were both appointed to their positions on an indeterminate basis.

[38] Free collective bargaining has been available to members of the federal public service since the enactment of the *Public Service Staff Relations Act*, RSC, 1985, c P-35 in 1967. The vast majority of CSC employees are unionized.

[39] Depending on their job classification, CSC employees are represented by one of six bargaining agents: the Union of Canadian Correctional Officers; the Public Service Alliance of Canada; the Professional Institute of the Public Service of Canada; the Canadian Association of Professional Employees; the Association of Canadian Financial Officers; or the International Brotherhood of Electrical Workers. Each bargaining unit is subject to its own collective

agreement that is renegotiated periodically by the bargaining agent and the Treasury Board Secretariat on behalf of the Treasury Board [TB].

[40] Some employees are excluded or otherwise unrepresented by a bargaining agent. Three occupational groups are unrepresented in the core public administration: the Executive [EX] and Law Management [LC] groups, which represent the executive cadre, and the Personnel and Administration Group [PE], which comprises positions that provide advice on human resources management. A number of positions are also excluded from unionization if they are considered managerial or confidential. Positions can only be excluded from a bargaining unit on this ground by order of the Federal Public Sector Labour Relations and Employment Board [Board] based on criteria defined by the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [FPSLRA].

[41] There are currently approximately 10,430 women employed by CSC, representing 51.1% of its workforce. Approximately 9,504 (or 91.1%) of female employees at CSC are represented by a bargaining agent. The 926 employees (or 8.9%) who are not represented comprise excluded employees, casual employees, students, and term employees who have been employed for less than three months.

III. Internal Grievance and Complaint Procedures

[42] The Defendant has identified the following internal grievance and complaint procedures available to women employed by CSC:

A. *CSC Grievance Process*

[43] Grievance and harassment complaints are usually initiated at the local level, by an employee bringing a grievance or complaint to their immediate supervisor or manager. The right to file a grievance is extended to both unionized and non-unionized employees. Former employees may grieve any issue that arose during the course of their employment.

[44] There are three types of grievances under the FPSLRA: individual, policy and group. An individual grievance may be brought by any employee who is aggrieved by: (a) the interpretation or application to them of a provision of a statute, regulation, or direction that deals with terms and conditions of employment, a provision of a collective agreement, or an arbitral award; or (b) any occurrence or matter affecting the employee's terms and conditions of employment. A group grievance may be brought by a bargaining agent on behalf of a group of employees who feel commonly aggrieved by the interpretation or application of a provision of a collective agreement or arbitral award. A policy grievance may be brought by a bargaining agent in respect of the interpretation or application of a collective agreement or arbitral award as it relates to the bargaining unit.

[45] The scope of matters that may be grieved is very broad, and includes grievances related to gender-based workplace harassment and discrimination. While collective agreements that cover CSC employees contain provisions prohibiting gender-based discrimination and harassment, these are grievable issues whether or not there is an applicable provision of a collective agreement or arbitral award.

[46] Individual grievances brought by CSC employees and/or their bargaining agents are addressed internally through a process set out in collective agreements. There are three levels of review and decision, culminating with the Assistant Commissioner, Human Resources Management. If at any point the person designated to hear a grievance is the subject of the complaint, that level of the process is bypassed.

[47] If a grievance is not resolved to an employee's satisfaction, the final decision can be judicially reviewed or referred to the Board for independent adjudication, assuming the Board has jurisdiction over the matter. Pursuant to s 209(1) of the FPSLRA, the Board's jurisdiction over an individual grievance includes matters involving the interpretation or application of a collective agreement or an arbitral award. Unionized employees within CSC may, with the approval of their bargaining agent, refer to the Board grievances citing their collective agreement's prohibitions on discrimination or sexual harassment. Non-unionized employees may challenge final level decisions of non-adjudicable grievances by judicial review in this Court.

[48] The scope of remedies available through the grievance process is broad. At the first three levels, decision-makers have wide discretion to provide redress for discrimination or harassment. Among other things, they may interpret and apply the *Canadian Charter of Rights and Freedoms*, award damages, and/or refer a matter for disciplinary investigation.

[49] If the Board determines that a grievance is founded, it has the power to make any order it considers appropriate in the circumstances. This includes awarding compensation for losses suffered (including damages for lost career opportunities), rescindment of a disciplinary action,

and/or other monetary compensation (including interest in cases involving termination, demotion, suspension or financial penalty). The Board also has the power to apply and grant relief in accordance with the *Canadian Human Rights Act*, RSC, 1985, c H-6, and any other Act of Parliament relating to employment matters.

[50] Pursuant to s 186(2)(a)(iii) of the FPSLRA, it an unfair labour practice for the employer and managers to retaliate against any employee for exercising the right to file a grievance.

B. *Treasury Board Policies*

[51] Between October 1, 2012 and December 31, 2020, the relevant TB policy was the *Policy on Harassment Prevention and Resolution*. This policy and the associated *Directive* set out a general framework for the investigation and resolution of workplace harassment complaints. They apply across the entire core public administration.

[52] In accordance with the *TB Guide on Applying the Harassment and Resolution Process*, CSC has implemented internal procedures for the investigation and resolution of workplace harassment complaints by CSC employees. Between 2013 and 2021, 1,382 harassment complaints were brought by CSC employees, including approximately 703 complaints by women.

[53] As of January 1, 2021, the investigation and resolution of harassment complaints is guided by regulation under the *Canada Labour Code*, RSC, 1985, c L-2.

C. *Canadian Human Rights Act*

[54] The *Canadian Human Rights Act* [CHRA] prohibits discrimination and harassment in employment on the basis of sex, gender identity or expression. Any individual or group at CSC who alleges that CSC has engaged in a discriminatory practice may file a complaint to the Canadian Human Rights Commission [Commission] pursuant to the CHRA.

[55] The Commission is the screening body for the Canadian Human Rights Tribunal [Tribunal]. The Commission may assign an independent investigator to conduct an investigation into the complaint and prepare a report on whether the complaint should be referred to the Tribunal. The Commission also provides mediation services with the consent of both parties, and may appoint a conciliator with a view to settling the complaint. If separate complaints raise substantially similar issues of fact and law, the Commission may deal with those complaints together.

[56] If settlement of a human rights complaint is not possible, the Commission may refer the matter to the Tribunal. The Commission may decide to participate in the proceedings before the Tribunal, and may adduce evidence and make submissions in the public interest. If the Tribunal determines that a complaint is founded, it may grant individual remedies, including reinstatement, monetary relief and/or systemic remedies. A complainant who is not satisfied with the Commission's handling of a complaint, or with the Tribunal's disposition, may bring an application for judicial review in this Court.

[57] Between 2015, when CSC began collecting national data on human rights complaints, and May 25, 2021, there have been a total of 260 complaints to the Commission brought by CSC employees, 54% of which were brought by female employees. There have been 78 complaints alleging discrimination on the basis of sex, 90% of which were brought by women.

D. *Canada Labour Code*

[58] Prior to the coming into force of the *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130 [WPHVPR] on January 1, 2021, the *Canada Occupational Health and Safety Regulations*, SOR/86-304 required all employers to develop a policy for preventing and addressing workplace violence. As of January 1, 2021, the *Canada Labour Code* provides CSC employees with recourse for gender-based workplace harassment and violence under the WPHVPR.

[59] To give effect to the requirements of the WPHVPR, CSC has issued a *Policy on Harassment and Violence Prevention in the Work Place*. Between January 1, 2021 and April 30, 2021, there were 78 notices of occurrences submitted by CSC employees.

[60] Under s 128 of the *Canada Labour Code*, employees can refuse work if there is reasonable cause to believe they face danger in the workplace. The *Code* also prohibits an employer from retaliating against employees who have provided information and/or testified in respect of conditions of work affecting them or other employees.

E. *Government Employees Compensation Act*

[61] Subject to review and approval by a provincial worker's compensation board, any person paid a direct wage or salary on behalf of Her Majesty the Queen in right of Canada may be entitled to compensation for workplace injuries, including injuries arising from workplace harassment and discrimination under the *Government Employees Compensation Act*, RSC, 1985, c G-5 [GECA]. All CSC employees, including students and casual employees, are eligible for benefits under the GECA for workplace injuries, including injuries to mental health.

F. *Public Servants Disclosure Protection Act*

[62] Complaints of harassment that constitute a serious breach of a TB policy or CSC code of conduct may be made to an employee's supervisor, a designated senior officer and/or the Public Service Integrity Commissioner [PSIC] pursuant to the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [PSDPA]. Where the disclosure is made to a supervisor or a designated senior officer, and if wrongdoing is found, the PSIC must publish any recommendations and corrective action, or explain why no corrective action was taken.

[63] The PSIC may investigate any disclosure to determine if wrongdoing has occurred, and report findings and make recommendations for corrective action to the department's chief executive. If wrongdoing is found, the PSIC provides a report to Parliament, including the PSIC's opinion as to whether the chief executive's response to the recommendations is satisfactory. The PSDPA also permits complaints for alleged reprisals.

[64] The PSIC has conducted two investigations in respect of harassing behaviour by CSC employees. In response to the PSIC's recommendations, CSC adopted further measures, including additional training and awareness sessions, developing a workplace wellness action plan in collaboration with bargaining agents, and convening disciplinary hearings against the managers involved.

G. *Informal Recourse*

[65] In addition to the formal recourse mechanisms described above, CSC employees may informally report issues of workplace harassment and/or discrimination through CSC's tip line and informal conflict management via the Office of Conflict Management.

IV. Issues

[66] The issues raised by these motions are whether this proceeding should be certified as a class action, and whether the Amended Statement of Claim should be struck without leave to amend.

V. Motion for Certification

[67] The test for certification of a proposed class action is found in Rule 334.16(1):

334.16(1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

i. would fairly and adequately represent the interests of the class,

ii. has prepared a plan for the proceeding that sets out a workable method of advancing the proceedings on behalf of the class and of notifying class members as to how the proceeding is progressing,

iii. does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

iv. provides a summary of any agreements respecting fees and disbursements between the representative plaintiff of application and the solicitor of record.

334.16(1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies:

(a) les actes de procédure révèlent une cause d'action valable;

(b) il existe un groupe identifiable formé d'au moins deux personnes;

(c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;

(d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

(e) il existe un représentant demandeur qui:

i. représenterait de façon équitable et adéquate les intérêts du groupe,

ii. a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

iii. n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

iv. communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

A. *Reasonable Causes of Action*

[68] It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and the relief sought (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*] at para 16. Pleadings play an important role in providing notice and defining the issues to be tried. The Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action. If the Court were to allow parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues (*Mancuso* at paras 16-17).

[69] A plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability. Plaintiffs cannot file inadequate pleadings and rely on a defendant to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars (*Mancuso* at paras 19-20).

[70] The normal rules of pleading apply with equal force to a proposed class action. The Court must view the pleading as it has been drafted, not as it might be drafted. The launching of a proposed class action is a matter of great seriousness, potentially affecting many class members' rights and the liabilities and interests of defendants. Complying with the Rules is not trifling or optional; it is mandatory and essential (*Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 40).

(1) *Federal Public Sector Labour Relations Act*, s 236

[71] The Plaintiffs acknowledge that CSC is part of the "core public administration" within the meaning of the FPSLRA, and its employees are subject to s 236. This provision reads as follows:

No Right of Action	**Absence de droit d'action**
Disputes relating to employment	**Différend lié à l'emploi**
236 (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.	**236 (1)** Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.
Application	**Application**
(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.	**(2)** Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.
[…]	[…]

[72] The right to grieve is available to employees as defined in s 206(1) of the FPSLRA. Both unionized and non-unionized employees may file a grievance. The Defendant says that the Plaintiffs' right to grieve encompasses the allegations contained in the Amended Statement of Claim, because they concern their "terms and conditions of employment", as that expression is used in s 208 of the FPSLRA:

Right of employee	**Droit du fonctionnaire**
208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved (a) by the interpretation or application, in respect of the employee, of	**208 (1)** Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé a) par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award; or	(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	b) par suite de tout fait portant atteinte à ses conditions d'emploi.

[73] Subsection 236(1) of the FPSLRA has been recognized as an "explicit ouster" of the courts' jurisdiction (*Bron v Canada (Attorney General),* 2010 ONCA 71 [*Bron*] at para 4). Once it is established that a matter must be the subject of a grievance, the grievance process cannot be circumvented, even for reasons of efficiency, by relying on a court's residual jurisdiction (*Bouchard c Procureur général du Canada,* 2019 QCCA 2067).

[74] Subsection 236(1) of the FPSLRA was enacted in 2005 in direct response to the Supreme Court of Canada's decisions in *Vaughan v Canada,* [2005] 1 SCR 146 [*Vaughan*] and *Weber v Ontario Hydro,* [1995] 2 SCR 929 [*Weber*] (see *Attorney General of Canada, on behalf of Correctional Service of Canada v Robichaud and MacKinnon,* 2013 NBCA 3 [*Robichaud*] at para 3). *Vaughan* and *Weber* stand for the proposition that courts should usually decline to

exercise any residual jurisdiction they may have to intervene in employment-related matters. Before a court will intervene in an employment-related dispute, there must be a gap in labour adjudication that causes a "real deprivation of ultimate remedy" (*Weber* at para 57).

[75] This principle was succinctly stated by the Federal Court of Appeal in *Canada v Greenwood*, 2021 FCA 186 [*Greenwood*] at paragraph 130 (leave to appeal ref'd, 2022 CanLII 19060 (SCC)):

> *Vaughan* and the cases that apply it hold that, in most instances, claims from employees subject to federal public sector labour legislation in respect of matters that are not adjudicable before the FPSLREB should not be heard by the courts, as this would constitute an impermissible incursion into the statutory scheme. However, an exception to this general rule allows courts to hear claims that may only be grieved under internal grievance mechanisms if the internal mechanisms are incapable of providing effective redress.

[76] The Defendant says the effect of s 236 of the FPSLRA is to remove any residual discretion this Court may have to intervene in labour disputes involving employees with grievance rights. The Defendant argues that s 236 serves to revoke any statutory grant of jurisdiction this Court might otherwise possess.

[77] According to the Defendant, following the enactment of s 236 of the FPSLRA, no court, whether having statutory or inherent jurisdiction, has ever intervened in a labour dispute that involves employees who possess grievance rights. The most one can find in the jurisprudence is *obiter* commentary suggesting that an exception might be found if the integrity of the grievance procedure is shown to be compromised based on the evidence presented in a particular case

(*Lebrasseur v Canada*, 2007 FCA 330 [*Lebrasseur*]). The onus of establishing that there is room for the exercise of a court's residual discretion lies with an applicant (*Lebrasseur* at paras 18-19).

[78] In *Robichaud*, the Court of Appeal of New Brunswick suggested that if the residual discretion to hear a labour dispute continues to exist, despite s 236 of the FPSLRA, it will be only in "exceptional" cases: "The truly problematic cases will be those where the grievance process is itself 'corrupt'" (at para 10).

[79] While evidence is not generally admissible to satisfy the "reasonable cause of action" criterion of the test for certification, it may be admitted where a jurisdictional question arises. Evidence as to the nature and efficacy of the suggested alternate processes is necessary to provide a basis for the Court's determination of whether it ought to decline jurisdiction in favour of the alternate administrative remedies (*Greenwood* at paras 95-96).

[80] The Plaintiffs' Amended Statement of Claim includes the following allegations:

> 5. The impugned conduct was not a matter affecting Class Members' terms and conditions of employment and was not an accident arising out of and in the course of Class Members' employment.
>
> 6. In the alternative and in any event, there were systemic issues with the internal dispute resolution processes and mechanisms within CSC. There was no effective, adequate, or reasonable legislative remedy or internal mechanism within CSC through which Class Members could report incidents of sexual violence, threats of sexual violence, sexual assaults, sexual harassment, gender based discrimination, physical assaults and reprisals. Neither was there an effective, adequate, or reasonable legislative remedy or internal mechanism within CSC to address Class

> Members' complaints of or grievances related to the impugned conduct.
>
> 7. The internal recourses were ineffective because they were dependent on the "chain of command", comprised of individuals who abused their power and who were either responsible for the offending behavior or who acted to protect other perpetrators, thus perpetuating the toxic misogynistic culture of CSC and thus normalizing and condoning sexual violence, threats of sexual violence, sexual assaults, sexual harassment, gender based discrimination, physical assaults and reprisals. Any grievances that were filed were improperly and inadequately investigated by CSC and were routinely, consistently and unreasonably held to be unfounded.
>
> 8. CSC's internal processes were also not equipped to provide redress or compensation for negatively impacted career paths or for harm endured by family members of the Class who were impacted by the impugned conduct.

[81] The Amended Statement of Claim contains a number of other allegations concerning the inadequacy of CSC's grievance regime, but neither the pleadings nor the evidence adduced in support of the motion for certification directly address the full range of recourse mechanisms described under the heading Internal Grievance and Complaint Procedures, above. Nor do they acknowledge the central role played by unions in the resolution of workplace disputes where employees benefit from collective bargaining.

[82] One of the affidavits submitted by the Plaintiffs is affirmed by Chad George McDougall, who worked as a correctional officer at Stony Mountain Institution. He deposes that between October 2018 and September 2019, he volunteered as Executive Secretary for the Union of Canadian Correctional Officers [UCCO] at Stony Mountain's Rockwood Site. In this role, he became aware that UCCO had filed grievances on behalf of many female members working at CSC institutions throughout Canada who had reported gender-based harassment, discrimination,

sexual assault, or sexual violence in the workplace. He says that CSC often determined these kinds of grievances to be unfounded, and they were routinely dismissed or rejected.

[83] According to the affidavits of Lee-Anne Root, Sharlene Hudson, Miranda Kuester and Ashley Alblas, CSC employees rarely report sexual misconduct to their union, and indeed union representatives are among the worst perpetrators. They claim that union representatives have generally failed to provide assistance. They say this is confirmed by statistics regarding the small number of grievances filed, and the even smaller number that are upheld.

[84] The Defendant objects to the Plaintiffs' reliance on public service surveys as inadmissible hearsay. Beyond that, the Defendant says the evidence regarding the failure of union representatives to provide adequate assistance is sparse and anecdotal.

[85] The duty of fair representation is the necessary corollary of a union's right to exclusive representation of the employees who comprise the bargaining unit (*Centre Hospitalier Régina Ltée v Labour Court*, [1990] 1 SCR 1330 at p 1345). The duty is codified in s 187 of the FPSLRA:

Unfair representation by bargaining agent	**Représentation inéquitable par l'agent négociateur**
187 No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith	**187** Il est interdit à l'organisation syndicale, ainsi qu'à ses dirigeants et représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi en matière de représentation de tout fonctionnaire

in the representation of any employee in the bargaining unit.	qui fait partie de l'unité dont elle est l'agent négociateur.

[86] Bargaining agents enjoy considerable latitude in decisions respecting the representation of their members (*Navikevicius v Public Service Alliance of Canada*, 2016 PSLREB 12 at para 15). It is legitimate for the union to consider collective agreement language, industry or workplace practices, the credibility of a grievor, the existence of potential witnesses in support of the grievor's version of the events, and the decisions of arbitrators in similar circumstances (*Ross v Public Service Alliance of Canada*, 2017 FPSLREB 13 at para 91).

[87] There is insufficient evidence before the Court to assess the adequacy of union representation for all proposed Class Members. Nor would it be appropriate for this Court to determine this question without notice to the implicated bargaining agents or without providing an opportunity to be heard. To the extent that unions have failed to comply with their duty of fair representation, the Class Members' complaints are with their bargaining agents, not the Defendant.

[88] The Plaintiffs argue that the question at this stage of the analysis is not whether the Amended Statement of Claim discloses strong causes of action, or whether it is likely that they will ultimately succeed. They note that novelty is not a bar to certification. Given the egregious nature of the facts pleaded, the Plaintiffs say it is not plain and obvious that their claims do not meet the threshold of exceptional circumstances sufficient to evoke the Court's residual jurisdiction to proceed to a trial on the merits.

[89] The requirement that the pleadings disclose a reasonable cause of action is ordinarily assessed on the same standard that applies to a motion to strike. A plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 63).

[90] However, as Prothonotary Mireille Tabib held in *Murphy v Canada (Attorney General)*, 2022 FC 146 [*Murphy*], before determining whether to exercise any discretion to consider a proceeding, the Court must first be satisfied that the grievance process is not available and would not provide any remedy (at para 32, citing *Public Service Alliance of Canada v Canada (Attorney General)*, 2020 FC 481). She continued at paragraph 33:

> Consequently, and as also suggested in *Lebrasseur v Canada*, 2007 FCA 330, at para 19, once it is established that a person has recourse to a statutory grievance scheme, it is up to the applicant, and not the respondent seeking to have the application dismissed as premature, to establish that the procedure is clearly not available. That is the necessary conclusion, since concluding otherwise and allowing access to the courts whenever the admissibility of a grievance is challenged would have the effect of bypassing the exhaustive scheme Parliament intended. It would amount to asking the Court to prejudge the admissibility of a grievance and to usurp the role of the grievance authority in respect of the interpretation and application of the provisions governing the grievance procedure.

[91] Even at this preliminary stage, the onus is on the Plaintiffs to establish the Court's jurisdiction over the claims advanced in the Amended Statement of Claim. I am not persuaded they have done so.

[92] The classes proposed by the Plaintiffs are extraordinarily broad. They encompass all female current and former employees of CSC, without differentiation based on time or place of employment. Secondary Class Members comprise all persons who have a derivative claim, in accordance with applicable family law legislation, arising from a family relationship with a Class Member.

[93] The pleadings and evidence of the Plaintiffs do not establish that the internal recourse procedures available to female employees of CSC are, in all circumstances, in every workplace, and at all times, "corrupt" and incapable of providing effective redress. As the Federal Court of Appeal held in *Lebrasseur*, the onus is on a plaintiff to demonstrate that the integrity of internal recourse mechanisms is compromised based on the evidence presented in a particular case (at para 19). Based on the limited evidence presented in support of the motion for certification, it is simply not possible for all members of the broadly-defined classes to meet this threshold.

[94] In closing argument on the motion for certification, the Plaintiffs suggested that the proposed classes could be narrowed in the following ways:

> **Revised Class Definition (In the Alternative)**
>
> All female current and former employees of the Correctional Service of Canada (CSC) who worked in a CSC institution.
>
> **Revised Class Definition (In the Further Alternative)**
>
> All female current and former employees of the Correctional Service of Canada (CSC) who worked in a CSC institution between 1986 and the date of certification.
>
> **Revised Class Definition (In the Still Further Alternative)**

> All female current and former employees of the Correctional Service of Canada (CSC) who worked in a CSC institution between 1986 and the date of certification who allege that they were subjected to sexual harassment, discrimination, assault or violence in the CSC workplace.

[95] The effect of these alternative definitions would be to limit the proposed class to female employees of CSC who (a) worked as corrections officers rather than in more conventional public service settings; (b) during the time periods covered by the evidence adduced by the Plaintiffs; and (c) who specifically allege they were subjected to sexual harassment, discrimination, assault or violence in a CSC workplace.

[96] While there is some evidence before this Court that toxic work environments characterized by sexual harassment and discrimination are more likely to be found in penitentiaries such as the maximum security Edmonton Institution or the multi-level Stony Mountain Institution, this is insufficient to demonstrate that CSC's internal recourse procedures provide no meaningful redress for all employees who work as corrections officers across all institutional settings. Even among different CSC institutions, which encompass maximum, medium and minimum security facilities, as well as women's institutions, Indigenous healing lodges, regional treatment centres, and community correctional centres, workplace conditions and cultures vary widely.

[97] There is insufficient evidence before this Court that all of the recourse mechanisms described under the heading Internal Grievance and Complaint Procedures, above, are compromised for all female employees working in these environments. Nor is there sufficient

evidence demonstrating that these employees' collective bargaining units are institutionally incapable of assisting them with their grievances and complaints.

[98] The Plaintiffs argue that the CSC grievance procedure is flawed because female employees must report misconduct to the perpetrators themselves, or to friends or colleagues of the perpetrators. However, as noted above, if the person designated to hear a grievance is the subject of the complaint, that level of the process is bypassed. Furthermore, the requirement to report misconduct to possible perpetrators does not arise in many of the other redress mechanisms described under the heading Internal Grievance and Complaints Procedures, above.

[99] The Defendant emphasizes the availability of complaints under the CHRA, which ensures that a complaint will be determined by a neutral third party. Complaints of harassment may also be brought under the PSDPA directly to the PSIC, which again ensures that the matter is determined by a neutral third party.

[100] A central theme in the Plaintiffs' allegations is that Class Members have not, and will not, avail themselves of internal recourse mechanisms due to a fear of reprisal. Several of the women who submitted affidavits in support of the certification motion cite this as their reason for not pursuing grievances. The Plaintiffs note that, according to public service surveys conducted in 2018 and 2019, approximately half of CSC employees reported having been the victim of harassment in the preceding 12 months, but not filing a grievance or formal complaint because they were afraid of reprisal.

[101] Here, again, the role of collective bargaining agents is key. The Plaintiffs make broad accusations against union representatives, claiming that they are among the worst offenders, they are complicit, or they are ineffective. But there is no evidence before the Court that these circumstances, to the extent they exist, prevail across all CSC institutions. Nor is there any evidence that concerted attempts have been made to advance grievances with the assistance of bargaining agents, or that there have been complaints of unfair representation when assistance has not been forthcoming.

[102] The Plaintiffs cannot escape the operation of s 236 of the FPSLRA by pleading that their claims are not "ordinary workplace disputes". As the Ontario Court of Appeal held in *Bron*, the right to grieve is "very broad" and "[a]lmost all employment-related disputes can be grieved under s 208 of the FPSLRA" (at paras 14-15).

[103] Allegations of gender-based harassment, discrimination, and even assault may be grieved under s 208 of the FPSLRA. *Jane Doe v Canada (Attorney General)*, 2018 FCA 183 [*Jane Doe*] concerned a grievance brought by an employee of the Canada Border Services Agency who alleged that her employer had failed to provide her with a harassment-free workplace. The employee claimed she had endured prolonged sexual harassment, including an admitted sexual assault by a co-worker. The Board upheld the grievance, finding that the employer had failed to provide a harassment-free workplace, but did not award compensation. The Federal Court of Appeal granted the application for judicial review, holding that the Board had unreasonably denied the employee compensation for pain and suffering (*Jane Doe* at para 44; see also *Doro v Canada Revenue Agency*, 2019 FPSLREB 6).

[104] Provincial superior courts have also recognized that sexual or gender-based harassment and discrimination are grievable, and have generally declined to exercise any residual jurisdiction they may have in favour of the applicable labour relations scheme (see, for example, *A(K) v Ottawa (City)* (2006), 80 OR (3d) 161; *Greenlaw v Scott*, 2020 ONSC 2028).

[105] The motion for certification must therefore be dismissed on jurisdictional grounds alone. This conclusion applies equally to members of the proposed class whose claims arose before 2005. The Plaintiffs have not demonstrated that the circumstances of those class members constitute "exceptional cases", or that there is a gap in labour adjudication that causes a "real deprivation of ultimate remedy" (*Weber* at para 57; *Vaughan* at paras 22, 39).

[106] Should I be wrong in this conclusion, I will address the substance of the proposed causes of action and the remaining criteria of Rule 334.16(1).

(2) Negligence

[107] The Defendant says the Plaintiffs' claims of negligence fail to disclose a reasonable cause of action. According to the Defendant, the Crown's public duties to take steps to prevent and provide redress for gender-based workplace harassment, discrimination and assault cannot serve as the basis for a private law duty of care owed to the Plaintiffs.

[108] The existence of a duty of care is determined by applying the two-stage framework recognized by the Supreme Court of Canada in *Cooper v Hobart*, 2001 SCC 79 [*Cooper*]. Before

applying the test, the Court must first consider whether the relationship between the parties falls within a category that has previously been recognized as giving rise to a duty of care (*Cooper* at para 41). The Court should then consider the particular factors that justified recognizing the prior category in order to determine whether the relationship at issue is truly the same or analogous (*Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63 at para 28).

[109] The Defendant asserts that the duty of care alleged by the Plaintiffs has not been previously recognized, and the *Cooper* framework applies. The Court must consider whether a *prima facie* duty of care exists between the parties based on the foreseeability of the alleged harm and the proximity of the relationship (*Nelson (City) v Marchi*, 2021 SCC 41 [*Nelson*] at para 17). If there is a *prima facie* duty of care, the question at the second stage of the test is whether there are residual policy concerns outside the parties' relationship that should negate the existence of a duty of care. At this stage of the test, the Court is concerned with the effect that recognizing a duty of care will have on other legal obligations, the legal system, and society more generally (*Nelson* at para 18).

[110] The Defendant says it is plain and obvious that the Plaintiffs' negligence claim will fail at the second stage of the *Cooper* test. Canadian courts have generally been unwilling to permit negligence claims in the employment context. In *Piresferreira v Ayotte*, 2010 ONCA 384 [*Piresferreira*], the Ontario Court of Appeal rejected the proposition that an employer owed its employees a duty in negligence to ensure "a safe and harassment-free environment without verbal abuse, intimidation or physical assault" (at paras 32, 45). The Court held that complaints of this nature are compensable through intentional tort remedies and/or principles of employment

law such as constructive or wrongful dismissal. The Court concluded that it is neither desirable nor necessary to import negligence principles into everyday workplace affairs (*Piresferreira* at paras 55-63).

[111] In *Greenwood*, the Federal Court of Appeal (*per* Gleason JA) observed that a claim in negligence for workplace harassment, whether brought on an individual or systemic basis, is liable to be struck if brought on behalf of persons governed by contracts of employment. However, the Court also found that the holding in *Piresferreira* did not apply to RCMP members, because no employment contract applied to them (*Greenwood* at paras 155-157).

[112] The Plaintiffs say that the nature of their employment relationship with CSC is sufficient to sustain an allegation of systemic negligence, as recognized by the Supreme Court of Canada in *Rumley v British Columbia*, 2001 SCC 69 [*Rumley*], and by this Court in a number of cases involving allegations of workplace harassment within the RCMP. (See also *White v Attorney General of Canada*, 2002 BCSC 1164; aff'd, 2003 BCCA 53.)

[113] In *Sauer v Canada (Attorney General)*, 2007 ONCA 454, the Ontario Court of Appeal cautioned that courts should be "circumspect" in finding it plain and obvious that there is no duty of care in novel circumstances (at para 45):

> […] It is to be remembered that at this point we have only the statement of claim. Ridley has not filed a defence. In [*Childs v Desormeaux*, [2006] 1 SCR 643], the court said that at the second stage, the defendant (in this case Ridley) bears the evidentiary burden of showing countervailing policy considerations sufficient to negate the *prima facie* duty of care. It is for this reason that this court has said that it should be circumspect in determining so early

> in an action that residual policy considerations make it plain and obvious that there is no duty of care. See *Haskett v. Equifax Canada Inc.* (2003), 2003 CanLII 32896 (ON CA), 63 O.R. (3d) 577 at para. 24 (C.A.).

[114] As the Federal Court of Appeal held in *Greenwood*, "it cannot be said that it is plain and obvious that there is no cause of action in negligence for workplace harassment experienced by an RCMP Member" (at para 162). Furthermore, the Ontario Court of Appeal in *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 [*Merrifield*] "left the door open to the recognition of a new tort of workplace harassment in an appropriate case" (*Greenwood* at para 58).

[115] The Plaintiffs therefore say that the law governing the circumstances in which an employer may owe a duty of care to its employees in relation to systemic misogyny, harassment, discrimination, and assault is not settled. In the words of the Ontario Court of Appeal in *Merrifield*, "we do not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts".

[116] I agree with the Plaintiffs that the Court should be "circumspect" in finding at this preliminary stage that the Defendant owes no duty of care to the Plaintiffs and other proposed Class Members. Furthermore, the Defendant acknowledges that the Plaintiffs' *Charter* claims meet the low threshold necessary to survive a motion to strike, and therefore satisfy the requirement in Rule 334.16(1)(a) that the pleadings disclose a reasonable cause of action.

(3) *Canadian Charter of Rights and Freedoms*, ss 7 and 15

[117] The Plaintiffs' Amended Statement of Claim alleges breaches of ss 15 and 7 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*]. CSC exercises authority under a federal statute, namely the *Corrections and Conditional Release Act,* SC 1992, c 20. CSC's conduct therefore constitutes "state action" for the purposes of the *Charter* (*RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at para 41; *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 at para 16).

[118] The Plaintiffs plead that the impugned state action, on its face or in its impact, creates a distinction based on enumerated or analogous grounds, and imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser*] at para 27). Section 15 may be infringed not only through state action that is explicitly discriminatory, but by seemingly neutral state action that has an adverse impact or that has a discriminatory effect in its application (*Meekis v Ontario*, 2021 ONCA 534; *Fraser* at paras 30, 52-53; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69).

[119] The Plaintiffs say they have been denied the right to equal protection and benefit of the law without discrimination based on sex. They say the breach of Class Members' rights under s 15 of the *Charter* cannot be justified under s 1.

[120] Section 7 of the *Charter* is breached by state action that deprives someone of the right to life, liberty, or security of the person, contrary to a principle of fundamental justice (*Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 3). Section 7 protects individual autonomy and dignity, and encompasses control over one's personal integrity, free from state interference. It is engaged by "state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering" (*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 64).

[121] The Amended Statement of Claim alleges that the acts and omissions of CSC have resulted in risk to Class Members' lives, liberty, and security of the person, in a manner that is grossly disproportionate and arbitrary and therefore contrary to the principles of fundamental justice. The Plaintiffs say that the alleged breach of Class Members' rights under s 7 of the *Charter* cannot be justified under s 1.

[122] The Plaintiffs assert that Class Members are entitled to damages under s 24(1) of the *Charter*.

[123] While the Defendant opposes certification of the Plaintiffs' *Charter* claims based upon the other criteria for certification, it does not deny that these claims meet the low threshold necessary to survive a motion to strike. Accordingly, even if the Plaintiffs' allegations of negligence were to be struck, the Plaintiffs' claim could still proceed on the basis of the *Charter* claims alone.

[124] Subject to the finding that this Court does not have jurisdiction to adjudicate the claims advanced in the Amended Statement of Claim by virtue of s 236 of the FPSLRA, the Plaintiffs' pleadings satisfy the criterion in Rule 334.16(1)(a) of disclosing a reasonable cause of action.

B. *Identifiable Class*

[125] Rule 334.16(1)(b) requires that there be "an identifiable class of two or more persons". The Plaintiffs must provide some basis in fact to satisfy this requirement (*Hollick v Toronto (City)*, 2001 SCC 68 at para 25).

[126] The purpose of a class definition is to identify those persons with a potential claim for relief against the defendant, define the parameters of the lawsuit to identify who will be bound by its result, and describe who is entitled to notice of the lawsuit (*Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 [*Dutton*] at para 38). There should be a rational relationship between the class and the common questions. Over– or under–inclusion is not fatal, so long as the class definition is not illogical or arbitrary.

[127] A rational connection between a class definition and a claim may exist even if it includes potential class members who have not suffered harm (*Tiboni v Merck Frosst Canada Ltd*, [2008] OJ No 2996 (ONSC) at paras 71-72). It need not be shown at the certification stage that each Class Member would be successful in establishing a claim for one or more remedies (*Cloud v Canada (Attorney General)*, 2004 CanLII 45444 (ONCA) at paras 45-47).

[128] The proposed classes are defined as follows:

> Class Members: All female current and former employees of the Correctional Service of Canada.
>
> Secondary Class Members: All persons who have a derivative claim, in accordance with applicable family law legislation, arising from a family relationship with a Class Member.

[129] With respect to Secondary Class Members, the Plaintiffs note that similar family classes have been certified in other class proceedings alleging systemic negligence against government agencies (citing *Slark (Litigation Guardian of) v Ontario*, 2010 ONSC 1726).

[130] The Defendant says that the Plaintiffs' proposed class definitions are overly broad and unmanageable. They include all female current and former employees of CSC, and all persons who have a derivative claim arising from a family relationship with a Class Member. If certified, the classes would include women who have not experienced the alleged gender-based misconduct, and also those whose claims are barred by limitations statutes or otherwise, *e.g.*, women who are or could be in receipt of pension benefits pursuant to the *Pension Act*, RSC, 1985, c P-6**,** or disability benefits under the GECA.

[131] The Defendant maintains that there is no nexus between a female employee of CSC who did not experience gender-based workplace harassment, discrimination or violence and any of the proposed common questions. There is no evidence pertaining to the proposed Secondary Class Members, and no proposed representative plaintiff for this group.

[132] According to the Defendant, if the Plaintiffs' proposed class definitions were certified, they would raise similar concerns of unmanageability to those identified in *Amyotrophic Lateral Sclerosis Society of Essex v Windsor (City)*, 2015 ONCA 572 [*ALS*], where the proposed class had the potential of reaching back to 1969 or 1970 (at para 42).

[133] In the present case, the Plaintiffs plead various incidents occurring in different provinces and territories. Regardless of whether a provincial or federal limitation period applies, if the proposed classes are certified, then the Defendant says that a similar approach should be taken to the one adopted in *ALS* and *Knight v Imperial Tobacco Canada Limited*, 2006 BCCA 235. The classes should be limited to claims falling within the federal limitation period of six years from certification, and then the issue of whether or not a provincial limitation period applies may be deferred.

[134] The Defendant also objects to the inclusion of claims prior to 1986, because the Plaintiffs have not provided any evidence of claims arising prior to that year. The Defendant notes that the Plaintiffs' and the other affiants' experiences cannot be extrapolated to provide some basis in fact for other groups of employees (citing *Greenwood* at para 173).

[135] The affidavits filed by the Plaintiffs in support of the motion for certification provide "some basis in fact" for the following assertions:

(a) At different times, beginning as early as 1986, some corrections officers employed by CSC have experienced gender-based harassment, discrimination, abuse, and related retaliation by male employees and management. The workplaces in which

this occurred include Atlantic Institution, Renous, New Brunswick; Dorchester Penitentiary, Dorchester, New Brunswick; Bowden Institution, Innisfail, Alberta; Edmonton Institution, Edmonton, Alberta; Grand Valley Institution for Women, Kitchener, Ontario; Mountain Institution, Agassiz, British Columbia; Pacific Institution, Abbotsford, British Columbia; Millhaven Institution, Bass, Ontario; Stony Mountain Institution, Winnipeg, Manitoba; Nova Institution for Women, Truro, Nova Scotia (Sharlene Hudson, Brinda Wilson-Demuth, Janet Hamilton, Lee-Anne Root, Heather Pederson, Nicole Losier, Miranda Kuester, Ashley Alblas, Chad McDougall, Lyndsey McMullin).

(b) Since 1992, gender-based harassment, discrimination, abuse, and related retaliation have also been experienced by at least one woman working as a psychologist in Prince Albert, Saskatchewan and Kitchener, Ontario, as an Assistant Warden in Prince Albert and Bath, Ontario, as a Warden at Grand Valley Institution, Kitchener, and in various capacities at NHQ in Ottawa (Brinda Wilson-Demuth).

(c) One woman who held the positions of Administrative Assistant, Pay & Benefits and Social Program Officer, and senior management positions on a temporary basis, experienced or witnessed gender-based harassment, discrimination, abuse, and related retaliation. This occurred at Millhaven Institution, Bath, Ontario; Fenbrook Institution, Gravenhurst, Ontario; Bath Institution, Bath, Ontario; Grand Valley Institution for Women, Kitchener, Ontario; and the Regional Treatment Centre in Kingston, Ontario (Vicki Rombough).

(d) During a CSC training course for the Emergency Response Team in September of 2016, male instructors berated and humiliated female participants. CSC convened a Board of Inquiry to investigate, but the report cast aspersions on the complainants and failed to take the matter seriously (Nubia Davis).

[136] Government reports, studies and surveys regarding CSC's workplace, and the expert reports of Dr. Berdahl and Dr. Workman-Stark, are summarized under the heading Factual Background, above.

[137] The evidence adduced by the Plaintiffs establishes "some basis in fact" for their allegations of gender-based harassment, discrimination, abuse, and related retaliation by male employees and management, but primarily in relation to institutions. The evidence of similar systemic misconduct in other workplace settings is sparse, and cannot be extrapolated to CSC as a whole.

[138] The expert evidence of Dr. Berdahl and Dr. Workman-Stark is restricted to male-dominated, military or paramilitary working environments. It is doubtful whether the factual assumptions that underlie their opinions have been established by the evidence. To the limited extent they may be, it appears that these working environments arise primarily, and almost exclusively, in penitentiaries.

[139] There is no evidence to establish "some basis in fact" for the claims of Secondary Class Members.

[140] Subject to the finding that this Court does not have jurisdiction to adjudicate the claims advanced in the Amended Statement of Claim by virtue of s 236 of the FPSLRA, the Plaintiffs' pleadings satisfy the criterion in Rule 334.16(1)(b) that there be "an identifiable class of two or more persons" only with respect to the alternative class definitions proposed by the Plaintiffs. The evidence adduced by the Plaintiffs establishes "some basis in fact" to support the following alternative class definition [Alternative Class]:

> All female current and former employees of the Correctional Service of Canada (CSC) who worked in a CSC institution between 1986 and the date of certification who allege that they were subjected to sexual harassment, discrimination, assault or violence in the CSC workplace.

[141] Where the resolution of a limitations issue depends on a factual inquiry, such as when the plaintiff discovered or ought to have discovered the claim, the issue should not be decided on a motion for certification (*ALS* at para 41). The Ontario Court of Appeal in *ALS* imposed an ultimate limitation period of 15 years upon the class definition in the interests of manageability. However, the Federal Court of Appeal did not apply any limitation period to the class definition approved in *Greenwood*, holding at paragraph 133:

> In terms of the commencement date of this period, the evidence that was before the Federal Court is incapable of supporting a class period commencing prior to 1995, the earliest possible date that one of the representative plaintiffs experienced harassment. […]

[142] The class approved in *Greenwood* was defined as follows (at para 202):

> All current or former RCMP Members (*i.e*. Regular, Civilian and Special Constable Members) and Reservists who worked for the RCMP between January 1, 1995 and the date a collective agreement becomes or became applicable to a bargaining unit to which they belong.

[143] Consistent with *Greenwood*, I do not consider it necessary or appropriate to address limitation periods or statutory bars to compensation at the certification stage. These issues are heavily dependent on factual inquiry. Allegations of sexual misconduct present unique considerations with respect to discoverability and in some jurisdictions benefit from exceptions in limitations legislation.

C. *Common Questions*

[144] Rule 334.16(1)(c) requires that the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members. In *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443, the Ontario Court of Appeal (*per* Winkler CJO) identified several legal principles that pertain to this requirement (at para 81, citing *Singer v Schering-Plough Canada Inc*, 2010 ONSC 42):

(a) there must be a basis in the evidence to establish the existence of the common issues;

(b) the resolution of a common issue must avoid duplication of fact-finding or legal analysis;

(c) the common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution;

(d) in considering whether there are common issues, the court must have in mind the proposed identifiable class;

(e) there must be a rational relationship between the class identified by the plaintiff and the proposed common issues;

(f) the proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim;

(g) a common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class;

(h) the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class, *i.e.*, success for one member must mean success for all, although not necessarily to the same extent;

(i) a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;

(j) where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate, with supporting evidence, that there is a workable methodology for determining such issues on a class-wide basis; and

(k) common issues should not be framed in overly broad terms: “It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient” (citing *Rumley* at para 29).

[145] The Plaintiffs propose the following common questions:

Systemic Negligence

1) Did the Crown, through its agents, servants and employees, owe a duty of care to Class Members to take reasonable steps in the operation and management of the Correctional Service of Canada to provide them with a work environment free from gender-based harassment, discrimination, sexual assault, sexual violence, and related reprisals?

2) Did the Crown, through its agents, servants and employees, owe a duty of care to Class Members to take reasonable steps in the operation and management of the Correctional Service of Canada to provide them with grievance and complaints processes that were themselves free from gender-based harassment, discrimination, and intimidation and that were capable of providing effective redress?

3) Did the Crown breach its duty of care?

4) Can causation of any damages sustained by Class Members be determined as a common issue?

5) Can the Court make an aggregate assessment of all or part of the damages suffered by Class Members? If so, to whom and in what amount?

Charter

6) Did the Crown breach section 15 of the *Canadian Charter of Rights and Freedoms* by systemically subjecting Class Members to gender-based harassment, discrimination, sexual assault, and sexual violence in the Correctional Service of Canada workplace and by failing to provide any effective processes of redress for that conduct?

7) Did the Crown breach section 7 of the *Canadian Charter of Rights and Freedoms* by infringing on the security of the person of Class Members by systemically subjecting them to gender-based harassment, discrimination, sexual assault, and sexual violence in the Correctional Service of Canada workplace and by failing to provide any effective processes of redress for that conduct?

8) Was the Crown's conduct a reasonable limit prescribed by law within the meaning of section 1 of the *Canadian Charter of Rights and Freedoms*?

9) Are damages available to Class Members under section 24(1) of the *Canadian Charter of Rights and Freedoms*? If yes, can the Court make an aggregate assessment of those damages? If so, to whom and in what amount?

Vicarious Liability

10) Is the Crown vicariously liable for the failure of its agents, servants, and employees to take reasonable steps in the operation and management of the Correctional Service of Canada to provide Class Members with a work environment free from gender-based harassment, discrimination, sexual assault, sexual violence, and related reprisals?

Punitive Damages

11) Does the conduct of the Crown merit an award of punitive damages and, if so, in what amount?

[146] The Defendant says that the proposed common issues cannot be decided in common. They presume a universal experience of all women who work or have worked at CSC, without regard to CSC's unique and varied workplace environments. The work environments of CSC staff vary widely depending on the type of office, institution or facility and among the multitude of categories of employment. The Defendant therefore takes the position that claims based upon gender-based workplace harassment, discrimination and assault are intrinsically individual.

[147] For similar reasons, the Defendant objects to the proposed common issues relating to systemic negligence (proposed questions 1 to 5). The Defendant says these are too general to account for the complexities of the various organizational structures in place for different categories of CSC employees at different workplaces and at different times.

[148] With respect to proposed common questions 6, 7, 8, and 9, the Defendant argues that the allegations of unconstitutionality do not stem from a single law or policy that is said to be defective. Rather, the impugned actions and omissions encompass the conduct of innumerable different people, acting pursuant to different policies at different times, and at different locations over a period of several decades.

[149] The Defendant maintains that proposed common question 10 is also dependent upon individual findings of fact that must take into account each class member's specific workplace environment, as well as geographic and temporal differences.

[150] Most of the Defendants' objections to the proposed common questions may be addressed by confining the proposed class definition to the Alternative Class. I have determined that the Alternative Class constitutes an identifiable class supported by some basis in fact. The Alternative Class may also serve as the basis for viable common questions.

[151] In *Greenwood*, the Federal Court of Appeal observed that issues related to the scope of a duty of care, breach and punitive damages have frequently been certified as common issues in systemic negligence claims (at para 182). This Court has certified several class actions for systemic negligence, including in contested matters, most recently in *Nasogaluak v Canada (Attorney General)*, 2021 FC 656 (under appeal).

[152] Applied to the Alternative Class, many of the common questions proposed by the Plaintiffs are comparable to those approved by the Federal Court of Appeal in *Greenwood*. As in that case, the same duties are alleged to be owed to all members of the Alternative Class, the facts relevant to their breach can be assessed commonly, and doing so will avoid duplication and advance the interests of Class Members (*Greenwood* at para 184).

[153] The proposed question relating to vicarious liability does not depend upon a finding of liability to any individual class member. Rather, it asks whether the Crown was vicariously liable for the failure of its agents, servants and employees to take reasonable steps in the operation and management of CSC to provide institutional workplaces free from sexual harassment and other misconduct. As the Federal Court of Appeal found in *Greenwood*, the facts relevant to the

existence and breach of the alleged systemic duties, and to the punitive damages claim, are substantially similar to those relevant to a vicarious liability assessment (at paras 185-186).

[154] There is no basis in fact for the assertion that the concerns raised by the Plaintiffs were shared by short-service public service employees (*Greenwood* at para 173). These comprise primarily casual employees, students, employees on terms of less than three months, and employees who are not required to work more than one third of the normal period of persons doing similar work. Evidence of the Plaintiffs' experiences cannot be extrapolated to provide some basis in fact for other categories of employees. As in *Greenwood*, no evidence has been presented by or about casual, student or term employees.

[155] Where questions relating to causation or damages are proposed as common issues (such as proposed common questions 4, 5, 9 and 11), a plaintiff must demonstrate with supporting evidence that there is a workable methodology for determining the issues on a class-wide basis, and without the need for proof from individual class members (*578115 Ontario Inc v Sears Canada Inc*, 2010 ONSC 4571 at para 43. In *Greenwood*, the Federal Court of Appeal found there was no basis in fact for a common question regarding aggregate damages, because the plaintiffs had tendered no evidence to suggest a method for the conduct of such an assessment (at para 188). The same impediment arises here.

[156] Subject to the finding that this Court does not have jurisdiction to adjudicate the claims advanced in the Amended Statement of Claim by virtue of s 236 of the FPSLRA, the Plaintiffs have satisfied the criterion in Rule 334.16(1)(c) that the claims of Class Members raise common

questions of law or fact. This pertains only to the Alternative Class, excluding casual, student or term employees, and only to the proposed common issues relating to systemic negligence (proposed questions 1 to 4); the *Charter* (proposed questions 6, 7 and 8); vicarious liability (proposed question 10); and punitive damages (proposed question 11). It does not pertain to proposed questions 4 and 9 relating to the availability of an aggregate award of damages.

D. *Preferable Procedure*

[157] The preferability analysis requires the Court to look to all reasonably available means of resolving the class members' claims, not just the possibility of individual actions. This entails consideration of other potential court procedures, and also non-court proceedings (*AIC Limited v Fischer*, 2013 SCC 69 [*Fischer*] at para 35).

[158] Once the alternative or alternatives to class proceedings have been identified, the Court must assess the extent to which they address the access to justice barriers that exist in the circumstances of the particular case. The Court should consider both the substantive and procedural aspects of access to justice, recognizing that court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims, and to do so in a manner that accords suitable procedural rights (*Fischer* at para 37).

[159] Even if internal recourse mechanisms are available to Class Members, the Plaintiffs say they should not be expected to bring a multitude of individual grievances or human rights

complaints. They maintain that this would not address the systemic nature of their allegations, which are directed towards the CSC's failings as an institution, rather than individual wrongdoing. Requiring each Class Member to advance a separate grievance or human rights complaint would be inefficient, expensive and cumbersome. In comparison, a class proceeding offers an efficient procedure for dealing with Class Members' claims collectively, in a manner that squarely addresses the systemic nature of their allegations.

[160] A class action may "allow claimants to overcome psychological and social barriers through the representative plaintiff who provides guidance and takes charge of the action on their behalf" (*Fischer* at para 29). The Plaintiffs say that, for many Class Members, the idea of commencing an individual action is overwhelming both financially and emotionally. Advancing claims though a class proceeding will foster a feeling of solidarity among women who have suffered similar misconduct. In the words of counsel for the Plaintiffs, "there is safety in numbers".

[161] According to the Defendant, no court has ever found a class proceeding to be preferable to a collectively-bargained grievance process, let alone one that is supplemented by access to other specialized avenues of redress. Through the enactment of s 236 of the FPSLRA, Parliament has determined that the grievance process is the preferable procedure for resolving the Plaintiff's complaints. The right to grieve is in lieu of the right to sue.

[162] As explained above, there is insufficient evidence before this Court to establish that all of the recourse mechanisms described under the heading Internal Grievance and Complaint

Procedures, above, are compromised for all female employees in all CSC workplaces, even if this is restricted to the Alternative Class. Nor is there sufficient evidence to demonstrate that these employees' collective bargaining units are institutionally incapable of assisting them with their grievances and complaints. In light of this conclusion, the internal grievance process, supplemented by the additional recourse mechanisms identified by the Defendant, remains the preferable procedure for resolving the Plaintiffs' complaints.

[163] A group grievance may be brought by a bargaining agent on behalf of a group of employees who feel commonly aggrieved by the interpretation or application of a provision of a collective agreement or arbitral award. A policy grievance may be brought by a bargaining agent in respect of the interpretation or application of a collective agreement or arbitral award as it relates to the bargaining unit. These forms of grievance are well-suited to addressing systemic problems, and do not require Class Members to pursue their complaints individually. They too provide "safety in numbers".

[164] Any employee may present a grievance to a designated recipient using a prescribed form prepared by the employer and approved by the Board. There is no need for the grievor to call evidence, conduct investigations, or present legal arguments. The Defendant notes that Ms. Wilson-Demuth filed two grievances alleging personal harassment during her tenure with CSC.

[165] Employees who are members of a bargaining unit may receive assistance and/or be represented by their union at any stage of the grievance process. Grievors have access to an

informal conflict management system, established in consultation with bargaining agents, at no expense to them. Mediation is available on consent.

[166] If this proposed class proceeding were to be certified, it would likely be years before a trial of the common issues, and even longer for the resolution of individual claims. By contrast, the Defendant says the grievance process may offer a resolution in a matter of months.

[167] Pursuant to the collective agreements that apply to CSC employees, a decision at the first two levels of the grievance process will normally be provided within ten days from the grievance's presentation. For non-represented employees, the deadline is 20 days. If there are delays in excess of fifteen days, the grievor is entitled to refer the grievance directly to the next level in the process.

[168] The Plaintiffs have provided some statistical information suggesting that the number of grievances filed against CSC alleging sexual misconduct is small, and the time required to resolve them is excessive. For example, in 2019, the total number of grievances brought by female CSC employees was only 36, and of those, none were upheld. But without further evidence or expert opinion, there is little that can be reliably inferred from these numbers.

[169] The Defendant notes that the grievance process offers a level of expertise in labour and employment matters that is not routinely available in the courts. Decision-makers within CSC are familiar with correctional workplaces, reducing the need for contextual or expert evidence. For matters referred to adjudication, the Board is a specialized tribunal whose members have

experience in labour, employment and human rights law, and forms of redress (*Canada (Attorney General) v Bétournay*, 2018 FCA 230 at para 29).

[170] The Defendant also relies on the availability of the other recourse mechanisms described under the heading Internal Grievance and Complaint Procedures, above. The Defendant emphasizes human rights complaints under the CHRA. Justice Paul Favel recently confirmed that representative human rights complaints may be brought under the CHRA in *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 [*FNCFCS*] at paragraph 227.

[171] The human rights process offers certain advantages over a class proceeding in achieving both procedural and substantive justice for Class Members. Complaints are made to the Commission, which may appoint an investigator with statutory powers to compel the production of information and/or appoint a conciliator for the purpose of attempting to settle the complaint. If the complaint is referred to the Tribunal, the Commission may appear at the hearing to present evidence and make submissions in the public interest. None of this requires any financial contribution on the part of the complainant. Both the Commission and the Tribunal have experience, expertise and interest in, and sensitivity to, human rights (*VIA Rail Canada Inc v Canada (Transportation Agency)*, 2006 FCA 45 at para 29).

[172] The Commission and the Tribunal are capable of ordering systemic and group remedies that may not be available in a civil action. Pursuant to s 53(2) of the CHRA, the Tribunal may order any person or entity who has engaged in a discriminatory practice to take measures to

"redress the practice or to prevent the same or a similar practice from occurring in the future". This provision confers broad powers on the Tribunal to remedy systemic discrimination, including by imposing positive obligations on the employer and ongoing monitoring (*CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1139; *FNCFCS* at para 178).

[173] In *Lewis v WestJet Airlines Ltd*, 2022 BCCA 145 [*Lewis*], the British Columbia Court of Appeal overturned a refusal to certify a proposed class action where the motions judge had found complaints under the CHRA to be a preferable procedure to a class action. However, in that case the motions judge misconstrued the plaintiff's claim as one of workplace discrimination rather than breach of contract. The British Columbia Court of Appeal also found that human rights complaints raised various substantive and procedural concerns respecting access to justice. However, in *Lewis*, complaints under the CHRA were considered as the sole alternative to a class proceeding. Here, human rights complaints are supplemental to the primary form of redress offered by the CSC grievance process, and may be pursued in tandem.

[174] A plaintiff cannot invoke the class action procedure merely by including a particular remedy in the claim, such as monetary or punitive damages. To hold otherwise would undermine the Court's discretion in determining whether a class action is preferable in a given case (*Lauzon v Canada (Attorney General)*, 2014 ONSC 2811 at para 67). The same rationale applies to the use of a class action in order to circumvent limitation periods that may apply to alternative procedures.

[175] Considering the objectives of class proceedings, access to justice in this case is more readily and appropriately sought through the internal grievance process, supplemented by other internal recourse mechanisms such as complaints under the CHRA. This will also serve the interests of judicial economy. The corrective action or other relief available through these recourse mechanisms, coupled with judicial review, are sufficient to recognize and vindicate the Plaintiffs' rights in this case. To the extent this might be necessary, they are also sufficient to promote systemic behaviour modification on the part of the Defendant.

E. *Representative Plaintiffs*

[176] The proposed representative plaintiffs need not be "typical" of the class, nor the "best" possible representatives. However the Court should be satisfied that the proposed representatives will vigorously and capably prosecute the interests of the class (*Dutton* at para 41).

[177] Ms. Hudson and Ms. Wilson-Demuth say they are willing to serve as representative Plaintiffs. They state in their affidavits that they will fairly and adequately represent the interests of all Class Members, and are committed to acting in the Class' best interests. Since commencing this action, they have exposed their personal circumstances to public scrutiny, and they have communicated effectively with counsel in advancing the proceeding. They say their interests are not in conflict with those of other Class Members with respect to the common questions. They have disclosed to the Court their agreements with counsel respecting fees and disbursements.

[178] The Plaintiffs have produced a reasonable and practical litigation plan that sets out a workable method of advancing the proceeding on behalf of the Class, and providing notice of important steps. The Plaintiffs note that the plan may be modified as the litigation progresses. At the certification stage, the plan must necessarily be tentative, and not all procedural details need be provided. Its purpose is to assist the motions judge in making a practical judgment respecting the fundamental question of whether the goals of class proceedings will be served by certification (*Andersen v St Jude Medical Inc*, 2004 CanLII 17808 (ONSC) at para 14).

[179] The Defendant cautions that the individual claims of the proposed representative Plaintiffs may be barred by limitations legislation or otherwise. The Defendant notes that Ms. Wilson-Demuth signed a release as part of an earlier settlement.

[180] As discussed above, it is neither necessary nor appropriate to address limitation periods or other bars to compensation at the certification stage. These issues are heavily dependent on factual inquiry, and are best addressed during the assessment of individual claims.

[181] There is some basis in fact to satisfy the requirement of Rule 334.16(1)(e) that there be representative Plaintiffs for the Alternative Class. However, this requirement has not been satisfied for the proposed Secondary Class, comprising persons who have derivative claims in accordance with applicable family law legislation arising from a family relationship with a Class Member.

F. *Precedential Effect of Prior Settlements*

[182] The Plaintiffs argue that this Court's approval of settlements in analogous circumstances confirms both the existence of the Court's residual jurisdiction, and the viability of this proceeding as a class action. They rely in particular on *Tiller v Canada*, 2019 FC 1501 [*Tiller*]; *Merlo v Canada*, 2017 FC 51 [*Merlo*]; and *Heyder v Canada*, 2019 FC 1477 [*Heyder*].

[183] The Plaintiffs say that, even in the context of certification motions on consent, the legislative requirements for certification must still be met (*Tiller* at para 13). As the Federal Court of Appeal observed in *Greenwood* (at para 160):

> […] common law class actions for workplace harassment have been certified in respect of RCMP Members in *Davidson*, *Merlo*, *Tiller* and *Ross*. While the latter three cases were decided in the context of the Crown's consent to the issuance of a certification order for purposes of settlement and the arguments made by the Crown in *Davidson* were different from those advanced by the Crown in the instant case, such that the cases may be of lesser precedential value, these cases cannot be completely ignored.

[184] Where the parties have negotiated a settlement agreement in a proposed class action and jointly move to have the action certified and the agreement approved on consent, the threshold for certification is lower and the Court may apply a less rigorous approach (*Heyder* at para 24; *Merlo* at para 10). In a negotiated settlement, there is typically no admission of liability and the common questions will never be decided by the courts. There is no concern for the manageability of the litigation.

[185] None of the certifications that were approved by this Court on consent required determination of the issues raised in these motions. There was no adversarial context to test the parties' assertions. The Court's jurisdiction was not disputed. The presiding judge was not privy to the Defendant's internal assessment of its potential liability to the proposed classes. While s 236 of the FPSLRA bars certification of class actions brought on behalf of public servants whose claims arose after 2005, the Defendant says that it does not bar the government from offering compensation to public servants through a negotiated settlement.

[186] The test for approval of a settlement is whether, in all of the circumstances, it is fair, reasonable and in the best interests of the class as a whole. The test is not whether the settlement meets the demands of every class member. A settlement need not be perfect, but must only fall within a zone or range of reasonableness (*Heyder* at para 59; *Merlo* at para 16). The Court "has no authority to alter a settlement reached by the parties or to impose its own terms upon them. The Court is limited to either approving or rejecting a settlement in its entirety" (*Manuge v Canada*, 2013 FC 341 at para 19). A court may approve a settlement despite the fact that some class members have strong claims, while others' claims are weak or even speculative.

[187] The Defendant also cautions that prior settlements should not be held against the Crown, as this may set a negative precedent and act as a deterrent to future settlements. It may create a disincentive to the pre-certification resolution of other employment-related disputes, particularly in matters that raise threshold issues such as jurisdiction, and detract from the goals of judicial efficiency and access to justice.

[188] While the prior settlements of comparable class actions “cannot be completely ignored”, they are insufficiently authoritative to undermine the Court’s conclusions respecting jurisdiction and the other certification criteria in this case.

VI. Motion to Strike

[189] In light of my conclusion respecting this Court’s lack of jurisdiction to determine the Plaintiffs’ allegations, the Amended Statement of Claim must be struck in its entirety without leave to amend (*Murphy* at para 48).

VII. Conclusion

[190] The Plaintiffs have not established that the available internal recourse mechanisms are incapable of providing them with adequate redress. Nor have they demonstrated that their bargaining agents are institutionally incapable of assisting them with their grievances or other complaints, such as those that may be made in accordance with the CHRA. This Court is therefore without jurisdiction to determine the claims advanced in the Amended Statement of Claim, or should decline to exercise any residual discretion it may have.

[191] Subject to the finding that this Court does not have jurisdiction over the claims advanced in the Amended Statement of Claim, the Plaintiffs’ pleadings satisfy the criterion in Rule 334.16(1)(a) of disclosing a reasonable cause of action.

[192] The Plaintiffs' pleadings satisfy the criterion in Rule 334.16(1)(b) that there be "an identifiable class of two or more persons", but only with respect to the following Alternative Class:

> All female current and former employees of the Correctional Service of Canada (CSC) who worked in a CSC institution between 1986 and the date of certification who allege that they were subjected to sexual harassment, discrimination, assault or violence in the CSC workplace.

[193] The Plaintiffs have satisfied the criterion in Rule 334.16(1)(c) that the claims of Class Members raise common questions of law or fact. This pertains only to the Alternative Class, excluding casual, student or term employees, and only to the proposed common issues relating to systemic negligence (proposed questions 1 to 4); the Charter (proposed questions 6, 7 and 8); vicarious liability (proposed question 10); and punitive damages (proposed question 11). It does not pertain to proposed questions 4 and 9 relating to the availability of an aggregate award of damages.

[194] Even if the Court were to have jurisdiction over the claims advanced in the Amended Statement of Claim, the internal grievance process, supplemented by the additional recourse mechanisms identified by the Defendant, would remain the preferable procedure for resolving the Plaintiffs' complaints. The corrective action or other relief available through internal recourse mechanisms, coupled with judicial review, are sufficient to recognize and vindicate the Plaintiffs' rights in this case. To the extent this might be necessary, they are also sufficient to promote behaviour modification on the part of the Defendant.

[195] The Plaintiffs have satisfied the criterion in Rule 334.16(1)(e) that there be representative Plaintiffs for the Alternative Class. However, this requirement has not been satisfied for the proposed Secondary Class, comprising persons who have a derivative claim, in accordance with applicable family law legislation, arising from a family relationship with a Class Member.

[196] The motion for certification must be denied on jurisdictional grounds, and also because a class proceeding is not the preferable procedure for resolving the Plaintiffs' claims.

[197] In light of the Court's lack of jurisdiction, the motion to strike must be granted and the Amended Statement of Claim will be struck without leave to amend.

[198] In keeping with Rule 334.39, no costs will be awarded to any party.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The motion for certification is denied without leave to amend.

2. The motion to strike is granted, and the Amended Statement of Claim is struck in its entirety without leave to amend.

3. No costs are awarded to any party.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1523-19
STYLE OF CAUSE:	SHARLENE HUDSON AND BRINDA WILSON-DEMUTH v HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 8-11, 2022
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	MAY 11, 2022

APPEARANCES:

Angela Bespflug Janelle O'Connor Kevin Gourlay	FOR THE PLAINTIFFS
Julie de Marco Andrew Law Melissa Gratta	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Murphy Battista LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE PLAINTIFFS
Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT