Federal Court  Cour fédérale

Date: 20231222

Docket: T-1509-21

Citation: 2023 FC 1752

Ottawa, Ontario, December 22, 2023

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

DUSTIN MCMILLAN

Plaintiff

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] The Plaintiff brings this class proceeding against the Royal Canadian Mounted Police (the "RCMP"). Before the Court are two motions. The first is a motion for an order to strike the claim (the "motion to strike") pursuant to rule 221(1) of the *Federal Courts Rules*, SOR/98-106 (the "Rules"). The second is a motion for an order to certify the proposed class (the "motion to

certify") pursuant to rules 334.16 and 334.17 of the Rules. The parties agreed to deal with both motions concurrently.

II. Background

A. *The Parties*

[2] The Plaintiff, Dustin McMillan, is a resident of British Columbia. He worked with the RCMP between 2003 and 2008. He worked as a Temporary Civilian Employee ("TCE") for most of his time with the RCMP, but also worked for three months as a Civilian Member in late 2007, and later worked as a municipal employee.

[3] His Majesty the King represents the Crown and the RCMP (the "Defendant" or the "Crown") and is the named Defendant pursuant to the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 and the Practice Direction issued by the Chief Justice on September 9, 2022: *Practice Direction – Designation "His Majesty the King"*.

B. *The Underlying Claim*

[4] The Plaintiff's Statement of Claim (the "Claim") alleges that he and members of the proposed primary class suffered systemic bullying, intimidation, and harassment in RCMP workplaces. The Plaintiff seeks general damages and special damages, among other remedies, on behalf of both himself and the proposed class.

[5] The proposed class includes individuals who worked in the RCMP's workplaces (the "primary class") and related family members entitled to assert a claim under certain provincial and territorial statutes by virtue of their relationship (the "family class"). The Plaintiff has since refined the proposed class. I describe the proposed class as refined by the Plaintiff in my discussion of the motion to certify.

C. *The Motion to Strike*

[6] The Crown seeks an order to strike the entirety of the Claim and an order to dismiss the Claim without leave to amend. The Crown relies on subparagraphs (a) to (f) of rule 221(1) of the Rules. However, its submissions focus exclusively on grounds falling within paragraph (a) – namely, lack of jurisdiction and the absence of a reasonable cause of action.

[7] The Crown specifically argues that:

A. The claims for the period on and after April 1, 2005, are barred by section 236 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 [*FPSLRA*];

B. The Court should decline jurisdiction with respect to claims not barred by the *FPSLRA* based on the jurisprudence in *Vaughan* and *Weber*, below;

C. The claims are barred by section 12 of the *Government Employees Compensation Act*, RSC, 1985, c G-5 [*GECA*];

D. Separate from jurisdiction:

i. it is plain and obvious that the Plaintiff's claims in negligence disclose no reasonable cause of action; and

ii. it is plain and obvious that the claims relating to the proposed class disclose no reasonable cause of action.

D. *The Motion to Certify*

[8] The Plaintiff's written representations on the motion to certify propose the following class, which refines the class initially proposed by the Statement of Claim as follows:

A. Primary Class Members: all persons who worked within RCMP workplaces during the Class Period in any of the following categories: temporary civilian employees; supernumerary special constables, auxiliary constables; cadets, pre-cadets, students; contractors and consultants; Commissionaires; employees of other governments including municipal and regional governments; seconded officers and employees; persons from outside agencies and police forces including members of integrated policing units and task forces; volunteers and non-profit organization employees; individuals working or attending courses on RCMP premises; and, individuals who are persons as defined in s. 206(1)(a)-(h) of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 [*FPSLRA*]; and

B. **Family Members**: All individuals who, by reason of a relationship with a Primary Class Member, are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990 c F.3, and equivalent or comparable legislation in other provinces and territories.

[9] The Plaintiff excludes from the proposed proceeding claims that:

A. arose on or after April 1, 2005, and that were subject to sections 208 and 236 of the *FPSLRA*;

B. arose while the individual served in the RCMP as a Regular Member, Civilian Member, Special Constable Member or Reservist; and

C. were resolved in *Merlo et al v Her Majesty the Queen*, Federal Court File T-1685-16, *Tiller et al v His Majesty the King*, Federal Court File T-1673-17, or *Ross et al v His Majesty the King*, Federal Court File T-370-17.

[10] The Plaintiff relies on his affidavit, as well as the affidavits of Whitney Santos, Dr. Angela Workman-Stark, and James Craig. The Defendant relies on the affidavits of Ken Cornell, John Park, and Meghan McCarthy. I discuss this evidence as may be relevant below.

E. *Similar Ongoing Proceeding*

[11] In *Canada v Greenwood*, 2021 FCA 186 [*Greenwood*], the Court of Appeal reviewed a certification order issued by this Court in relation to similar allegations. The language of the certification order (as it was then) read in part as follows:

> All persons who worked with or for the RCMP being all current or former:
>
> (a) RCMP Members: including all Regular Members, Civilian Members, Special Constables, Special Constable Members, Supernumerary Special Constables, Reservists, and Recruits;
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> (b) Public Services Employees ("PSEs") who are not able to grieve under s. 208 of the Federal Public Sector Labour Relations Act, SC 2003, c 22, s 2 ("FPSLRA");
>
> (c) Others who work within RCMP workplaces: including but not limited to: temporary civilian employees, community constables, auxiliary constables, cadets, pre-cadets, students, independent and subcontractor employees (including Commissionaires, custodial workers, guards/matrons, individuals employed through temporary agencies, and interns – e.g. Youth Internship Program), other government employees (including municipal, regional or similar levels of government employees and seconded officers and employees, including Interchange Canada participants) who are not entitled to grieve under s. 208 of FPSLRA, volunteers, and non-profit organization employees; individuals working or attending courses on RCMP premises; and other individuals who worked with or for the RCMP and who have a Human Resources Management Information Services ("HRMIS") identification.

[12] On appeal, the Court amended the order to set limits on the class period. It also amended the class to exclude "non-indeterminate public service employees" and "non-employees", finding that there was no evidence at all before the chambers Judge with respect to the individuals

specified therein (*Greenwood* at paras 170-175). In the end, the Court of Appeal's amended class read as follows:

> 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.

[13] Subsequent to the Court of Appeal's decision in *Greenwood*, this Court further amended the certified class to include the following:

> All individuals who are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990 c F.3, and equivalent or comparable legislation in other provinces and territories […].

The Crown has appealed the Court's decision to include the family class. That appeal is ongoing.

[14] It is evident that the description of a portion of the initial class in *Greenwood* (specifically, category "c" above) is nearly identical to the language of the proposed class in this proceeding. The similarity between the two proceedings is relevant in the analysis below.

III. Issues

A. Should the Court strike the pleadings or any portions therein pursuant to rule 221(1) of the Rules?

B. Should the Court certify this proceeding as a class proceeding pursuant to rule 334.16 of the Rules?

IV. Analysis

A. *Should the Court grant the Crown's motion to strike the Statement of Claim?*

(1) Applicable Standard

[15] Rule 221(1)(a) of the Rules provides:

> **Motion to strike**
>
> 221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> > (a) discloses no reasonable cause of action or defence, as the case may be,
> >
> > […]
>
> and may order the action be dismissed or judgment entered accordingly.

[16] The applicable standard on a motion to strike a pleading under rule 221(1)(a) of the Rules is whether it is "plain and obvious" that the pleading discloses no reasonable cause of action (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 [*Hunt*] at para 32). This is a high bar for the moving party to meet (*Berenguer v Sata internacional – Azores Airlines, SA*, 2023 FCA 176 [*Berenguer*] at para 23).

[17] The Court must read the pleading in question generously. Allegations made to support the pleading are taken as true, unless they are manifestly incapable of being proven (*Hunt*; *Condon v Canada*, 2015 FCA 159 [*Condon*] at para 13; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42

[*Imperial Tobacco*] at para 22, citing *Operation Dismantle Inc v The Queen*, [1985] 1 SCR 441 at p 455). The Court therefore assesses whether those alleged facts, if true, can support an action with a reasonable chance of success (*Imperial Tobacco* at para 47).

[18] To assess whether the alleged facts, if true, support the action, the Court must only consider material facts, as opposed to conclusory statements and "bald allegations" (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*] at para 17). Material facts are the details that the party relies on to support their claim. They frame the proceeding and establish the parameters of what is relevant from what is not. Conclusory statements and bald accusations, in contrast, allege liability, but fail to nourish that allegation with factual assertions – that is, the "who, when, where, how, and what" (*Mancuso* at paras 17-19). The distinction between material facts and conclusory statements is not always clear, and it is the task of the Court to make that assessment. However, in all cases, the material facts must be adequate, otherwise the claim is liable to be struck (*Mancuso* at paras 19-20).

(2) Jurisdiction Generally

[19] A claim will have no reasonable chance of success where it is plain and obvious that the Court lacks the jurisdiction to hear it (*Berenguer* at para 24, citing *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at para 24).

[20] The Court will ordinarily not admit evidence on a motion to strike. However, it may do so insofar as the moving party alleges that the Court lacks or must decline jurisdiction

(*Greenwood* at para 95, citing *Mil Davie Inc v Société d'Exploitation et de Développement d'Hibernia Ltée*, 85 CPR (3d) 320, [1998] CarswellNat 814 (FCA) at paras 7-8).

(3) Jurisdiction over Labour Disputes

(a) *Jurisprudential Framework*

[21] The Supreme Court of Canada held in *Vaughan v Canada*, 2005 SCC 11 [*Vaughan*], that where there is a comprehensive legislative scheme to deal with labour disputes, courts should defer to the legislated process and decline jurisdiction as a matter of course. The Court nevertheless held that courts retain residual jurisdiction that may be exercised where the legislated process does not provide effective redress (*Vaughan* at paras 18-25). However, it is also possible for a legislative scheme to oust the Court's jurisdiction completely, such that no residual jurisdiction remains, but the legislative language must be strong to reach that conclusion (*Vaughan* at paras 27-29).

[22] Where the Court retains residual jurisdiction, it has the discretion to exercise that jurisdiction or to decline to do so (*Greenwood* at para 130). The mere fact that a legislated process does not provide identical remedies or procedures as courts is not sufficient on its own for the Court to exercise jurisdiction (*Vaughan* at paras 22, 36). There must be a gap that causes a "real deprivation of ultimate remedy" (*Hudson v Canada*, 2022 FC 694 [*Hudson*] at para 74; *Weber v Ontario Hydro*, [1995] 2 SCR 929 [*Weber*] at para 57, citing *St Anne Nackawic Pulp & Paper Co v Canadian Paper Workers Union, Local 219*, [1986] 1 SCR 704 at p 723).

(b) *Residual Jurisdiction on and after April 1, 2005*

[23] Part 2 of the *FPSLRA* provides a statutory scheme to resolve labour disputes through grievances and binding adjudication. It came into force on April 1, 2005. It includes section 236, which provides as follows:

> **No Right of Action**
>
> **Disputes relating to employment**
>
> 236 (1) The right of an employee to seek redress by way of grievance or 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.
>
> **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.
>
> **Exception**
>
> (3) Subsection (1) does not apply in respect of an employee of a separate agency that has not been designated under subsection 209(3) if the dispute relates to his or her termination of employment for any reason that does not relate to a breach of discipline or misconduct.

[24] Section 236 of the *FPSLRA* completely ousts this Court's jurisdiction over certain disputes. It leaves no room for residual jurisdiction (*Bron v Canada (Attorney General)*, 2010 ONCA 71 [*Bron*] at paras 4, 29; *Ebadi v Canada*, 2022 FC 834 [*Ebadi*] at paras 32-33, citing *Bron* at para 29; *Adelberg v Canada*, 2023 FC 252 at para 13, citing *Bron* at para 4; *Hudson* at paras 73, 102, citing *Bron* at para 4).

[25] It is clear from the language of section 236 that there are parameters on the ouster of the Court's jurisdiction. First, an "employee" must bring the action. Second, that employee cannot be "an employee of a separate agency that has not been designated under subsection 209(3)". Third, the dispute must be in relation to the employee's terms or conditions of employment. Fourth, the dispute must pertain to a matter that can be grieved under Part 2 of the *FPSLRA*. Finally, the matter in dispute must have arose on or after the coming into force of section 236 – that is, April 1, 2005.

[26] The RCMP is not a separate agency. Further, section 206 of the *FPSLRA* defines "employee" to mean a person employed in the federal public service, excluding some categories of individuals. Section 206 excludes from the definition the following categories of individuals, among others: (1) persons not ordinarily required to work more than one third of the normal period for persons doing similar work; (2) persons employed on a casual basis; (3) persons employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more; and (4) persons employed under a program designated by the employer as a student employment program.

[27] The Plaintiff readily acknowledges in his submissions on the motion to strike that this action "excludes individual claims that arose on or after April 1, 2005, and are subject to sections 208 and 236 of the *FPSLRA*". He concedes that the Court does not have jurisdiction over those claims. The parties are therefore in agreement on this point.

[28] That said, it is apparent that the Plaintiff does not exclude from the claim *all* allegations that arose on or after April 1, 2005, but only those that are also "subject to sections 208 and 236 of the *FPSLRA*". Nevertheless, the Court must still determine the boundaries of its residual jurisdiction.

[29] The Crown takes the view that all of the allegations in the Statement of Claim and arising on or after April 1, 2005, fall under section 236 and that this provision ousts the Court's jurisdiction completely after that date. The Crown argues in particular that allegations of negative workplace experiences – that is, systemic bullying, intimidation, and harassment – can be grieved under section 208 of the *FPSLRA*. The Crown also relies on this Court's decisions in *Hudson* and *Ebadi*, as well as *Green v Canada (Border Services Agency)*, 2018 FC 414 [*Green*].

[30] In *Hudson*, the plaintiff was an employee of the Correctional Service of Canada. She alleged that she was subjected to gender-based harassment, discrimination, and sexual assault by several of her male colleagues and superiors. She further alleged that the Correctional Service of Canada encouraged and condoned these actions and failed to provide adequate redress. The Court found that allegations of gender-based harassment, discrimination, and even assault can all be grieved under section 208 of the *FPSLRA* and that they were all barred under section 236 (*Hudson* at paras 103-105).

[31] In *Ebadi*, the plaintiff was an employee of the Canadian Security Intelligence Service. He alleged that his employer and his colleagues harassed him and treated him in a prejudicial manner amounting to religious and ethnic discrimination. The Court held the plaintiff's

allegations could be grieved under section 208 and were therefore barred under section 236 (*Ebadi* at paras 37-38). Similarly, in *Green*, the plaintiff alleged that the defendant employer harassed her and engaged in racial discrimination against her. The Court also held that the plaintiff's allegations could be grieved under section 208 and were therefore barred under section 236 (*Green* at para 16).

[32] In *Public Service Alliance of Canada v Canada (Attorney General)*, 2020 FC 481, the Court also held that, under section 236, the Court's jurisdiction over employees' labour disputes was restricted to matters that were clearly not grievable. Even then, the Court held that it must exercise that jurisdiction sparingly and in extreme cases.

[33] I agree with the authorities cited by the Crown. Allegations of workplace harassment, bullying, and intimidation are all subject to the grievance process outlined in section 208. This accords with the Ontario Court of Appeal's finding in *Bron* that:

> [14] Section 208 of the PSLRA [now the FPSLRA] and s. 91 of the PSSRA provide employees with a very broad right to grieve any occurrence or matter affecting the terms or conditions of their employment. [page755] Grievances brought under those provisions are heard and determined according to the procedures set out in the relevant legislation, regulations and terms of the applicable collective agreement. The grievance process is internal. Management personnel determine the merits of the grievance.
>
> [15] Almost all employment-related disputes can be grieved under s. 208 of the PSLRA or s. 91 of the PSSRA. The right of the employee to refer that grievance to third-party adjudication, however, is significantly limited in both Acts. Section 209 of the PSLRA and s. 92 of the PSSRA set out the limited circumstances in which an employee can refer a grievance to independent third-party adjudication.
>
> [Emphasis added]

[34] The Court therefore retains no jurisdiction to hear any of the allegations under the Claim arising on or after April 1, 2005, that pertain to an "employee" within the meaning of section 206 of the *FPSLRA*.

[35] There were no arguments before me, nor any evidence presented, as to whether proposed primary class members who are not "employees" under section 206 of the *FPSLRA* are ousted from the Court's jurisdiction by any other legislative scheme. Since the onus is on the party seeking to strike the claim to demonstrate the Court's jurisdiction is ousted, I find that the Court still retains jurisdiction regarding allegations arising on or after April 1, 2005, that pertain to individuals who are not "employees" under section 206.

[36] The Plaintiff was an "employee" within the meaning of section 206 of the *FPSLRA* while employed as a TCE. His allegations while working as a TCE are therefore not within the Court's jurisdiction on and after April 1, 2005. The same conclusion extends to all other proposed primary class members who are also "employees" under section 206 of the *FPSLRA*.

[37] The Plaintiff was not, however, an "employee" under section 206 during his time as a municipal employee with the RCMP. The Court therefore retains residual jurisdiction for the Plaintiff's allegations while he was a municipal employee after April 1, 2005.

(c) *Residual Jurisdiction before April 1, 2005*

[38] Prior to the coming into force of Part 2 of the *FPSLRA*, grievances governed by that statute were subject to Part IV of the *Public Service Staff Relations Act*, RSC, 1985, c P-35

[*PSSRA*], which has since been repealed. Part IV of the *PSSRA* did not oust the Court's residual jurisdiction (*Vaughan* at para 29).

(d) *Should the Court use its discretion to exercise its residual jurisdiction?*

[39] As established earlier, unless a legislated scheme clearly ousts the Court's jurisdiction, the Court retains discretionary residual jurisdiction to hear labour disputes. However, it should only exercise that discretion where the legislated scheme presents a gap that causes a "real deprivation of ultimate remedy".

[40] Although the onus on a motion to strike is generally on the moving party, once that party satisfies the Court that there is a legislative scheme to which the Court must defer, the onus turns to the plaintiff to show that the Court should exercise its residual jurisdiction (*Lebrasseur v Canada*, 2007 FCA 330 at para 19). This is reserved for "exceptional cases" (*Hudson* at para 22). The evidentiary burden on the Plaintiff is therefore high.

[41] In *Greenwood*, the Court of Appeal affirmed this Court's decision to exercise jurisdiction regarding a proposed class proceeding that entails similar allegations against the RCMP. On review of the evidence before it, the chambers Judge held as follows:

> [30] Prior to 2015, RCMP members were unable to unionize under the RCMP Regulations and had to use the Staff Relations Representative Program. However, the Supreme Court of Canada determined in Mo*unted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 [*MPAO*] that this system was not independent from management, and that excluding RCMP members from collective bargaining violated their right to freedom of association under section 2(d) of the *Canadian Charter of*

> *Rights and Freedoms*. In this decision, the Court commented that this grievance structure was inadequate (*MPAO* at paras 113-116).
>
> [31] As well, the Plaintiffs argue that there is no comprehensive regime in place within the RCMP to address the issues they raise in this proposed claim. The Plaintiffs point to the findings in the Reports and argue that the internal mechanisms within the RCMP are, in fact, the problem.
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> […]
>
> [35] Against this backdrop, I do not see the proposed claims as "ordinary" employment disputes. The Reports support the Plaintiffs' claim that there are systemic issues with the internal dispute resolution processes within the RCMP. The Reports also support the Plaintiff's arguments that the systemic issues go beyond gender-based or sexual orientation-based issues, and are widespread and pervasive.
>
> [36] The RCMP internal processes do not appear to be equipped to provide redress or compensation for negatively impacted career paths or harm to the family members impacted by the alleged conduct. Therefore, the internal processes may not be able to provide an appropriate remedy, or any remedy at all, for some of the claims advanced. Finally, the internal processes and how they are, or are not administered, forms a core component of the claims advanced by the Plaintiffs.
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> [37] The proposed class action is an attack on, and takes direct issue with, the RCMP processes, including the grievance system as a whole. One of the common questions advanced is whether the RCMP was negligent in how it ran its grievance process.
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> […]
>
> [39] Finally, the Crown did not argue that the Court does not have jurisdiction, rather, it argues that the Court should decline jurisdiction in favour of other processes. However, for the reasons outlined above, I am not convinced that the internal options, which have been acknowledged to be problematic and deficient, provide a fulsome remedy, or any remedy, for the claims sought to be advanced in this class proceeding.

[42] The Court of Appeal overturned some of the chambers Judge’s findings, but only to restrict the class period and to narrow the class membership. The Court observed that there was

no evidence whatsoever before the chambers Judge on the efficacy of the grievance process with respect to non-indeterminate public service employees and non-employees. Otherwise, the Court of Appeal determined that it was open to the chambers Judge to find that the grievance process was inadequate based on the evidence:

> [128] In my view, the Federal Court did not commit a reviewable error in accepting jurisdiction over the claims made on behalf of RCMP members and reservists, but did so err in failing to set limits on the class period in respect of this group.
>
> [129] The rationale underpinning *Vaughan* and the line of cases that rely on *Vaughan* involves the recognition by the courts that they ought not intervene in the field of labour relations, where specialized tribunals have been established by legislators for settlement of disputes. Such tribunals include grievance arbitrators, who generally possess exclusive jurisdiction over issues that arise expressly or inferentially under a collective agreement.
>
> [130] Turning more specifically to the issues in the present appeal, a range of issues are not negotiable in the federal public sector (in contrast to the private sector). *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.
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> […]
>
> [132] As noted, it was open to the Federal Court to have made the factual determination that the internal recourse mechanisms available to RCMP Members and Reservists were ineffective for a portion of the class period set by the Federal Court. Under *Vaughan* and its progeny, including, notably, the decisions of other appellate Courts in *Smith*, *Merrifield* and *Sulz*, this finding, coupled with the nature of the RCMP members' and reservists' claims and lack of coverage under a collective agreement, provided an allowable basis for the Federal Court to have accepted jurisdiction over their claims for a portion of the class period.

[43] As in *Greenwood*, much of the Plaintiff's pleadings here pertain to the response of his managers and supervisors to his complaints. The Plaintiff says that he continuously reported his concerns to the RCMP's management. The alleged failure of the Plaintiff's supervisors to act appropriately in response to those complaints, the reprisals he claims he faced, and the purported lack of a formal grievance process all form a significant part of the Plaintiff's claim and the claims on behalf of the proposed class.

[44] The Crown argues that the pleadings do not necessarily indicate that the RCMP's management of the Plaintiff's complaints were deficient, stressing that the RCMP's harassment policy includes a screening stage. The lack of response by the RCMP's management may be attributable to management's decision to screen the Plaintiff's complaints out, the Crown says.

[45] I do not find this argument persuasive. The Court must assume that the facts pleaded by the Plaintiff are true for the purposes of a motion to strike. This assumption extends not only to the Plaintiff's allegations with respect to the complaint process, but also the underlying circumstances that led to those complaints. Those underlying circumstances include allegations of: intimidation and humiliation of new TCEs; refusing to give the Plaintiff and other new TCEs an access card during their first few weeks; demanding they seek access by throwing rocks at the window; public ridicule; an atmosphere of fear; yelling; inappropriate comments about the Plaintiff's sexuality; and so on. If, as the Crown alleges, management elected to screen the Plaintiff's complaints out of the process, then that only serves to support the Plaintiff's allegation that the complaint process was broken.

[46] In addition to his comments on his supervisors' failure to take action, the Plaintiff alleges "[t]here was no formal grievance process, no division representative, and no union". Taken as true, this allegation suggests that, not only were the RCMP's internal harassment policies ineffectual, but so too was the application of the grievance processes mandated by legislation.

[47] In my view, the allegations warrant an exercise of the Court's jurisdiction with respect to at least some of the claims. That said, I must still determine whether the pleadings and the evidence permit me to extend the exercise of that jurisdiction to all the claims, including those alleged on behalf of the proposed class.

[48] The Crown is correct to observe that the only material facts in the Plaintiff's pleadings pertain to the harassment that he and other TCEs experienced. In fact, the alleged incidents occurred only in the Kelowna operational communications centre ("OCC"), and the earliest allegation was in 2003.

[49] The Plaintiff does not allege in his pleadings or his affidavit that he was harassed during his time as a municipal employee or his time at another OCC, let alone that he made any complaints in relation to any such incidents. While he does allege that he "reach[ed] out by letter to another Corporal" about an earlier complaint, the subject matter of that letter was his time as a TCE at the Kelowna OCC, and the Corporal was from the same division as the one in which the Plaintiff worked as a TCE.

[50] In *Greenwood* at paragraph 133, the Court of Appeal held that it was a palpable and overriding error for the chambers Judge to extend her exercise of residual jurisdiction beyond the period for which there is evidence:

> [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. 1995 was the first year Mr. Gray started with the Musical Ride, where he experienced his first instances of what he alleges were harassment, intimidation and bullying. He also deposed as to the reasons why he felt he could not seek redress under the RCMP's internal enforcement mechanisms for at least some of these incidents. The Reports all post-date 1995 by several years, the earliest one having been published in 2007. Given the lack of evidence regarding systemic problem with redress—or of any problems with harassment—prior to 1995, there was no basis upon which the Federal Court could find that the RCMP's internal enforcement mechanism were ineffective prior to 1995. It accordingly made a palpable and overriding error in allowing the class period to commence earlier than 1995.

[51] In my view, the same principle stands with respect to location and position. Without any evidence beyond that provided to the Court, I cannot find a basis for the Court's jurisdiction except in relation to TCEs in the Kelowna OCC between 2003 and March 31, 2005. While the pleadings and the Plaintiff's affidavit do at times make bald allegations and conclusory statements on a broader basis, they disclose no material facts outside these parameters.

[52] It may be correct that, for such a diverse and large class as the one proposed here, it is impractical to demand from the Plaintiff some evidence with respect to each category of employees and each worksite. However, the Plaintiff must provide more than mere bald allegations and conclusory statements. Here, there are simply no material facts in relation to

incidents of intimidation, harassment, or bullying, nor attempts to complain about or grieve such incidents, except with respect to TCEs in the Kelowna OCC, between 2003 and March 31, 2005.

[53] To supplement the limited scope of his evidence, the Plaintiff submits various reports as exhibits to the affidavit of Whitney Santos, dated July 25, 2022. Ms. Santos is a paralegal who works with Plaintiff's counsel. She does not comment on the veracity of the reports. The reports are, however, the subject of Dr. Angela Workman-Stark's expert report, comprising Exhibit B of her affidavit. Dr. Workman-Stark summarizes and agrees with the observations of these reports.

[54] On pages 6 and 8 of her report, Dr. Workman-Stark observes that, according to the Commission for Public Complaints against the RCMP:

> This policy [the harassment policy] was also described as applying in spirit to all people employed by the RCMP, which include "supervisors, managers, indeterminate, term and casual employees, students, temporary civilian employees as defined by the RCMP Act, municipal employees, custodial services personnel, employees of other departments and persons working or attending courses on the premises of the RCMP" (p. 13).
>
> […]
>
> Consistent with the Commission report, it is my opinion that the RCMP harassment policies and practices did not come anywhere near to meeting the RCMP commitment to "providing a safe and respectful work environment, free of discrimination, offensive behavior, and harassment", resulting in proposed class members continuing to be exposed to bullying, harassment, and intimidation.

[55] Dr. Workman-Stark also cites the Final Report on Tiller/Copland/Roach RCMP Class Action (the "Tiller Report"). The Tiller Report alludes to claims of harassment that are not

gender-based, as early as 1974. The Plaintiff argues that this is the "hook" that permits the Court to exercise jurisdiction as far back as 1974.

[56] Despite Dr. Workman-Stark's findings and the seriousness of the allegations she highlights, her evidence is biased and compromised by the questions posed for her to consider in rendering her report. In particular, the second question posed to Dr. Workman-Stark was whether there are "publications or other documents that support the plaintiffs [*sic*] allegations that class members working with the RCMP have been subjected to persistent bullying, intimidation, and harassment?" (Emphasis added)

[57] Plaintiff's counsel agrees that the question's wording is suggestive and that it taints Dr. Workman-Stark's evidence. However, this weakness in her evidence goes to the weight of her evidence, not its admissibility. I agree. Counsel further argues that the diminished weight of her evidence should be restricted to the second question, without affecting the weight of the remaining questions. I disagree. The phrasing of the second question indicates to the expert that the Plaintiff is looking for evidence that supports allegations of bullying, intimidation, and harassment. Since the subject matter for the entire report is about bullying, intimidation, and harassment or the RCMP's response to the same, the tainted nature of question 2 flavours the rest of the report. I therefore assign little weight to Dr. Workman-Stark's report. Consequently, that report cannot overcome the high bar that the Plaintiff must meet to justify the Court's exercise of residual jurisdiction.

[58] The affidavits of Ken Cornell and John Park provide a thorough description of the development of the RCMP's harassment policies and the availability of other recourse mechanisms. Based on my review, the affidavits of Mr. Cornell and Mr. Park are concerned with the content of the policies. They pay little attention to the actual practice of the RCMP's management in light of those policies. Beyond providing valuable context regarding the RCMP's structure and history, they provide little assistance on the question of residual jurisdiction.

[59] Since none of the other affidavits provides clear evidence beyond what I have already found in the Plaintiff's affidavit, I conclude that an exercise of this Court's residual jurisdiction is warranted only with respect to TCEs in the Kelowna OCC, and only in relation to the period between 2003 and March 31, 2005 (inclusive).

(4) The *Government Employees Compensation Act*

[60] The Crown also argues that the Plaintiff is barred from advancing his claim under section 12 of the *GECA*. The Crown advances this argument solely about the Plaintiff, and not in relation to the proposed class.

[61] Sections 4 and 12 of the *GECA* provide in part as follows:

> **Compensation**
>
> Persons eligible for compensation
>
> 4 (1) Subject to this Act, compensation shall be paid to
>
> (a) an employee who

> (i) is caused personal injury by an accident arising out of and in the course of his employment, or
>
> (ii) is disabled by reason of an industrial disease due to the nature of the employment; and
>
> (b) the dependants of an employee whose death results from such an accident or industrial disease.
>
> **Rate of compensation and conditions**
>
> (2) The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who
>
> (a) are caused personal injuries in that province by accidents arising out of and in the course of their employment; or
>
> (b) are disabled in that province by reason of industrial diseases due to the nature of their employment.
>
> […]
>
> **No claim against Her Majesty**
>
> 12 Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.
>
> [Emphasis added]

[62] The applicability of section 12 of the *GECA* turns on the proper interpretation of the word "accident". Section 2 of the *GECA* defines the word "accident" to include a "wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause". I accept the finding in *Canada (Royal Canadian Mounted Police) v Rees*, 2005

NLCA 15 [*Rees*] at paragraph 32, that, on its own, the word is broad enough to include gradual onset stress.

[63] *Rees* goes further than merely providing an interpretation of the term "accident". It also concludes that the word displaces any entitlement eligibility criteria that exists under provincial legislation. This is no longer good law. In *Martin v Alberta (Workers' Compensation Board)*, 2014 SCC 25 at paragraph 40, the Supreme Court of Canada concluded that, unless the term "accident" is directly in conflict with the eligibility criteria provided for by provincial legislation, the provincial criteria prevail.

[64] In my view, the term "accident" under the *GECA* and the eligibility criteria for compensable mental distress under the applicable provincial legislation are not in direct conflict. The provincial criteria are simply narrower, and they exclude gradual onset stress.

[65] Pertinent here is section 5.1(1) of the *Workers Compensation Act*, RSBC 1996, c 492 [*BCWCA*], prior to being amended by the *Workers Compensation Amendment Act, 2011*, SBC 2012, c 23, s 1. Section 5.1(1) provided the conditions necessary for the Plaintiff to be eligible for compensation for a "mental disorder" that arose in British Columbia between 2003 and March 31, 2005:

> 5.1 (1) Subject to subsection (2), a worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental stress
>
> > (a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,

> (b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and
>
> (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

[66] In *Plesner v British Columbia Hydro and Power Authority*, 2009 BCCA 188, to assess whether section 5.1 infringes on section 15 of the *Charter*, the majority decision interpreted the provision by citing the Workers' Compensation Appeal Tribunal's "Policy 13.30", which explained the Tribunal's interpretation of compensable mental disorders. The Court upheld only a portion of the policy, the relevant parts of which read as follows:

> Under subsection 5.1(1)(a), the Act establishes a two-part test:
>
> > 1. There must be an acute reaction to a sudden and unexpected traumatic event.
> >
> > 2. The acute reaction to the traumatic event must arise out of and in the course of employment.
>
> An "acute" reaction means – "coming to crisis quickly", it is a circumstance of great tension, an extreme degree of stress. It is the opposite of chronic. The reaction is typically immediate and identifiable.
>
> In most cases, the worker must have suffered or witnessed the traumatic event first hand.
>
> In all cases, the traumatic event must be:
>
> > • clearly and objectively identifiable; and
> >
> > • sudden and unexpected in the course of the worker's employment.
>
> […]

> In considering the matter of work-relatedness, the Board must determine if there is a connection between the employment and the resulting acute reaction. This requires consideration of personal factors in the worker's life, which may have contributed to the acute reaction. For compensation to be provided, the workplace circumstances or events must be of causative significance to the worker's mental stress. If there is no causal link to work-related factors, the worker's mental stress will not be compensable.
>
> It is recognized that some workers, due to the nature of their occupation, may be exposed to traumatic events on a relatively frequent basis (e.g. emergency workers). If such a worker has an acute reaction to a sudden and unexpected traumatic event, compensation for mental stress may be provided even if the worker was able to tolerate past traumatic events.

[67] The question for the Court is whether it is plain and obvious from section 5.1 and Policy 13.30 that the Plaintiff would have been compensated for the mental distress he alleges to have suffered. Based on the above, I am unable to reach that conclusion. The Plaintiff's alleged mental distress appears at its face to be more of a condition that gradually increased in severity until the Plaintiff reached a "breaking point". It was also related to his employer's decisions respecting the workplace environment.

[68] While it is not my role to determine the Plaintiff's eligibility for compensation under the mandate of British Columbia's Workers' Compensation Board, I conclude that it is not plain and obvious that he would have been eligible under Policy 13.30. Therefore, it is also not plain and obvious that section 12 of the *GECA* ousts the Court's jurisdiction.

(5) Disclosure of a Reasonable Cause of Action in Negligence

(a) *Claims outside Jurisdiction*

[69] I declined to exercise jurisdiction except in relation to TCEs working in the Kelowna OCC between 2003 and March 31, 2005. Even if jurisdiction was not an issue, I find it is plain and obvious that the pleadings do not disclose a reasonable cause of action, except in relation to TCEs working in the Kelowna OCC between 2003 and March 31, 2005.

(b) *Claims within Jurisdiction*

[70] The Crown relies on *Piresferreira v Ayotte*, 2010 ONCA 384 [*Piresferreira*], to argue that no claim in negligence lies between parties whose relationship is governed by an employment contract. However, unlike in these proceedings, the comments in *Piresferreira* were not in respect to a motion to strike, but in relation to a final disposition on a negligence claim. It is therefore distinguishable from what is before this Court here, where the evidentiary standards are different.

[71] In *Piresferreira*, the Ontario Court of Appeal did not conclude that an employee may never bring an action against an employer who negligently causes mental suffering. Rather, it declined to recognize a new tort in negligence, namely the negligent affliction of mental suffering, where the duty of care rested on the contractual relationship between the parties. In the absence of this new tort, the Court concluded that the action must rest on the common law alone,

independent of whether the employer's conduct is also in breach of the employment contract.

The following passage from *Piresferreira* is instructive:

> [45] The trial judge termed the tort she recognized "Negligent Infliction of Emotional Distress, Mental Suffering, Nervous Shock and/or Psycho-traumatic Disability". **She found that the duty of care for the tort rested squarely on the contractual relationship** between the parties. Under the heading, "Did Ayotte/Bell Mobility owe Piresferreira a duty of care?", she said that Bell Mobility "as Piresferreira's employer" and Ayotte "as her immediate supervisor" owed her "the duty to ensure that [she] was working in a safe and harassment-free environment…all in accordance with Bell Mobility's Code of Business Conduct"
>
> […]
>
> [47] Accepting that Bell Mobility's Code of Business Conduct was part of the employment contract, a breach of a contractual duty cannot be the basis for the recognition of a common law tort. **For concurrent tort liability to be available there must be a common law duty of care that would exist even in the absence of the specific contractual term** which created the corresponding contractual obligation. In *Central & Eastern Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 SCR 147, Le Dain J. differentiated between a duty that is created by the contract and an independent common law duty. He wrote at p. 205:
>
> What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract.
>
> [Underlined emphasis in the original; bolded emphasis added]

[72] The Crown further relies on *Merrifield v Canada (Attorney General)*, 2019 ONCA 205, among other cases, which the Crown says further affirms its interpretation of *Piresferreira*. Yet, in *Sulz v Minister of Public Safety and Solicitor General*, 2006 BCCA 582, the Court upheld an award in tort for workplace harassment incurred by an RCMP member. As noted in Greenwood,

at paragraph 159, this resulted in a divided appellate authority on the question of tortious negligence in the context of workplace harassment.

[73] In my view, neither *Piresferreira* nor *Merrifield* are conclusive on a motion to strike, where the evidentiary standard is different. Again, the test here is an onerous one to meet, and the Court must err on the side of permitting a novel but arguable claim (*Imperial Tobacco* at para 21). The Plaintiff correctly observes that, in *Greenwood* at paragraphs 158-162, our Court of Appeal has declined to limit claims alleging that an employer caused mental injury to an employee (or class of employees) by negligence. The Court's analysis in *Greenwood* merits repeating:

> [158] Moreover, in *Merrifield No. 2*, the Ontario Court of Appeal left the door open to the recognition of a new tort of workplace harassment in an appropriate case (at paragraph 53).
>
> [159] I also note that, standing in contrast to the decision in *Merrifield*, the British Columbia Court of Appeal came to an opposite conclusion in *Sulz* and upheld an award of damages against the provincial Crown in tort for workplace harassment incurred by an RCMP member. There is thus divided appellate authority on the issue of whether RCMP members may recover damages in tort for workplace harassment.
>
> [160] Further, as noted by the respondents, 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.
>
> [161] In *Merlo, Tiller* and *Ross*, the Federal Court needed to be satisfied that it was not plain and obvious that the claims disclosed no cause of action before it could approve the settlements. Presumably, a similar view would have been required for the Crown to have agreed to the settlements on a principled basis. As

> the respondent notes, Tiller was decided after the decision of the Ontario Court of Appeal in Merrifield.
>
> [162] Given the foregoing and the high threshold for a successful motion to strike a pleading, 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.

[74] I am cognizant that in *Greenwood*, the Court held that RCMP members are subject to a statutory relationship, not an employer relationship. However, paragraphs 160 and 162 of the Court of Appeal's decision stress the onerous threshold that must be met on a motion to strike, and reiterates the view that novel claims should not be struck when they are arguable.

[75] I therefore find that it is not plain and obvious that the claims pertaining to TCEs in the Kelowna OCC between 2003 and March 31, 2005 disclose no reasonable cause of action.

(6) The Family Class

[76] In light of the above conclusions, it is plain and obvious that there is no reasonable cause of action for proposed members of the family class, except in relation to injuries experienced by TCEs in the Kelowna OCC between 2003 and March 31, 2005.

[77] A family class member may only claim compensation under the applicable legislation in British Columbia. The only legislation relied on by the Plaintiff from British Columbia for family class members is the *Family Compensation Act*, RSBC 1996, c 126.

[78] The *Family Compensation Act* permits compensation only in cases involving death. The Plaintiff does not allege in his pleading or his affidavit that any individual died because of harassment, bullying, or intimidation. In the absence of a material fact in relation to this necessary element, claims under the *Family Compensation Act* must also be struck.

[79] Therefore, it is plain and obvious that the pleadings disclose no reasonable cause of action with respect to family class members.

(7) Summary of Findings on the Motion to Strike

[80] The Claim is within this Court's jurisdiction with respect to TCEs employed at the Kelowna OCC between 2003 and March 31, 2005. Allegations falling within those parameters disclose a reasonable cause of action in negligence. Since there are no material facts that can furnish a "scintilla" of a cause of action for all other claims, I strike them without leave to amend (*Simon v Canada*, 2011 FCA 6 at para 8; *Al Omani v Canada*, 2017 FC 786 at paras 33-34).

B. *Should the Court grant the Plaintiff's Motion to Certify?*

(1) Applicable Standard

[81] To certify a class proceeding under rule 334.16(1) of the Rules, the Court must be satisfied that that the proceeding meets all of the following five elements:

1. The pleadings disclose a reasonable cause of action;

2. There is an identifiable class of more than one person;

3. The claims raise common questions of fact and law;

4. A class proceeding is the preferable procedure for the just and efficient resolution of the common questions; and

5. There is an appropriate representative plaintiff.

[82] A motion for certification does not involve an assessment of the merits of the case. The only question before the Court is whether there is "some basis in fact" for each of the certification requirements, except for the first (*Hollick v Toronto (City)*, 2001 SCC 68 [*Hollick*] at para 25). There is no requirement to resolve conflicting facts or evidence, nor to make determinations on a balance of probabilities (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 [*Pro Sys*] at paras 100, 102). However, under the "some basis in fact" standard, the party seeking to certify a class proceeding must provide sufficient evidence to establish a minimum evidentiary basis for the certification order (*Hollick* at paras 24-25).

(2) The First Element: Reasonable Cause of Action

[83] For the first element, the same legal principles apply as with the motion to strike (*Hollick* at para 25). I have already concluded that the pleadings disclose a reasonable cause of action for TCEs in the Kelowna OCC between 2003 and March 31, 2005. The same conclusion applies here.

(3) The Second Element: Identifiable Class

[84] To conclude that there is an identifiable class of more than one person, the Court must be satisfied that there is "some basis in fact" supporting an objective class definition that is not dependent on the outcome of the litigation and that bears a rational connection to the common issues (*Salna v Voltage Pictures LLC*, 2021 FCA 176 [*Salna*] at para 91; *Wenham v Canada (Attorney General)*, 2018 FCA 199 [*Wenham*] at para 69, citing *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 [*Western Canadian*] at para 38 and *Hollick* at paras 19 and 25).

[85] The class members need not be identically situated (*Pro Sys* at para 108). The essence of the test is to confirm that the proposed class is not unnecessarily broad and that narrowing it down further would arbitrarily exclude some people with the same interest (*Cloud v Canada (Attorney General)*, [2004] OJ No 4924 (ONCA), [2004] CarswellOnt 5026 at para 45). This is not an onerous threshold.

[86] The Plaintiff proposes a class period of 1974 onward. The Plaintiff also proposes the following class:

A. **Primary Class Members**: all persons who worked within RCMP workplaces during the Class Period in any of the following categories: temporary civilian employees; supernumerary special constables, auxiliary constables; cadets, pre-cadets, students; contractors and consultants; Commissionaires; employees of other governments including municipal and regional governments; seconded officers and

employees; persons from outside agencies and police forces including members of integrated policing units and task forces; volunteers and non-profit organization employees; individuals working or attending courses on RCMP premises; and, individuals who are persons as defined in s. 206(1)(a)-(h) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22 ["*FPSLRA*"]; and

B. **Family Members**: All individuals who, by reason of a relationship with a Primary Class Member, are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990 c F.3, and equivalent or comparable legislation in other provinces and territories.

[87] The Plaintiff excludes from the proposed proceeding claims that:

A. arose on or after April 1, 2005, and that were subject to sections 208 and 236 of the *FPSLRA*;

B. arose while the individual served in the RCMP as a Regular Member, Civilian Member, Special Constable Member or Reservist; and

C. were resolved in *Merlo et al v Her Majesty the Queen*, Federal Court File T-1685-16, *Tiller et al v His Majesty the King*, Federal Court File T-1673-17, or *Ross et al v His Majesty the King*, Federal Court File T-370-17.

[88] I have already constrained the claims to allegations between 2003 and March 31, 2005. I also determined that my exercise of jurisdiction must be limited to TCEs in the Kelowna OCC.

The proposed primary class cannot exceed those limits. By extension, the family class must be excluded entirely, as set out above. Therefore, by process of elimination, the proposed class and class period must be amended to the following (the "amended class"):

> All persons who worked at the Kelowna operational communications centre between January 1, 2003 and March 31, 2005 as temporary civilian employees.

And since the first two exclusions are redundant, the only claims that must be explicitly excluded from the amended class are those that were resolved in *Merlo et al v Her Majesty the Queen*, Federal Court File T-1685-16, *Tiller et al v His Majesty the King*, Federal Court File T-1673-17, or *Ross et al v His Majesty the King*, Federal Court File T-370-17.

[89] The amended class specifies who is included by their job title at the RCMP. This is an objective definition that constrains the amended class to TCEs in the Kelowna OCC. Those falling within this definition are identifiable without reference to the outcome of the litigation.

[90] Members of the amended class also have a rational connection to the common issues brought forth by the Plaintiff – that is, allegations of workplace bullying, intimidation, and harassment at the Kelowna OCC. Assuming the Plaintiff's allegations are true, then TCEs who worked at Kelowna OCC would have been regularly exposed to the purported bullying, intimidation, and harassment.

[91] There is also "some basis in fact" to satisfy the second element. The Plaintiff alleges in his pleading and affidavit that he and other TCEs at the Kelowna OCC all experienced various incidents of harassment and bullying. Among those incidents are regular attempts to intimidate

and humiliate “new TCEs”, refusing to give new people key cards to access the building, reprisal against “recently hired TCEs” for participating in an offsite training course, and public ridicule of “recently hired TCEs”. All these present “some basis in fact” that the amended class includes two or more people, all of whom have a rational connection to the issues proposed here.

[92] Given the above, the second element is met for the amended class.

(4) The Third Element: Common Questions

[93] The commonality requirement is at the heart of a class proceeding. The underlying question here is whether certifying the proceeding will avoid duplication in fact-finding or legal analysis. An issue will be common only where its resolution is necessary to the resolution of each class member’s claim. It is not necessary that common issues predominate, as long as there is a substantial common ingredient (*Pro Sys* at paras 106-108, citing *Western Canadian* at paras 39-40), and the answer to a common question may differ from one class member to another (*Salna* at para 99). Nor is it necessary for all proposed members to be identically situated in relation to the opposing party (*Pro Sys* at para 108).

[94] The Plaintiff proposes the following questions

> Negligence
>
> i. Did the RCMP, through its agents, servants and employees owe a duty of care to the Plaintiff and other Primary Class Members to take reasonable steps in the operation or management of the RCMP to provide them with a work environment free from bullying, intimidation, and harassment?

> ii. If yes, was there a breach of this duty by the RCMP through its agents, servants, and employees?
>
> iii. If yes, was the Crown vicariously liable for the failure of its agents, servants, and employees at the RCMP, to take reasonable steps in the operation and management of the RCMP to provide a work environment free from bullying, intimidation and harassment?
>
> Damages
>
> iv. Does the conduct of the Defendant or of the individuals for whom it is vicariously liable justify an award of aggravated, exemplary or punitive damages?

The chambers Judge in *Greenwood* certified the proceeding there along a similar set of issues and in relation to similar allegations.

[95] The first and second questions pertain to the RCMP's duty to the members of the amended class, as well as the requisite standard of care. The questions are necessary in all claims of negligence. Further, they require assessing the RCMP's conduct at a systemic level. They do not require the Court to make determinations on an individual class member level.

[96] The Crown argues that there is a wide range of legal relationships included in the proposed class action and that determining the duty of care for each relationship will "immediately break down" in this case. This argument is no longer applicable in light of the amended class. In fact, since they are all TCEs employed in a single OCC, all members of the amended class are identically situated in relation to the RCMP.

[97] Like the first two questions, the third question is necessary to establish the Crown's liability and it applies to all members of the proposed class. Again, this does not require an assessment on an individual class member level. It simply examines the nature of the relationship between the Crown and its agents, servants, and employees at the RCMP.

[98] Finally, the fourth question is also common to all members of the proposed class. It addresses the Defendant's conduct at a systemic level to assess if it merits awarding aggravated, exemplary, or punitive damages. The reference to "individuals for whom [the Defendant] is vicariously liable" demonstrates that the Plaintiff alleges negligence at a systemic level.

[99] There is also some basis in fact to support the above common questions. The Plaintiff's affidavit discloses specific allegations against managers, supervisors, and colleagues within the Kelowna OCC against various TCEs. The evidence of Dr. Workman-Stark also speaks to the RCMP's duty of care and the standard of care that flows from that duty. Dr. Workman-Stark also discusses the RCMP's purported mishandling of harassment complaints at a systemic level. Although I have found Dr. Workman-Stark's evidence to be of little weight, the evidentiary burden here is sufficiently low for her evidence to supplement the Plaintiff's affidavit.

[100] The proposed class's purported injuries therefore arise out of the same set of alleged acts and omissions. Individual legal claims by members of the proposed class will involve relying on identical legal arguments and allegations across the claims. The common questions presented by the Plaintiff avoid that duplication and are necessary for the resolution of all claims. I address this point further under the next element.

[101] Therefore, the third element is met.

(5) The Fourth Element: Preferable Procedure

[102] To satisfy the fourth element, the Plaintiff must show that (1) a class proceeding would be a fair, efficient, and manageable method of advancing the claim, and that (2) it would be preferable to any other reasonably available method (*AIC Ltd v Fischer*, 2013 SCC 69 [*Fischer*] at para 48; *Wenham* at para 2018 FCA 199 at para 77). The Court must consider the preferability of class proceedings with three principal objectives in mind: judicial economy, behaviour modification, and access to justice. This is a comparative exercise. The question is not whether the proposed proceeding will fully achieve those objectives, but whether it is preferred compared to others (*Fischer* at paras 22-23).

[103] The proposed class proceeding avoids duplication of fact-finding and legal analysis. The purported injuries arise out of the same set of alleged acts and omissions. Individual legal claims by members of the proposed class will necessarily involve relying on identical legal arguments and allegations across the claims. A class proceeding ensures greater fairness and efficiency, preserves judicial resources, and makes adjudication more manageable.

[104] By avoiding duplication, the class proceeding also avoids unnecessary legal expenses that class members would otherwise incur to pursue individual claims. It would promote greater fairness and access to justice for individuals who may not be able to pursue a claim. The Plaintiff also correctly observes that answering the common questions will leave few individual issues for determination, such as harm, causation, and limitations. This is comparatively more

manageable, and may be properly addressed at the administration stage. Alternatively, if the common questions lead the Court to dismiss the matter, it would do so for all members of the proposed class, thereby providing finality to the parties.

[105] The Crown suggests that a class proceeding would not be manageable due to the diverse nature of the proposed primary class. However, this argument is not relevant with respect to the amended class, which is constrained to TCEs in the Kelowna OCC between 2003 and March 31, 2005. The Crown also argues that other mechanisms for adjudication are better suited than class actions, such as human rights and workers compensation tribunals. I do not agree. For one, as I have already explained, it is not plain or obvious that the mental distress experienced by the Plaintiff and other members of the amended class is compensable under the applicable workers compensation regime at the time. There is also no indication that the alleged incidents of harassment, bullying, and intimidation were based on prohibited grounds of discrimination. The exception is the allegation that the Plaintiff's sexuality was the subject of repeated mockery by some individuals in the workplace. However, a claim based on such an incident would be excluded from this action, since it was already addressed by prior proceedings.

[106] Rule 334.16(2) of the Rules requires the Court to also consider the following when assessing preferability:

A. whether the questions of law or fact common to the class members predominate over any questions affecting only individual members;

B. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

C. whether the class proceeding would involve claims that are or have been the subject of any other proceeding;

D. whether other means of resolving the claims are less practical or less efficient; and

E. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[107] I addressed the last two factors above. As for the rest, there are no questions that affect individual members alone, nor is there evidence of a significant portion of the proposed class having an interest in individually controlling their own proceeding. The proposed proceeding also excludes claims that were subject to other proceedings.

[108] A class proceeding is therefore fairer, more efficient, and more manageable. It is also the preferable process compared to the alternatives. The fourth element is met.

(6) The Fifth Element: Representative Plaintiff

[109] Rule 334.16(1)(e) of the Rules requires “that there is a representative plaintiff” 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 proceeding 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 or applicant and the solicitor of record.

[110] The representative plaintiff must be "anchored in the proceeding". While it is inappropriate to assess limitation periods at the certification stage (*Hudson* at para 141), if the Court is satisfied that the representative plaintiff's individual claim is definitively barred because of the expiry of the limitation period, then the representative plaintiff is not anchored in the proceeding (*Amyotrophic Lateral Sclerosis Society of Essex v Windsor (City)*, 2015 ONCA 572 at para 52; *Stone v Wellington County Board of Education*, [1999] OJ No 1298, [1999] CarswellOnt 1039 (ONCA) at paras 9-10).

[111] In my view, the Plaintiff is not anchored in the proceeding. Based on his pleading and affidavit, the Plaintiff's individual claim has definitively expired. The last date in which an actionable incident of harassment, bullying, and intimidation could have occurred would have been March 31, 2005.

[112] The British Columbia *Limitation Act*, SBC 2012, c 13, generally restricts the possibility of bringing an action or claim to two years from the date in which the incident occurred or was discoverable. None of the exceptions listed apply here. Moreover, section 21 of the *Limitation Act* places an ultimate expiry date of 15 years, regardless of discoverability.

[113] As for claims for incidents occurring before the *Limitation Act* came into force in 2013, section 30 specifies that the limitation period in the predecessor legislation applies – that is, the *Limitation Act*, RSBC 1996, c 266. There, section 3 places a general limitation period of six years from the date of the incident, which would have expired in 2011.

[114] There is nothing in the Plaintiff's pleading or evidence to suggest that he was unaware of his injuries. In fact, the Plaintiff alleges that the reason behind the delay in bringing an action was that he was managing the mental consequences of the bullying, intimidation, and harassment. Taken at face value, this suggests to me the Plaintiff was well aware of the harm caused by the alleged harassment very soon after the harassment began. The Plaintiff says that it was only when he was able to regain his emotional strength that he decided to pursue the claim. Unfortunately, the emotional fortitude of the Plaintiff is not a relevant factor in assessing limitations.

[115] Therefore, the Plaintiff's personal claim is definitively expired, he is not anchored in the proceeding, and he cannot adequately represent the interests of the class. The fifth element is not met.

V. Conclusion

[116] The motion for an order to strike the pleadings is granted in part. All claims in the pleadings are struck without leave to amend except claims pertaining to TCEs who worked in the Kelowna OCC between January 1, 2003 and March 31, 2005 (inclusive).

[117] The motion for an order to certify the proposed class proceeding is dismissed.

[118] Pursuant to rule 334.39 of the Rules, no costs are payable for this motion.

JUDGMENT in T-1509-21

THIS COURT'S JUDGMENT is that:

1. The motion for an order to strike the pleadings is granted in part. All claims in the pleadings are struck without leave to amend except claims pertaining to TCEs who worked in the Kelowna OCC between January 1, 2003 and March 31, 2005 (inclusive).

2. The motion for an order to certify the proposed class proceeding is dismissed.

3. No costs are payable for this motion.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1509-21
STYLE OF CAUSE:	DUSTIN MCMILLAN v HIS MAJESTY THE KING
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 18-20, 2023
JUDGMENT AND REASONS:	MANSON J.
DATED:	DECEMBER 22, 2023

APPEARANCES:

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