Federal Court  Cour fédérale

Date: 20240905

Docket: T-1201-18

Citation: 2024 FC 1327

Ottawa, Ontario, September 5, 2024

PRESENT: Madam Justice McDonald

CLASS PROCEEDING

BETWEEN:

GEOFFREY GREENWOOD and TODD GRAY

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

I. Overview of Motion

[1] This class proceeding has been certified against the Royal Canadian Mounted Police [RCMP] for systemic negligence for bullying, intimidation, and harassment. On this Motion, the Plaintiffs request an Order to amend the certification order to include a "family class" (underlined below) in the class definition as follows:

> All current or former RCMP Members (ie. 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 ("Primary Class");
>
> and
>
> All individuals who are entitled to assert a claim pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, and equivalent or comparable legislation in other provinces and territories (the "Family Class"). [Emphasis added.]

[2] The Court of Appeal has remitted the question of whether there is "some basis in fact" concerning the second criterion for the certification of an identifiable class. Specifically, this Court is to determine whether there is "some basis in fact" to conclude that the family class is an identifiable class of two or more persons, as required by Rule 334.16(1)(b) of the *Federal Court Rules*, SOR/98-106. Depending on the outcome of this analysis, the Court of Appeal also asks this Court to examine the "workability" of the family class definition (*Canada v Greenwood*, 2024 FCA 22 at para 46).

[3] The RCMP, defended by Canada, objects to the inclusion of a family class for two reasons. First, they argue the evidence does not satisfy the "some basis in fact" test to establish the family class as "an identifiable class of two or more persons". Second, they argue that the family class is not workable because of differences in the equivalent or comparable legislation in the provinces and territories.

II. Analysis

A. *There is "some basis in fact" to establish the family class as an identifiable class*

[4] To determine whether the Plaintiffs have provided "some basis in fact" to establish the family class as an identifiable class, I turn to three inquiries. First, I consider whether the

Statement of Claim provides "some basis in fact" for the family class to be established. Second, I consider if the affidavit evidence included in the Plaintiffs' Motion record is inadmissible hearsay, and if so, whether hearsay evidence can provide "some basis in fact" for the certification requirements at this stage of the proceeding. Third, I consider whether the public reports included in the Plaintiffs' Motion record can provide "some basis in fact".

(1) "Some basis in fact" criteria

[5] The certification stage of the proceeding is not meant to be a test of the merits of the action. The question at this stage is whether there is "some basis in fact" to establish the second certification requirement; namely whether the family class "is an identifiable class of two or more persons". This does not require evidence on a balance of probabilities nor the resolution of conflicting facts and evidence (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 99-102).

[6] In *Jensen v Samsung Electronics Co Ltd*, 2023 FCA 89 at para 78 [*Jensen*], the Court of Appeal describes the "some basis in fact" test as having two components:

> … first that the putative class members must have a claim, or at the very least some minimal evidence supporting the existence of a claim, and second some evidence that the common issue is such that its resolution is necessary to the resolution of each class member's claim.

[7] The Statement of Claim pleads the facts in support of the family class as follows:

> 71. Mr. Greenwood's family has also suffered tremendously from the bullying, intimidation, and harassment by the RCMP, through its agents, servants and employees. In 2013, he and his spouse were forced to undergo counselling to save their marriage. Mr. Greenwood's spouse and his children have suffered the loss of

Mr. Greenwood's guidance, care and companionship. His spouse has also endured both financial and emotional hardship from taking on an increased role in the relationship.

…

102. Mr. Gray's family has also suffered as a result of the harassment, intimidation and bullying by the RCMP through its agents, servants and employees. Mr. Gray's spouse and children have suffered the loss of Mr. Gray's guidance, care and companionship. Mr. Gray's spouse, Samantha Gray, was also affected as both a class member and FLA claimant. In Kugluktuq, Mrs. Gray was employed as a matron to guard cells at the RCMP detachment and to clean the RCMP detachment. Cpl White would not let Mrs. Gray continue to work as a matron after she was visibly pregnant, despite another matron being permitted to work until they left for maternity leave to give birth. In Hinton, Mrs. Gray was ostracized in planning a local activity by individuals who were friends with the complainant and his wife.

…

119. As a result of the breach of contract and negligence of the RCMP, through its agents, servants and employees, the Family Class Members have sustained and will continue to sustain and suffer injury, loss and damages, including but not limited to:

a) actual expenses reasonably incurred for the benefit of the class members;

b) travelling expenses incurred while visiting the Class Members during medical procedures, counselling and or recovery; and,

c) loss of income and/or the value of services provided by Family Class Members for Class Members where services, including nursing and housekeeping, have been provided.

120. The Family Class Members seek compensation for the above listed costs, as well as compensation for the loss of support, guidance, consortium, care and companionship that they might reasonably have expected to receive from the Class Members.

[8] Applying the *Jensen* test to the Statement of Claim, I am satisfied that the pleadings (a) outline a claim, namely, breach of contract and negligence, and (b) provide sufficient evidence on a common issue to the family class.

[9] As such, I find that the pleadings provide "some basis in fact" that there are common issues among the family class members and that deciding these commons issues is necessary for the resolution of each family class member's claim. This conclusion is consistent with my original "some basis in fact" analysis in *Canada v Greenwood*, 2020 FC 119 at paras 51–58.

[10] The content of the pleadings is sufficient to establish "some basis in fact" to include the family class as an identifiable class. Nevertheless, I will now consider if the Plaintiffs' affidavit evidence on this issue is hearsay, and whether such evidence can provide "some basis in fact".

(2) Is the Plaintiffs' affidavit evidence hearsay?

[11] In support of this Motion, the Plaintiffs rely upon the original certification Motion record filed on October 10, 2018 which contains the Affidavit of Geoffrey Greenwood, sworn October 4, 2018, and the Affidavit of Todd Gray, sworn October 1, 2018.

[12] In his Affidavit Mr. Greenwood states:

> 44. My family has suffered as a result of the bullying, intimidation, and harassment I have endured by the RCMP. At times I believe that my emotional state caused me to over react to normal family situations. I disassociated from and [had no] future sense of my family. In 2013, my wife and I were forced to undergo counselling to save our marriage. My wife and children have suffered and I have not been able to provide the same guidance, care and companionship. My wife has also endured both financial

> and emotional hardship from taking on an increased role in our relationship.

[13] Mr. Gray states as follows in his Affidavit:

> 43. I believe that my wife and sons have suffered as a result of my experiences.
>
> a. In Kugluktuq, my wife was employed by the Commissionaires Corps as a matron to guard cells at the detachment and to clean the detachment. After I reported the Detachment Commander he would not let my wife continue to work as a matron once she was visibly pregnant. However, the other matron was permitted to work right up until they left for maternity leave to give birth. My wife's Human Rights' complaint regarding this was dismissed;
>
> b. My wife was isolated in Kugluktuq when I went away on my relief posting. When supplies were delivered from the barge containing dry goods for the following year and she was seven months pregnant neither Cpl. White nor the other member would help her lift these materials. Fortunately, the new replacement constable was willing to help.
>
> c. In Hinton, my wife was ostracized for planning a local activity by individuals who were friends with the complainant and his wife. My wife was also very stressed, angry and disappointed about the way I was being treated;
>
> d. My eldest son had to transfer schools in his final year of high school and we had to sell our house in a depressed market. The sale of our house took a longer than anticipated time and we did not receive as much for it as we paid. This was a stressful time. My sons and I moved down from Airdrie before our house was sold in Hinton in order for them to start at new schools. As the result of our move, my sons are currently not able to play competitive contact hockey as they previously did in Hinton. We are looking into alternatives to ensure that they continue to develop their hockey skills and understand that these will cost more.

> 44. My experiences and the effects of my experiences have affected my home life. I have been depressed and stressed. I believe that my wife and sons have been affected.

[14] Canada argues that this Affidavit evidence is not admissible to support the "some basis in fact" criteria on the family class because the statements of Mr. Greenwood and Mr. Gray about their spouses and/or children are hearsay.

[15] Hearsay evidence is (1) an out-of-court statement that is adduced to prove the truth of its contents; and (2) there is an absence of a contemporaneous opportunity to cross-examine the declarant (*R v Khelawon,* 2006 SCC 57, at paras 2, 35 [*Khelawon*]).

[16] In my view, the affidavit evidence cannot be characterized as hearsay at this stage of certification because (1) it is not relied upon to prove the truth of its contents, and (2) the Defendant has had opportunity to cross-examine the declarant. To the extent that the affidavit may include statements of opinions, they are not, at this stage of the proceeding, being introduced for the truth of their contents, and their reliability is not presently at issue. On a certification motion where the moving party need only establish that there is "some basis in fact" for the certification criteria, evidence can be admitted even though it would not be admissible for the truth of its contents, in order to support, along with other evidence, that there is some basis in fact for the certification criteria (*Sweet v Canada,* 2022 FC 1228 at para 49 [*Sweet*]).

[17] If the affidavit evidence is hearsay, it may nevertheless be admissible and provide "some basis in fact" if the party adducing it can establish it is necessary and reliable (*Khelawon* at para 42; *Coldwater First Nation v Canada (Attorney General)*, 2019 FCA 292 at para 48). A

statement is reliable if there is no real concern about whether the statement is true because of the circumstances in which it was made, or if the circumstances allow its truth and accuracy to be sufficiently tested (*Khelawon* at paras 61-63). Necessity and reliability considerations may have an impact on the other, such that if the reliability of the evidence is sufficiently established, the necessity requirement can be relaxed (*Khelawon* at paras 46 and 77).

[18] On my reading of these statements, both representative Plaintiffs are offering firsthand evidence. Mr. Greenwood states his emotional state caused him to "over react" to normal family situations and he says he "disassociated" from his family. He states that he and his wife went to counselling to save their marriage. In Mr. Gray's case, he talks about what he observed of his wife's treatment by others in a remote RCMP detachment and the impact on his sons of having to transfer to other schools. He states that he was depressed and stressed, and this affected his home life.

[19] In my view, the statements of Mr. Gray and Mr. Greenwood, as husbands and fathers, is evidence about their personal observations of their immediate family members. They are not recounting something they have been told by someone else. Rather, they are recounting their own firsthand experiences and observations of the circumstances of their family. I do not regard such evidence as hearsay evidence.

[20] Even if this evidence could be characterized as hearsay, I am satisfied that the statements are reliable (*Khelawon* at paras 61-63). Statements describing personal impacts and the impacts on spouses and children in a family setting, in these circumstances, should not be contentious

evidence. There is no suggestion that there is an attempt to shield family members from providing evidence. On that, I would observe, that to the extent there are minor children, they would not provide direct evidence in any event. Finally, on this point, I note that the Supreme Court of Canada in *Hollick v Toronto (City)*, 2001 SCC 68 [*Hollick*] specifically denounced the requirement of direct evidence from class members (para 9).

[21] Finally, while Canada's position is that the "family class" evidence is hearsay, when Canada had the opportunity to cross-examine both Mr. Greenwood and Mr. Gray on their Affidavits, they did not question them on the inclusion of a family class (Affidavit of David Endemann at paragraph 20). Canada argues that their decision not to cross-examine on this does not constitute an admission of the hearsay statements and that no inference should be drawn to support the Plaintiffs from this decision. Notwithstanding Canada's current position on this evidence, the availability of a contemporaneous opportunity to cross-examine the declarant on challenged evidence is a factor to consider in the characterization of evidence as hearsay. As Canada chose not to avail itself of the opportunity to challenge the evidence directly when it questioned both Plaintiffs on their Affidavits, this lends support to the conclusion that this evidence is not hearsay.

[22] At the certification stage, the establishment of "some basis in fact" does not require that evidence be assessed on a balance of probabilities nor does it require the resolution of conflicting facts and evidence. Regardless of whether the affidavit evidence contained in the Motion record is admissible for the truth of its contents; it may nevertheless be considered and assessed, along

with the frailties it may contain, to determine whether the moving party has met the onus of establishing "some basis in fact" for the certification requirements (*Sweet* at para 49).

(3) Can the public reports be considered as evidence?

[23] Canada objects to the Plaintiffs placing any reliance on information contained in the public reports as providing "some basis in fact" evidence. They say the public reports do not provide information about the existence of a claim on behalf of a family class member.

[24] As the Court of Appeal noted in *Bigeagle v Canada*, 2023 FCA 128 at para 44:

> [44] While the referral to reports may be used on a certification motion to help put uncontentious facts into context, to determine whether the references made in the statement of claim are accurately reflected and to assist in discharging the "some basis in fact" burden, the reports cannot be used as a means to fill in the existing gaps or the blanks in the pleadings. […] It is clearly not the role of the motion judge to comb through the reports in order to particularize broad allegations that might support Ms. BigEagle's causes of action.

[25] The Court of Appeal in *Canada v Greenwood*, 2021 FCA 186 addressed the public reports as follows:

> [96] As the respondent rightly notes, evidence similar to the Reports has frequently been relied on in certification matters, along with other evidence, to support that there is some basis in fact for the final four criteria for certification: see, e.g. *Johnson v. Ontario*, 2016 ONSC 5314, 364 C.R.R. (2d) 17, at paras. 50-67; *Bigeagle v. Canada*, 2021 FC 504, 2021 CarswellNat 2031, at paras. 37-47; *R.G. v. The Hospital for Sick Children*, 2017 ONSC 6545, 2017 CarswellOnt 16865, at paras. 22-27, aff'd on other grounds 2018 ONSC 7058 (Ont. Div. Ct.); *Gay et al. v. Regional Health Authority 7 and Dr. Menon*, 2014 NBCA 10, 421 N.B.R. (2d) 1, at para. 18.
>
> [97] Indeed, the Crown recognizes that the Reports could be admitted on this basis to establish, along with other evidence, that

> the final four criteria for certification were met. Here, there was such other evidence from the representative plaintiffs in respect of their own situations and observations. The Federal Court thus did not err in admitting and relying on the Reports along with the evidence from the representative plaintiffs in consideration of the final four criteria for certification.

[26] At this time, I will not review the public reports in detail – they are addressed in my decision on certification (2020 FC 119). However, the February 2013 *Public Interest Investigation into RCMP Workplace Harassment* notes at page 13:

> On a personal level, members of the victim's support network (e.g. partners, immediate and extended family, friends, colleagues and co-workers) may themselves experience stress, trauma and/or financial expense as a result of workplace harassment incident. Interpersonal difficulties between the victim and his or her partner - possibly caused by the projection of frustration onto spouses and children - may lead to a diminished family life culminating in family breakdown and dysfunctionality, and possibly even separation or divorce. [Footnotes omitted.]

[27] As well, in the report titled S*hattered Dreams* prepared in December 2014 addressing harassment and systemic discontent within the RCMP, the authors note at page 19 of that report as follows:

> … Despite this distinguished legacy, a growing number of RCMP Members have come forward with horrific stories of sexual assault, harassment and bullying in the workplace. These allegations are accompanied by stories of family breakdown, mental anguish, suicide, career destruction and suffering that cast a pall over the reputation of the RCMP in a way that undermines the credibility of the force.

[28] I accept that the public reports are useful, not for the truth of their contents necessarily, but rather to provide some context and an understanding of how the workplace experiences of RCMP members can impact their family. However, it is not necessary to rely upon the

information in the public reports to establish "some basis in fact" for the family class, as the Statement of Claim and the Affidavits of Mr. Greenwood and Mr. Gray provide sufficient evidence to satisfy that requirement.

[29] In summary, I find that the evidence of Mr. Greenwood and Mr. Gray provides "some basis in fact" to support the inclusion of a family class.

B. *Workability criteria*

[30] The Court of Appeal asks that I examine the "workability" of the family class definition.

[31] The Defendant argues that the family class cannot be certified because the class is not adequately defined.

[32] The "workability" of a class definition, on its own, is not a criterion under the certification requirements in Rule 334.16(1). Rather, "workability" refers to whether the definition of the family class is sufficient to objectively identify those persons who are covered by the class definition and who would be entitled to notice. In other words, whether a class has a "workable" definition is relevant to whether there is an "identifiable class of two or more persons". The class must be defined in a way that will "allow for a later determination of class membership". The purpose of a class definition is to:

> (i) identify those persons who have a potential claim for relief against the [defendant];

(ii) define the parameters of the lawsuit so as to identify those persons who are bound by its result;

(iii) describe who is entitled to notice of the action;

(*Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 at para 57 [*Sun-Rype*])

[33] Canada relies upon *Sun-Rype* in support of its position that the family class is unworkable. *Sun-Rype* was a price fixing class action brought on behalf of direct and indirect purchasers of high-fructose corn syrup (HFSC). On whether "indirect purchasers" were an identifiable class, the issue was that indirect purchasers would not know if they were members of the class. The evidence of the representative plaintiff herself was that she was unable to state if the products she purchased contained HFSC (*Sun-Rype* at para 66). As noted by the Court at paragraph 69:

> … In this case, the problem is that the indirect purchaser plaintiff did not offer any evidence to show some basis in fact that two or more persons could prove they purchased a product actually containing HFCS during the class period and were therefore identifiable members of the class.

[34] Factually *Sun-Rype* is different from this case. In *Sun-Rype* indirect purchasers would not know, if they were or could be a member of the class, because they could have unknowingly purchased HFCS products, indirectly, so they were unaware they had done so.

[35] Here, the proposed family class is "all individuals who are entitled to assert a claim pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, and equivalent or comparable legislation in other provinces and territories". When the family class definition is read along with the

Statement of Claim and the evidence of the representative Plaintiffs, it is clear the family class definition is intended to cover immediate family members of the primary class members. The criteria for membership in the family class is having a family member in the primary class. The primary class is someone who was a member of the RCMP or a Reservist with the RCMP between January 1, 1995, and the date of a relevant collective agreement. Based upon this, potential family class members can self-identify their membership. Thus, I do not view the proposed family class here as having the same degree of uncertainty as was the case in *Sun-Rype*.

[36] Canada also relies upon the decision in *Bonaparte v Canada (Attorney General)*, [2003] OJ No 1046 (QL) [*Bonaparte*], a decision of the Ontario Court of Appeal. In my view, this case is not relevant to the issues on this Motion for the following reasons. First, *Bonaparte* is not a class proceeding. Second, the claims advanced in *Bonaparte* were historical claims that pre-dated the enactment of the *Family Law Act* and the Court of Appeal held that the discoverability principle could not create a cause of action where one did not previously exist. These factors are not present here; therefore, *Bonaparte* is of no assistance.

[37] Canada says the uncertainty over "equivalent or comparable legislation in other provinces and territories" makes the family class unworkable. According to Canada, the eligibility of family class membership would vary significantly across the provinces and territories based upon the individual's relation to the primary class member, and the nature of harm suffered by the primary class member. They note that only Ontario and Alberta recognize a cause of action for injury to a family member, whereas family class members from other jurisdictions would be restricted to claims relating to the death of a family member under fatal accidents legislation. In

essence, Canada takes the position that the family class is not workable because of the differences in the potential rights under the various legislative regimes.

[38] Although family classes have been certified in similar class proceedings, such as *Merlo v Canada*, 2017 FC 51 and *Corriveau v Canada*, 2021 FC 267, Canada argues that the issues raised on this Motion were not raised in those other cases. Accepting this, I will consider class proceeding decisions from Ontario, where objections to the inclusion of a family class were raised.

[39] In *Robinson v Medtronic Inc*, [2009] OJ No 4366 (QL) [*Robinson*] the defendant objected to the inclusion of a family class on the grounds that only class members in Ontario had a claim whereas class members in other jurisdictions would have claims under *Fatal Accidents Acts* and such claims would be restricted to family members of deceased persons for wrongful death. In response to this objection, Justice Perell notes at paragraph 76:

> … The question of whether an individual member of the Family Law Class [qualifies] for a claim pursuant to the *Family Law Act* and related provincial and territorial legislation is an individual issue to be determined after a common issues trial. The current pleading is adequate to advance the claims of the members of the Family Law Class.

[40] In *Crisante v DePuy Orthopaedics Inc*, 2013 ONSC 5186 [*Crisante*] the defendant argued that because of a lack of evidence of the deaths of any potential primary class members, the family class should be confined to Ontario and Alberta claimants. In response, Justice Belobaba stated at paragraph 40:

> The composition of the family member class, like the primary class, is not merits-based. Individuals need only have standing to

> assert derivative claims under the relevant legislation. Those claims will naturally be limited to those permitted under the applicable legislation. [Footnotes omitted.]

[41] Likewise in this case, the fact that there may be differences to entitlements among family class members is not a disqualifying criterion for certification. I recognize there may be differences in rights among members of the family class based upon the differences in the applicable legislation. This was recognized in *Crisante* where the court noted that family class claims are derivative claims that will be limited to those permitted under the applicable legislation. Further, as noted in *Robinson,* whether an individual member of the family law class qualifies for a claim pursuant to the relevant legislation, is an individual issue to be determined after a common issues trial.

[42] Certification of the family class is not an assessment of the merits of any such claims. That will happen at a later stage. In my view, the family class is identifiable as it is dependant on the existence of a primary class member. This provides sufficient notice to a potential class member that they may have a right to advance a claim. As this stage, it is the existence of the class, rather than the viability of their claims, that must be determined.

III. Conclusion

[43] Based upon the forgoing, I am granting the Plaintiffs' Motion as I am satisfied that the family class definition is identifiable and is workable. Their evidence together with the applicable low evidentiary threshold satisfies me that the requirement, under Rule 334.16(1)(b) of an identifiable class of two or more persons, has been met.

ORDER IN T-1201-18

THIS COURT ORDERS that:

1. the Plaintiffs' Motion is granted. Pursuant to Rule 334.19 the Certification Order shall be amended to replace the definition of the Class in paragraph 2 of the Order with the following:

   all current or former RCMP Members (ie. 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 ("Primary Class");

   and

   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 "Family Class").

   This Class Proceeding excludes claims that are covered under *Merlo v Her Majesty the Queen*, Federal Court File No. T-1685-16, *Ross et al v Her Majesty the Queen*, Federal Court File No.T-370-17, and *Gaétan Delisle et al c Sa Majesté La Reine*, Quebec Superior Court No. 500-06-000820-163.

2. No costs are payable on this Motion.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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