



Appeal File No.: A-9-24

Federal Court File No.: T-1509-21

**FEDERAL COURT OF APPEAL**  
**PROPOSED CLASS PROCEEDING**

DUSTIN MCMILLAN

Appellant  
(Plaintiff)

and

HIS MAJESTY THE KING

Respondent  
(Defendant)

**NOTICE OF APPEAL**

**TO THE RESPONDENT:**

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the appellant. The relief claimed by the appellant appears on the following page.

**THIS APPEAL** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at the Federal Court of Appeal in Vancouver.

**IF YOU WISH TO OPPOSE THIS APPEAL**, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by *the Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** after being served with this notice of appeal.

**IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION** of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date): 5 January 2024

*Issued by:* Original signed by Frank Fedorak  
(Registry Officer)

Address of local office: Pacific Centre  
P.O. Box 10065  
701 West Georgia Street  
Vancouver, British Columbia  
V7Y 1B6

TO: The Administrator  
Pacific Centre  
P.O. Box 10065  
701 West Georgia Street  
Vancouver, British Columbia  
V7Y 1B6

AND TO: HIS MAJESTY THE KING  
c/o Department of Justice Canada  
Ontario Regional Office  
120 Adelaide Street West, Suite #400  
Toronto, Ontario M5H 1T1

Christine Mohr  
Marilyn Venney  
Andrew Law  
William Switzer

Lawyers for the Respondent

## **APPEAL**

**THE APPELLANT, DUSTIN MCMILLAN, APPEALS** to the Federal Court of Appeal from the Judgement of the Honourable Mr. Justice Manson (the “Motions Judge”), dated December 22, 2023, dismissing the Appellant’s motion for an order certifying the action without costs, and partially granting the Respondent’s motion for an order striking the claim without costs (the “Order”).

**THE APPELLANT ASKS** that this Honourable Court:

1. Allow the appeal and set aside the Order;
2. Certify this action as a class proceeding;
3. Dismiss the Respondent’s motion to strike in its entirety; and
4. Grant such further and other relief as counsel may advise and this Honourable Court permit.

**THE GROUNDS OF APPEAL** are as follows:

5. This proposed class proceeding is against the Government of Canada for failing to prevent systemic bullying, harassment and intimidation against individuals who work with or for the Royal Canadian Mounted Police (“RCMP”) in RCMP workplaces. The claim alleges systemic negligence.
6. The proposed class includes personnel who worked in RCMP’s workplaces but were not themselves RCMP members (the “Primary Class”). Primary Class Members include individuals in the following categories:
  - temporary civilian employees [Temporary Civilian Employees, or TCEs];
  - 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”].

7. The Appellant (“Mr. McMillan”) filed a motion for certification, relying on the following evidence:

(1) his affidavit documenting his own experiences being harassed and witnessing other Temporary Civilian Employees being harassed;

(2) a paralegal affidavit attaching public reports, which document rampant bullying, harassment and intimidation within the RCMP and the ineffectiveness of internal recourse mechanisms;

(3) a report from expert and fact witness Dr. Angela Workman-Stark - an expert on Organizational Human Resources who worked in the RCMP for 24 years, including in senior management positions; and

(4) a report from James Craig, an expert in labour and employment law, who describes the impediments or limitations for members of the proposed class who are not federal government employees and who may have recourse to grievance procedures under collective agreements.

8. The Respondent filed a motion to strike the claim for failing to plead a cause of action and for lack of jurisdiction. The motion to strike was heard concurrently with the certification motion.

9. In his Reasons for Order, dated December 22, 2023, the Motions Judge granted the Respondent’s motion to strike the claim except for TCE’s at the Kelowna OCC between 2003 and March 31, 2005. The Motions Judge dismissed Mr. McMillan’s motion for certification. The Motions Judge made the following errors:

- a. Error #1: The Motions Judge erred in finding that the material facts pled pertained only to Mr. McMillan’s personal experience and observations.<sup>1</sup>
- b. Error #2: The Motions Judge erred in striking portions of the claim without leave to amend.<sup>2</sup>

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<sup>1</sup> Reasons for Order, paras. 48, 80

<sup>2</sup> Reasons for Order, para. 80

- c. Error #3: The Motions Judge failed to consider the totality of the evidence regarding jurisdiction. Specifically, he overlooked the reports attached to the paralegal affidavit<sup>3</sup>.
  - d. Error #4: The Motions Judge erred in finding that a leading question posed to Dr. Workman-Stark tainted her entire report and that it should be assigned little weight.<sup>4</sup>
  - e. Error #5: The Motions Judge erred in finding that Mr. McMillan suffered no bullying, harassment or intimidation while working as a municipal employee placed in an RCMP detachment.<sup>5</sup>
  - f. Error #6: The Motions Judge erred in coming to different conclusions regarding jurisdiction in the strike motion versus the preferability criteria of the certification motion<sup>6</sup>.
  - g. Error #7: The Motions Judge erred in finding that an individual's emotional state is not a relevant factor in analyzing limitation periods.<sup>7</sup> This led to his error in finding that Mr. McMillan's personal claim is time-barred.<sup>8</sup>
10. The Statement of Claim sets out sufficient material facts to support each element of the negligence cause of action for the proposed class.<sup>9</sup> In a proposed class proceeding, it is not always possible for a representative plaintiff to plead the claims of each class member with the same particularity as would be required in an individual suit.<sup>10</sup>
11. The Motions Judge applied an unduly narrow concept of 'material facts' in a broad-based class action claiming systemic negligence. He conflated material facts with the particulars of the individual class member claims. A material fact represents the factual conclusions

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<sup>3</sup> Reasons for Order, paras. 51-57.

<sup>4</sup> Reasons for Order, paras. 56, 57.

<sup>5</sup> Reasons for Order, para. 49.

<sup>6</sup> Reasons for Order, paras. 57, 59, 99, 104, 108.

<sup>7</sup> Reasons for Order, para. 114.

<sup>8</sup> Reasons for Order, para. 115.

<sup>9</sup> See, for example, *Davidson v Canada (Attorney General)*, 2015 ONSC 8008, paras. 20, 29, 30.

<sup>10</sup> *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, para. 39; Branch and Good, "Class Actions in Canada", Vancouver: Western Legal Publications, 2<sup>nd</sup> Ed, 2022, p. 4-7.

or findings that the plaintiff will ask the Court to make at the common issues trial. They are identifiable by their importance and generality.<sup>11</sup>

12. The Motions Judge struck the claim as it relates to most of the proposed class without leave to amend<sup>12</sup> but failed to consider whether the defect could be cured by amendment. Striking a claim without leave to amend should be done only in the clearest cases where it is plain and obvious that no amendment can be made to cure the defect.<sup>13</sup> Though Mr. McMillan maintains that there are sufficient material facts in his pleading, the defect identified by the Motions Judge can be cured by amendment.
13. In striking most of the claim for lack of jurisdiction,<sup>14</sup> the Motions Judge failed to consider the entirety of the evidence. Though the Motions Judge makes reference to the public reports attached to the paralegal affidavit,<sup>15</sup> he ignores their contents. This was an error. The reports, which augment the Appellant's other evidence, support the assumption of jurisdiction for the entire class. Notwithstanding that the Motions Judge assigned little weight to Dr. Workman-Stark's report due to a leading question posed by counsel,<sup>16</sup> the public reports were admissible as supplementary evidence and should have been considered. The public reports also supplement Mr. McMillan's affidavit, justifying the Court's exercise of jurisdiction.<sup>17</sup>
14. Though one of the questions posed to Dr. Workman-Stark was flawed, she acknowledged her duty to the Court to provide opinions that are objective and unbiased. Her objectivity and independence were not questioned during cross-examination. No objection to the expert was delivered by the Defendant.<sup>18</sup> For the most part, Dr. Workman-Stark's answer to the impugned question recites the contents of public reports that were filed separately as attachments to the paralegal affidavit and are separately admissible. Furthermore, Dr. Workman-Stark provides evidence as a fact witness in both her report and the testimony she gave on cross-examination.<sup>19</sup>

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<sup>11</sup> *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2022 BCSC 540, para. 14.

<sup>12</sup> Reasons for Order, para. 80.

<sup>13</sup> *Simon v Canada*, 2011 FCA 6; *Al Omani v. Canada*, 2017 FC 786; See also *Fernandez Leon v. Bayer Inc.*, 2023 ONCA 629, para. 5.

<sup>14</sup> Except for TCEs at the Kelowna OCC between 2003 and March 31, 2005.

<sup>15</sup> Reasons for Order, para. 53.

<sup>16</sup> Reasons for Order, para. 57.

<sup>17</sup> *Canada v. Greenwood*, 2021 FCA 186, paras. 59, 60, 95-98, 124; *Araya v. Canada (Attorney General)*, 2023 FC 1688, paras. 48, 49.

<sup>18</sup> *Federal Courts Rules*, Rule 52.5.

<sup>19</sup> *Kaul v. The Queen*, 2017 TCC 55, paras. 29, 56, 57.

15. Mr. McMillan's pleading and evidence are that he continued his efforts to have his complaints taken seriously and addressed when he moved into his role as a municipal employee placed in an RCMP detachment. He was again ignored. The failure to address complaints is a form of bullying, harassment, and intimidation. This is evidence of bullying, harassment and intimidation directed at individuals beyond merely those who worked as TCEs. It meets the some basis in fact threshold for certification.
16. The Motions Judge erred in coming to different conclusions regarding jurisdiction in the strike motion versus the preferability criteria of the certification motion. These pose the same questions under a virtually identical test.<sup>20</sup>
17. In the certification motion, the Motions Judge found Dr. Workman-Stark's report could supplement Mr. McMillan's affidavit, demonstrating that the RCMP mishandles complaints at a systemic level.<sup>21</sup> The Motions Judge held the Court may assume jurisdiction of the claims.<sup>22</sup> In the motion to strike, he held there was insufficient evidence to justify the Court assuming jurisdiction. Both motions rely on the same evidence and ask the same question. The Motion Judge should have followed the evidentiary test set out by the Federal Court of Appeal in *Canada v. Greenwood*, 2021 FCA 186. This is the test he applied for the certification motion, but not the motion to strike.
18. The Motions Judge erred in finding Mr. McMillan's claim is time barred. Mr. McMillan pleaded he was incapable of commencing his action as a consequence of the symptoms of anxiety he suffered as a result of the ongoing bullying, intimidation and harassment. This engages the postponement provisions of the *Limitation Act*, RSBC 1996, c 266. The Motions Judge stated that emotional fortitude is irrelevant in determining limitation periods. This is a legal error.<sup>23</sup> Moreover, it is generally inappropriate to determine limitation periods for the representative plaintiff at certification.<sup>24</sup>
19. *Federal Courts Act*, RSC 1985, c F-7, s. 27
20. *Federal Courts Rules*, SOR/98-106, Part 5.1

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<sup>20</sup> *Canada v. Greenwood*, 2021 FCA 186, para. 98.

<sup>21</sup> Reasons for Order, para. 99.


<sup>22</sup> Reasons for Order, paras. 99, 104, 108.

<sup>23</sup> *Novak v. Bond*, [1999] 1 SCR 808; *Ibarra v The Attorney General of Canada*, 2023 BCSC 757; *Davidson v Canada (Attorney General)*, 2015 ONSC 8008, paras. 31, 32; *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, paras. 102, 106.

<sup>24</sup> *Hudson v. Canada*, 2022 FC 694 para. 141; *Davidson v Canada (Attorney General)*, 2015 ONSC 8008, paras. 31, 32; *Levac v. James*, 2023 ONCA 73, para. 106; *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 6098, paras. 12-17.

21. Such further grounds as counsel may advise and this Honourable court may permit.

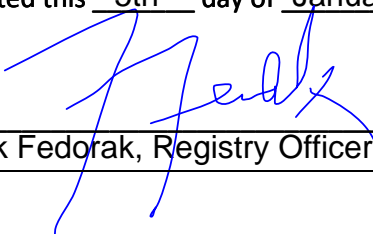
January 2, 2024



David Klein  
Klein Lawyers LLP  
1385 W 8th Ave #400,  
Vancouver, BC V6H 3V9

Counsel for the Appellant

I HEREBY CERTIFY that the above document is a true copy of the original issued out of/~~filed in~~ the Court on the 5th day of January 2024 ~~2023~~. Dated this 5th day of January 2024



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Frank Fedorak, Registry Officer