Federal Court of Appeal | Cour d'appel fédérale

Date: 20241127

Docket: A-9-24

Citation: 2024 FCA 199

CORAM: **DE MONTIGNY C.J.**
MACTAVISH J.A.
LEBLANC J.A.

BETWEEN:

DUSTIN MCMILLAN

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Vancouver, British Columbia, on September 10, 2024.

Judgment delivered at Ottawa, Ontario, on November 27, 2024.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: DE MONTIGNY C.J.
LEBLANC J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20241127

Docket: A-9-24

Citation: 2024 FCA 199

CORAM: **DE MONTIGNY C.J.**
MACTAVISH J.A.
LEBLANC J.A.

BETWEEN:

DUSTIN MCMILLAN

Appellant

and

HIS MAJESTY THE KING

Respondent

REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] Dustin McMillan is a former temporary employee of the Royal Canadian Mounted Police. He is also the representative plaintiff in a proposed class proceeding which seeks damages for alleged systemic bullying, intimidation and harassment within RCMP workplaces. Mr. McMillan's claim is framed in negligence, asserting that the RCMP and its management owed a duty of care to class members, that they breached that duty by condoning abusive

behaviour in the workplace, that class members have suffered damages as a result, and that these damages were caused by the RCMP's breach of its duty to class members.

[2] Mr. McMillan brings this action on behalf of numerous categories of individuals who worked for or with the RCMP in a variety of capacities at different times in different locations across Canada. Also included in the class are other individuals who worked in RCMP workplaces, whether as volunteers, or while employed by other police forces, governments and organizations. The claim is also brought on behalf of individuals who, because of their relationship to a member of the proposed class, are entitled to assert a claim under the relevant family law legislation.

[3] In a decision reported as 2023 FC 1752, the Federal Court struck Mr. McMillan's statement of claim as disclosing no reasonable cause of action except to the extent that it related to Temporary Civilian Employees (TCEs) working in the RCMP's Kelowna Operational Communications Centre (Kelowna OCC) between January 1, 2003, and March 31, 2005 (the class period).

[4] The Federal Court dismissed Mr. McMillan's motion to certify the action as a class proceeding on the basis that his statement of claim failed to disclose a reasonable cause of action except in relation to TCEs working at the Kelowna OCC during the class period (the Kelowna TCEs). The Federal Court further found that Mr. McMillan was not a suitable representative plaintiff for the class, as his personal claims were statute-barred.

[5] Mr. McMillan appeals from the Federal Court's judgment, asserting that the Court made numerous errors in coming to its decisions with respect to both the motion to strike and the certification motion. In particular, Mr. McMillan asserts that the Federal Court erred in failing to find that he had pleaded sufficient material facts to support claims beyond those of the Kelowna TCEs. Even if the Federal Court did not err in this regard, Mr. McMillan says that the Court should have granted him leave to amend his statement of claim, and that it erred in refusing to do so. Mr. McMillan further contends that the Federal Court erred in declining to exercise its residual jurisdiction over the claims of the broader class, and in finding that he was not an adequate representative plaintiff for the class as his personal claims were statute-barred.

[6] His Majesty the King (the Crown) represents the RCMP in this proceeding. The Crown cross-appeals from the Federal Court's decision, asserting that the Court erred in finding that a private law duty of care may be owed to TCEs who are engaged through contracts of employment. The Federal Court further erred, the Crown says, in applying the wrong evidentiary standard in deciding whether to assume jurisdiction over the claims of Mr. McMillan and other Kelowna TCEs arising during the class period.

[7] For the reasons that follow, I have concluded that the Federal Court did not err in striking Mr. McMillan's statement of claim for failure to plead material facts (except as it relates to the claims of the Kelowna TCEs). The Federal Court also did not err in its assessment of the evidence, or in declining to exercise its residual jurisdiction over the claims of class members, other than those of the Kelowna TCEs. However, the Federal Court did err in denying Mr. McMillan leave to amend his statement of claim, and I would allow his appeal to this extent.

[8] Insofar as the Crown's cross-appeal is concerned, I do not accept the Crown's contention that it is plain and obvious that the claims of the Kelowna TCEs are doomed to fail because the RCMP employed these individuals pursuant to contracts of employment. Nor am I persuaded that the Federal Court applied the wrong evidentiary standard in deciding whether to assume jurisdiction over the claims of Mr. McMillan and other Kelowna TCEs. Consequently, I would dismiss the Crown's cross-appeal.

[9] I have further concluded that the Federal Court did not err in dismissing Mr. McMillan's certification motion. The Federal Court correctly found that Mr. McMillan's statement of claim did not disclose a reasonable cause of action, except as it related to the claims of the Kelowna TCEs. Nor did the Federal Court err in finding that Mr. McMillan is not a suitable representative plaintiff for this action as his personal claims are statute-barred. Consequently, I would dismiss Mr. McMillan's appeal of the Federal Court's decision to dismiss his certification motion.

I. Background

[10] Mr. McMillan started his employment as a TCE with the RCMP's Kelowna OCC in September of 2003, working as a 911 operator and dispatcher. Mr. McMillan states in his statement of claim that it immediately became apparent to him that RCMP members and managers at the Kelowna OCC did not welcome TCEs, and that he was humiliated, yelled at and ridiculed by these individuals. Mr. McMillan also alleges that he witnessed RCMP staff making offensive comments and jokes about other employees, including demeaning comments about TCEs' ability to carry out their jobs, their sexual orientation and their mental health.

[11] Mr. McMillan alleges that he first voiced his concerns about this conduct to RCMP management in early 2004. He says that nothing was done to address his concerns, which were minimized or dismissed by his superiors. Shortly thereafter, Mr. McMillan says that his performance assessments and feedback from his managers went from “exceptional” to “poor”. He asserts that this happened in retaliation for his having voiced concerns about the state of his workplace, and that other class members faced repercussions for speaking out about the bullying, harassment or intimidation that they experienced.

[12] Mr. McMillan transferred to the Operational Communications Centre in Kamloops (Kamloops OCC) in 2006, where he worked for a few months. He says that he had a positive experience working at the Kamloops OCC, which lasted until it amalgamated with the Kelowna OCC, and Mr. McMillan returned to work in Kelowna. According to Mr. McMillan, the environment of bullying, harassment and intimidation at the Kelowna OCC had not changed in his absence.

[13] In 2007, Mr. McMillan obtained a Civilian Member position with the RCMP, which he left after three months in order to return to school. While at school, he continued to work part-time as a TCE at the Kelowna OCC. He subsequently became a municipal employee, while still working at the Kelowna RCMP detachment. According to Mr. McMillan, his complaints regarding the bullying and harassment that he says that he suffered as a TCE at the Kelowna OCC remained unresolved, and a further complaint to RCMP management was ignored.

[14] At this point, Mr. McMillan says that he reached a “breaking point”, and that he was suffering from depression and anxiety. He says that he decided to leave the RCMP workplace in April of 2008, because he was “defeated, exhausted, and frustrated”. Mr. McMillan’s statement of claim was issued some 13 years later, on October 4, 2021.

II. Mr. McMillan’s Statement of Claim

[15] Mr. McMillan’s statement of claim alleges that he and his fellow class members were subjected to acts of bullying, intimidation and harassment by RCMP members, civilian members, public service employees and RCMP management. The claim also alleges that the Crown, the RCMP and its management failed to fulfill the statutory and common law duties they owed to Mr. McMillan and members of the proposed class to ensure that they were in a safe and secure work environment.

[16] The statement of claim further alleges that the RCMP has condoned a culture of bullying, intimidation and harassment for decades, creating a toxic work environment that has been documented in numerous independent reviews and reports. RCMP leaders have themselves acknowledged that bullying and harassment are pervasive within the organization. Individuals who inflict the bullying, intimidation and harassment are often protected by those higher up in the chain of command, which has the effect of silencing victims.

[17] Mr. McMillan’s statement of claim additionally asserts that despite these known problems, the RCMP and its management have failed to take the necessary steps to provide class

members with a safe and supportive work environment. Mr. McMillan states that the RCMP has also failed to provide class members with a meaningful (or any) way to obtain redress for their grievances, and that existing complaint or grievance processes have been inadequate or inapplicable to respond to his and other class members' complaints of bullying, intimidation and harassment.

[18] Mr. McMillan's statement of claim provides some 17 paragraphs detailing his own negative experiences working for or with the RCMP, and his unsuccessful attempts to obtain redress for his complaints. The statement of claim does not refer to any other individual's experiences with the RCMP.

[19] The statement of claim then provides particulars of the alleged systemic negligence on the part of the RCMP and its management, and the injuries and damages allegedly suffered by class members.

III. The Proposed Class

[20] Mr. McMillan's statement of claim defines the proposed class as being comprised of:

> [A]ll persons who worked within the RCMP workplaces […] being all current or former, including, but not limited to, temporary civilian employees, community constables, supernumerary special constables, auxiliary constables, cadets, pre-cadets, students, independent contractors and subcontractor employees (including Commissionaires, custodial worker, 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 the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, ("*FPSLRA*"); members of integrated policing units, and persons from outside agencies and police forces who were supervised or managed by the RCMP or who worked in an RCMP controlled workplace, 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 […] identification.

[21] The proposed class also includes individuals in class members' families who are entitled to assert a claim for consequential loss of care, companionship and guidance pursuant to the relevant provincial family law legislation.

[22] Excluded from Mr. McMillan's proposed class are individuals with claims that arose on or after April 1, 2005, who are subject to the ouster provisions of sections 208 and 236 of the *FPSLRA*. Also excluded are claims that arose while individuals served as Regular Members, Civilian Members, Special Constable Members or Reservists in the RCMP, whose claims were resolved in *Tiller et al. v. His Majesty the King*, Federal Court File T-1673-17, *Merlo et al. v. Her Majesty the Queen*, Federal Court File T-1685-16 or *Ross et al. v. His Majesty the King*, Federal Court File T-370-17. Claims that class members have in the certified class proceedings in *Greenwood and Gray v. His Majesty the King*, Federal Court file T-1201-18 and in *Delisle c. R.*, QCCS 500-06-000820-163, are also excluded from the proposed class, unless the proceedings in these cases are de-certified prior to the trial of this action.

[23] *Tiller* was a class proceeding wherein it was alleged that the RCMP had failed to take reasonable measures to ensure that women working in RCMP-controlled workplaces or under RCMP supervision, who were not themselves RCMP members or direct employees of the RCMP

could work in an environment free of gender—and sexual orientation–based harassment and discrimination.

[24] *Merlo* was a class proceeding involving allegations of systemic harassment and bullying, as well as gender—and sexual orientation-based discrimination, against current and former female RCMP members, civilian members and public service employees.

[25] *Ross* was a class proceeding wherein it was alleged that the Government of Canada engaged in a prolonged and widespread campaign to identify and expel thousands of lesbian, gay, bisexual and transgender members of the Canadian Armed Forces, current or former members of the RCMP and the federal public service from the ranks of these institutions.

[26] In each of *Merlo*, *Tiller* and *Ross*, class actions for workplace harassment were certified, albeit with the Crown's consent to the issuance of a certification order in each case for the purpose of settlement.

[27] *Delisle* is a class proceeding brought on behalf of current and former RCMP members and civilian members of any gender identity residing in Canada who, in the course of their employment, suffered physical or psychological harassment, reprisals, discrimination and/or the abusive exercise of power by other members or employees, including on the basis of their francophone (or other) linguistic affiliation.

[28] Mr. McMillan explains that the proposed class definition in this case arises from the decision of this Court in *Canada v. Greenwood*, 2021 FCA 186, leave to appeal to SCC refused, 39885 (17 March 2022) (*Greenwood*). *Greenwood* is a class proceeding in which the representative plaintiffs seek, on their own behalf and on behalf of class members, damages for non-sexual bullying, intimidation and harassment, which they allege is systemic in RCMP workplaces. The claim also seeks damages resulting from the reprisals allegedly suffered by those who have raised complaints: *Greenwood*, above at para. 5.

[29] This Court determined in *Greenwood* that the scope of the class certified by the Federal Court in *Greenwood v. Canada*, 2020 FC 119 (*Greenwood* FC) was overly broad, given that it consisted of over two hundred thousand potential members. Included in the class was virtually everyone who ever worked for or with the RCMP or at RCMP premises, regardless of whether they were members or employees of the RCMP, or were employed in the public service and assigned to work with the RCMP: *Greenwood*, above at para. 4.

[30] This Court concluded that the evidence before the Federal Court only supported the inclusion of RCMP Members (*i.e.*: Regular Members, Special Constable Members and Civilian Members) and Reservists in the class: *Greenwood*, above at paras. 12, 175.

[31] According to Mr. McMillan, the proposed class in this case is made up of the individuals who were excluded from the class definition by this Court in *Greenwood*.

IV. The Evidence before the Federal Court

[32] In addition to his own affidavit documenting his personal experiences working as a TCE at the RCMP's Kelowna OCC, Mr. McMillan provided opinion evidence proffered by James Craig and Dr. Angela Workman-Stark. Whitney Santos, a paralegal who works with Mr. McMillan's counsel, also provided affidavits.

[33] Mr. Craig is a labour lawyer whose evidence sought to cast doubt on the efficacy of labour arbitration as an adequate remedy for instances of workplace harassment experienced by unionized employees.

[34] Ms. Santos attaches various documents as exhibits to her affidavits. Appended to one of her affidavits are various reports that discuss findings with respect to the culture of bullying and harassment within the RCMP, and the inadequacies of the RCMP's grievance processes. Ms. Santos does not comment on the veracity of these reports in her affidavit.

[35] One such report is the Final Report on the Tiller/Copland/Roach RCMP Class Action (the Tiller Report): Office of the Assessors, "Final Report on Tiller/Copland/Roach RCMP Class Action", (2022), online: <https://www.rcmp-grc.gc.ca/wam/media/6127/original/7fc02d5aaa9118111c3ac347b860408e.pdf >. This report was prepared in satisfaction of one of the terms of the settlement in the *Tiller* class proceeding. As noted, the *Tiller* class proceeding was brought on behalf of women working in RCMP-controlled workplaces or under RCMP supervision, who

were not themselves RCMP members or direct employees of the RCMP, who had experienced gender-based harassment and discrimination within the RCMP.

[36] The Tiller Report describes a culture of bullying, harassment and intimidation directed at individuals who fell within the class definition in the *Tiller* case. Also discussed in the Tiller Report is the toxic work environment in RCMP workplaces, as they relate to non-policing personnel, and the impediments that class members face in reporting and seeking redress for bullying, harassment and intimidation.

[37] Dr. Workman-Stark is an Associate Professor in the Faculty of Business at Athabasca University. Based on the reports appended to the Santos affidavit and her own personal experience within the RCMP, amongst other things, Dr. Workman-Stark provided evidence with respect to the culture of workplace bullying, harassment, discrimination and other harmful workplace behaviours within RCMP workplaces. It was Dr. Workman-Stark's opinion that RCMP harassment policies and practices do not come anywhere near to meeting the RCMP's commitment to provide a safe and respectful work environment, free of discrimination, offensive behaviour, and harassment, and that members of Mr. McMillan's proposed class continue to be exposed to bullying, harassment, and intimidation.

[38] The Crown filed affidavits from Ken Cornell, John Park and Megan McCarthy in support of its position.

[39] Ken Cornell is a Regular Member of the RCMP, where he holds the rank of Inspector. Inspector Cornell recently served as the Officer in Charge, Employment Relations Section at RCMP headquarters, where he worked on the review and modernization of RCMP harassment resolution policies. This review was set up to respond to criticisms of the RCMP raised in various reports. Inspector Cornell also discusses the different categories of personnel working in RCMP workplaces.

[40] John Park is a civilian employee of the RCMP where he serves as the Director General, Collective Bargaining and Labour Relations. Mr. Park provides evidence with respect to the past and current unionization status of various categories of employees within the RCMP, and the grievance rights currently available to them. He also describes the other avenues of recourse that may be available to RCMP employees (and some other categories of personnel) to resolve situations of harassment and/or discrimination in the workplace.

[41] Mr. Park also discusses the nature of the relationship between the RCMP and categories of workers not employed by the RCMP but who work within RCMP facilities, and the avenues of recourse that may be available to them through their own employer or home organization.

[42] Finally, Mr. Park explains the difficulties associated with trying to estimate the number of people who come within the proposed class definition. He asserts that the RCMP's "best estimate" is that more than 290,000 individuals fall within the proposed class in this case. There are a further 1,473 "persons of interest" who have a relationship with the RCMP, such as external instructors or trainees and others.

[43] An affidavit was also provided by Megan McCarthy. She is the Acting Manager of the Disability Benefits Program Management Section within the Service Delivery Branch of Veterans Affairs Canada. Ms. McCarthy discusses the benefits and services that are available to current and former members of the RCMP. She also confirms that Mr. McMillan has not made a claim for Veterans Affairs disability benefits.

V. The Federal Court's Decision

[44] As noted earlier, the Federal Court struck all of Mr. McMillan's claims as disclosing no reasonable cause of action, without leave to amend, except for claims pertaining to TCEs employed at the Kelowna OCC between January 1, 2003, and March 31, 2005.

[45] The January 1, 2003, date reflected the fact that the earliest incidents of misconduct alleged by Mr. McMillan occurred in 2003. Insofar as the March 31, 2005, end date is concerned, the Federal Court noted that sections 208 and 236 of the *FPSLRA* oust the claims of any "employee" (as defined by section 206 of the Act) arising on or after the Act came into force on April 1, 2005. This would include Mr. McMillan's post-April 1, 2005 employment as a TCE with the RCMP, as well as the employment of other members of the proposed class who were "employees" under section 206 of the *FPSLRA*.

[46] Mr. McMillan evidently conceded before the Federal Court that the Court did not have jurisdiction over those claims: Federal Court reasons at para. 27.

[47] The Federal Court acknowledged that Mr. McMillan was not an “employee” within the meaning of section 206 of the *FPSLRA* during the time that he was a municipal employee working with the RCMP. The Court could thus have potentially retained residual jurisdiction over any allegations that Mr. McMillan might have made relating to this period. However, Mr. McMillan had not alleged in either his statement of claim or in his affidavit that he had been bullied, harassed or intimidated during his time as a municipal employee in late 2007 or 2008. Indeed, the only allegations of this nature made by Mr. McMillan concern earlier events that occurred while he was working as a TCE at the Kelowna OCC.

[48] Mr. McMillan had also not asserted that he experienced bullying, intimidation or harassment while working with the RCMP in Kamloops. This led the Federal Court to find that the only material facts pleaded in his statement of claim related to the bullying, intimidation and harassment that he and other TCEs allegedly experienced at the Kelowna OCC during the class period.

[49] The Federal Court then considered whether the pleadings and the evidence before it would allow it to exercise its jurisdiction over claims relating to other members of the proposed class arising prior to April 1, 2005, and to those involving persons who were not “employees” under the *FPSLRA*. The Court found no basis in the pleadings or in the evidence that would justify the Court exercising its residual jurisdiction over any claims other than those of Kelowna TCEs arising during the class period.

[50] In finding that the claims of Kelowna TCEs did disclose a reasonable cause of action, the Federal Court rejected the Crown's argument that a claim in negligence could not be maintained where an employment contract governed the relationship between the parties.

[51] Because of these findings, the Federal Court struck all of Mr. McMillan's claims as disclosing no reasonable cause of action, without leave to amend, except for those relating to Kelowna TCEs that arose during the class period, and those of their family members. The Court amended the class definition and the class period in the statement of claim to include "[a]ll persons who worked at the Kelowna operational communications centre between January 1, 2003 and March 31, 2005 as temporary civilian employees".

[52] Insofar as Mr. McMillan's certification motion was concerned, the Federal Court held that its finding that the claims of the Kelowna TCEs disclosed a reasonable cause of action satisfied the first requirement of the test for certification for these class members. The Court further found that there was some basis in fact to satisfy the "identifiable class", "common questions of law or fact" and "preferable procedure" elements of the certification test established in Rule 334.16(1) of the *Federal Courts Rules*, S.O.R./98-106, as they related to the claims of Kelowna TCEs.

[53] The Federal Court found, however, that Mr. McMillan was not an adequate representative plaintiff for the class, because his personal claims were not anchored in the proceeding, as they were statute-barred. Consequently, the Federal Court dismissed Mr. McMillan's certification motion.

VI. The Issues

[54] This appeal raises the following issues:

1. Whether the Federal Court erred in striking all of Mr. McMillan's statement of claim (other than claims relating to Kelowna TCEs during the class period), based on his failure to plead material facts;
2. Whether the Federal Court made a palpable and overriding error in denying leave to Mr. McMillan to amend the statement of claim to assert claims on behalf of the broader class;
3. Whether the Federal Court erred in declining to exercise its residual jurisdiction over the claims of the broader class; and
4. Whether the Federal Court erred in finding that Mr. McMillan was not an adequate representative plaintiff, as his own claims were statute-barred.

[55] The Crown's cross-appeal raises the following issues:

1. Whether the Federal Court erred in law in finding that it is not plain and obvious that no private law duty of care is owed to Kelowna TCEs hired pursuant to contracts of employment; and
2. Whether the Federal Court erred in applying the wrong evidentiary standard in assessing whether to assume jurisdiction over the claims of the Kelowna TCEs with respect to claims arising during the class period.

VII. The Standard of Review

[56] Whether a pleading discloses a reasonable cause of action is primarily a question of law. Consequently, the standard of appellate review of the Federal Court's decision on both the motion to strike and the first certification condition is that of correctness: *Brink v. Canada*, 2024 FCA 43 at para. 40, leave to appeal to SCC refused, 41266 (10 October 2024); *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61 at para. 21, leave to appeal to SCC refused, 40734 (14 December 2023); *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 57; *Canada (Attorney General) v. Jost*, 2020 FCA 212 at para. 21. On this standard, this Court owes no deference to the Federal Court: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[57] The standard of review applicable to discretionary decisions of the Federal Court is the *Housen v. Nikolaisen* standard. That is, correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law (except where there is an extricable question of law): *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 79.

VIII. Analysis

[58] Before considering the issues raised by this appeal and cross-appeal, and in order to put Mr. McMillan's proposed class proceeding into context, it should be noted that the RCMP has come under considerable scrutiny in recent years. Numerous individuals have come forward, alleging that the culture within RCMP workplaces is toxic, and that employees are exposed to

sexual and non-sexual workplace harassment, discrimination, intimidation and abusive treatment at the hands of their superiors. These individuals have further alleged that RCMP management has condoned this behaviour, that employees' attempts to report misconduct were thwarted or not taken seriously, and that employees often faced reprisals for making such reports.

[59] This has led to a significant amount of litigation against the RCMP, including numerous class proceedings brought on behalf of different groups, including the *Tiller*, *Merlo*, *Ross*, *Delisle* and *Greenwood* actions referred to earlier. As will be explained below, this Court's decision in *Greenwood* is of particular significance for this case.

[60] Concerns with respect to the environment within RCMP workplaces have also resulted in numerous studies and independent reports, the most important of which for our purposes is the Tiller Report.

[61] With this understanding of the context in which Mr. McMillan's claim arises, I turn next to consider the issues arising out of the Crown's motion to strike.

A. *The Crown's Motion to Strike*

[62] Before considering whether the Federal Court erred in striking Mr. McMillan's statement of claim for failing to disclose a reasonable cause of action, however, it is first necessary to have an understanding of the principles governing the pleading of a claim such as this.

(1) The Principles of Pleading

[63] Rule 174 of the *Federal Courts Rules* provides that "[e]very pleading shall contain a concise statement of the material facts on which the party relies...". Rule 181(1) further requires that pleadings "contain particulars of every allegation contained therein …".

[64] As this Court observed in *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, leave to appeal to SCC refused, 36889 (23 June 2016), "[i]t is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought". This is because pleadings play an important role in providing notice, and in defining the issues to be tried: at para. 16.

[65] Not only is the proper pleading of a statement of claim necessary for a defendant to prepare a statement of defence, the material facts will also establish the parameters of relevancy of evidence at discovery and trial: *Mancuso*, above at para. 17. In addition, the nature of the facts pleaded allows counsel to advise their clients, prepare their case and map a trial strategy. Consequently, the Court and the opposing parties should not be left to speculate as to how the facts might be arranged to support various causes of action: *Brink*, above at para. 54.

[66] A statement of claim must thus plead each constituent element of every cause of action with sufficient particularity, and material facts must be pleaded to support each allegation. The bald assertion of conclusions does not constitute the pleading of material facts: *Mancuso*, above at para. 27; *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72

A.C.W.S. (3d) 346 (F.C.T.D.). Indeed, if the Court were to "[allow] parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues": *Mancuso*, above at para. 17.

[67] What will constitute a material fact in a statement of claim in a given case is to be determined in light of the causes of action asserted and the damages sought. Plaintiffs must plead—in summary form but with sufficient detail—the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant the "who, when, where, how and what" of the actions that allegedly give rise to its liability: *Mancuso*, above at para. 19.

[68] An assessment of the sufficiency of the material facts pleaded in a statement of claim is contextual and fact-driven. There is no bright line between material facts and bald allegations, nor is there a bright line between the pleading of material facts and the prohibition on the pleading of evidence. They are, rather, points on a continuum. It is the responsibility of a motions judge, "looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair": *Mancuso*, above at para. 18.

[69] Plaintiffs cannot file inadequate pleadings and rely on defendants to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars: *Mancuso*, above at para. 20; *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112.

[70] Moreover, in assessing whether a statement of claim should be struck, the Court must look at the claim as it has been drafted, not how it might be drafted: *Brink*, above at para. 72; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, at para. 40.

[71] The normal rules of pleading apply with equal force to proposed class proceedings. Indeed, the launching of a proposed class action is a serious matter as it potentially affects the rights of many class members as well as the interests of defendants. Compliance with the requirements of the *Federal Courts Rules* is consequently not a trifling or optional matter; it is both mandatory and essential: *Brink*, above at para. 60; *Merchant Law Group*, above at para. 40.

[72] Also relevant to the analysis are the principles governing motions to strike claims on the basis that they do not disclose a reasonable cause of action. I will review these principles next.

(2) Principles Governing Motions to Strike

[73] The Crown brought its motion to strike Mr. McMillan's statement of claim pursuant to Rule 221(1) of the *Federal Courts Rules*, and its submissions focused on whether the claim disclosed a reasonable cause of action: Federal Court reasons at para. 5.

[74] A statement of claim should not be struck unless it is plain and obvious that the action cannot succeed, assuming the facts pleaded in the claim to be true: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at 980; *Pro-Sys Consultants Ltd. v. Microsoft*

Corporation, 2013 SCC 57 at para. 63. In other words, the claim must have no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.

[75] The onus is on the party who seeks to establish that a pleading fails to disclose a reasonable cause of action: *La Rose v. Canada*, 2023 FCA 241 at para. 19; *Edell v. Canada*, 2010 FCA 26 at para. 5. The threshold that a plaintiff must meet to establish that a claim discloses a reasonable cause of action is a low one: *Brake v. Canada (Attorney General)*, 2019 FCA 274 at para. 70.

[76] Moreover, pleadings must be read generously, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document: see *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, [1985] S.C.J. No. 22 at 451.

[77] Motions judges should not delve into the merits of a plaintiff's arguments, but should, rather, consider whether the plaintiff should be precluded from advancing the arguments at all: *Salna v. Voltage Pictures, LLC*, 2021 FCA 176 at para. 77, leave to appeal to SCC refused, 39895 (26 May 2022). Recognizing that the law is not static, motions judges must err on the side of permitting novel, but arguable claims to proceed to trial: *R. v. Imperial Tobacco*, above at paras. 19-25; *Mohr v. National Hockey League*, 2022 FCA 145 at para. 48, leave to appeal to SCC refused, 40426 (20 April 2023).

[78] That said, it must also be recognized that there is a cost to access to justice in allowing cases that have no substance to proceed. The diversion of scarce judicial resources to such cases diverts time away from potentially meritorious cases that require attention: *Mohr*, above at para. 50; *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143 at para. 13, leave to appeal to SCC refused, 36226 (9 April 2015).

[79] Finally, while evidence is not ordinarily admissible on a motion to strike under Rule 221(1)(a) of the *Federal Courts Rules*, it may be considered insofar as the moving party alleges that the Court lacks or must decline jurisdiction: *Greenwood*, above at para. 95.

[80] With this understanding of the principles governing motions to strike, I turn now to consider whether the Federal Court erred in striking most of Mr. McMillan's statement of claim based on a failure to plead material facts.

(3) Did the Federal Court Err in Striking Portions of the Statement of Claim based on a Failure to Plead Material Facts?

[81] Mr. McMillan submits that the Federal Court erred in striking all of his statement of claim (other than claims relating to Kelowna TCEs), based on a failure to plead material facts. In particular, he says that the Federal Court erroneously focused on his individual experiences and the actions of lower-level RCMP managers and supervisors in striking the majority of his claims.

[82] According to Mr. McMillan, the Court failed to appreciate that this is a class action alleging systemic negligence throughout a national organization, where common duties are owed

to all class members, who are subject to common policies and procedures (including internal redress procedures that are alleged to be inadequate), and who are managed under a hierarchical structure.

[83] Mr. McMillan further contends that these allegations are plead properly, with sufficient material facts stated in the statement of claim to support each element of a systemic negligence claim. He also observes that claims in systemic negligence are often certified in class actions, including in claims against the RCMP: citing, for example, *McQuade et al. v. Canada (Attorney General)*, 2023 FC 1083; *Nasogaluak*, above.

[84] However, the Federal Court did not ignore the systemic nature of Mr. McMillan's allegations. It also did not find that the material facts pleaded related only to his individual experience. Instead, the Court accepted that the statement of claim included material facts pertaining to the bullying, intimidation and harassment experienced by Mr. McMillan "and other TCEs" working at the Kelowna OCC: Federal Court reasons at para. 48.

[85] Nor did the Federal Court strike most of Mr. McMillan's statement of claim because systemic negligence is not a viable cause of action. Indeed, the Court was satisfied that the statement of claim *did* disclose a reasonable cause of action in systemic negligence as it related to TCEs working at the Kelowna OCC during the class period.

[86] What the Federal Court did do was to strike most of Mr. McMillan's statement of claim because it was devoid of any material facts that could support his allegations, except as they

related to individuals working at the Kelowna OCC during the class period, and their family members: see the Federal Court's reasons at paras. 47–49, 52, 69, 76.

[87] Indeed, Mr. McMillan's claim focuses on the response of his managers and supervisors to his complaints, or the lack thereof. The statement of claim is completely devoid of any material facts relating to the rest of the proposed class that he seeks to represent. In particular, no facts are pleaded with respect to the legal relationship of these individuals to the RCMP, the nature, frequency or extent of their day-to-day interactions with RCMP members and employees, their reporting structure or the nature of their relationships with their own employer (if applicable). Nor are any facts pleaded as to the terms and conditions of those relationships (including whether or not they are unionized), the policies to which they are subject, whether they fall within federal or provincial jurisdiction, and the specific avenues of recourse available to those individuals, and how such avenues are alleged to be deficient.

[88] Mr. McMillan's statement of claim is also deficient insofar as it relates to claims brought on behalf of TCEs working outside of the Kelowna OCC, as no material facts are pleaded with respect to the experiences of these individuals. Indeed, Mr. McMillan's description of the bullying, intimidation and harassment faced by TCEs in Kelowna appears to highlight their unique circumstances.

[89] That is, Mr. McMillan's statement of claim provides details with respect to the environment that he alleges he experienced and observed at the Kelowna OCC between 2003 and 2005. The claim is, however, devoid of any allegation of workplace harassment, bullying or

intimidation at any other RCMP location, during this or any other time-period. To the contrary, Mr. McMillan pleads that he worked as a TCE at another RCMP location, namely the Kamloops OCC, where he had a "positive experience" and "enjoyed his work." Mr. McMillan also does not allege that he experienced or observed any harassment, intimidation or bullying while working at the Kamloops OCC.

[90] Mr. McMillan submits that it is simply impractical to think that he would be able to provide some evidence with respect to each of the categories of employees in the diverse and large class proposed here, as well as some evidence relating to each site where these individuals worked.

[91] While this may present challenges from a pleading perspective, the difficulty arises, to a significant extent, from the large and diverse nature of the proposed class. As noted earlier, the proposed class is made up of numerous categories of individuals who worked for or with the RCMP in a variety of capacities at different times in different locations across Canada.

[92] Indeed, Mr. Park states in his affidavit, the best estimate is that approximately 300,000 individuals would fit within Mr. McMillan's proposed class definition. This includes federal government employees and employees of other levels of government (including municipal, regional or similar levels of government employees). Also included in the proposed class are independent contractors and subcontractor employees, as well as interns, volunteers, individuals employed through temporary agencies, and employees of non-profit organizations working in RCMP-controlled workplaces.

[93] Members of other police forces also come within the proposed class definition including members of integrated policing units, and persons from outside agencies and police forces who were supervised or managed by the RCMP or who worked in an RCMP-controlled workplace.

[94] Whatever challenges may result from the large and diverse nature of the proposed class, a representative plaintiff must provide more than mere bald allegations and conclusory statements to support a claim. There are simply no material facts pleaded in Mr. McMillan's statement of claim with respect to incidents of intimidation, harassment, or bullying, or with respect to attempts to complain about or grieve such incidents, except with respect to TCEs in the Kelowna OCC, between 2003 and March 31, 2005.

[95] Mr. McMillan further submits that the Federal Court erred by failing to have regard to public reports (in particular the Tiller Report) that have detailed the toxic environment within RCMP workplaces as they relate to non-policing personnel, and the systemic failures of the RCMP to address complaints of bullying, intimidation and harassment.

[96] According to Mr. McMillan, the Tiller Report, read in combination with his own affidavit, demonstrates that the RCMP has systemically mishandled complaints of bullying, intimidation and harassment brought by non-policing personnel. Mr. McMillan submits that this is the same type of evidence that this Court relied on in *Greenwood*, to permit the Federal Court to assume jurisdiction in that case.

[97] It is, however, important to have regard to what this Court said about whether the statement of claim in *Greenwood* disclosed a reasonable cause of action.

[98] In *Greenwood* FC, the Federal Court had referred to public reports as "providing the necessary evidence to support a reasonable cause of action": at para. 49. This Court found this to be an error of law, as Rule 221(2) of the *Federal Courts Rules* provides that no evidence is admissible on the question of whether a statement of claim discloses a reasonable cause of action for the purpose of Rule 221(1)(a): *Greenwood*, above at para. 91. This is because the defect in the pleading must be apparent on its face: *Brink*, above at para. 110.

[99] This Court nevertheless found that in *Greenwood* FC, the Federal Court had not premised its determination of whether the statement of claim disclosed a reasonable cause of action on this evidence, but had instead centred its analysis on whether, as a matter of law, the pleading disclosed a cause of action: *Greenwood*, above at paras. 92–93.

[100] It would not therefore have been open to the Federal Court to consider the public reports (including the Tiller Report) in determining whether Mr. McMillan's statement of claim (as presently drafted) disclosed a reasonable cause of action. The Federal Court thus did not err in finding that Mr. McMillan's statement of claim did not contain the necessary material facts to support a reasonable cause of action on behalf of the broader proposed class. The Court could not simply assume, without some material facts, that all of the categories of workers in the proposed class were so similarly situated to TCEs in the Kelowna OCC that the facts pleaded

about these TCEs would support a reasonable cause of action on behalf of the entire proposed class.

[101] Indeed, this Court held in *Greenwood* that it would be a palpable and overriding error to extrapolate the experiences of one category of RCMP personnel to others not similarly situated *vis-à-vis* the employer: above at para. 173.

[102] Consequently, Mr. McMillan has not demonstrated that the Federal Court erred in finding that it was plain and obvious that his statement of claim did not disclose a reasonable cause of action, except to the extent that it related to TCEs working at the Kelowna OCC between January 1, 2003, and March 31, 2005, and their family members.

[103] The next question, then, is whether the Federal Court erred in refusing to grant leave to Mr. McMillan to amend his statement of claim to assert claims on behalf of a broader class. This issue will be considered next.

(4) Did the Federal Court Err in Denying Leave to Mr. McMillan to Amend the Statement of Claim?

[104] Mr. McMillan contends that even if the Federal Court did not err in striking most of his claims, it nevertheless erred in denying him leave to amend his statement of claim to assert claims on behalf of the members of the broader class.

[105] As noted, the Federal Court struck Mr. McMillan's statement of claim as failing to disclose a reasonable cause of action, except to the extent that it related to the Kelowna TCEs, finding that "[a]llegations falling within those parameters disclose a reasonable cause of action in negligence": Federal Court reasons at para. 80. The Federal Court then stated "[s]ince 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". In support of its decision, the Federal Court cites the decisions of this Court in *Simon v. Canada*, 2011 FCA 6 at para. 8, and of the Federal Court in *Al Omani v. Canada*, 2017 FC 786 at paras. 33–34.

[106] The decision whether or not to grant leave to a party to amend their statement of claim is a discretionary one. As such, it is subject to review on the palpable and overriding error standard: *Bigeagle v. Canada*, 2023 FCA 128 at para. 27, leave to appeal to SCC refused, 40910 (6 June 2024).

[107] That said, leave to amend a statement of claim in a proposed class proceeding should only be denied in the clearest of cases. This would include cases where it is plain and obvious that no tenable cause of action is possible on the facts as alleged, and there is no reason to suppose that the party could improve his or her case by an amendment: *Brink*, above at para. 133; *Jost*, above at para. 49.

[108] In other words, for a statement of claim to be struck without leave to amend, the defect in the claim must be one that is not curable by amendment: *Hunt v. Carey*, above at 976-978; *Davis*

v. Canada (Royal Canadian Mounted Police), 2024 FCA 115 at para. 97; *Simon*, above at para. 8.

[109] The Federal Court acknowledged that Mr. McMillan's statement of claim disclosed a reasonable cause of action insofar as it related to TCEs working at the Kelowna OCC during the class period. The defect that the Court identified in the statement of claim was that Mr. McMillan had failed to plead any material facts with respect to any other class members. This was not a situation where there was a fatal defect in a statement of claim, such as a legally insupportable cause of action: see, for example, *Brink*, above at para. 136; *Adelberg v. Canada*, 2024 FCA 106 at paras. 38, 65. In such cases, no amount of amendment can salvage a pleading, and leave to amend should therefore be denied.

[110] The reasoning of the Federal Court on the leave question in this case was somewhat circular. Portions of the pleading were struck due to a lack of material facts, and leave to amend was then denied due to the lack of material facts in the statement of claim that could "furnish a 'scintilla' of a cause of action" with respect to members of the broader class.

[111] The Federal Court had accepted that Mr. McMillan's statement of claim pleaded a reasonable cause of action with respect to certain individuals. There is no reason to think that the statement of claim could not be amended to disclose a reasonable cause of action insofar as other categories of individuals are concerned, by providing material facts regarding their experiences with the RCMP: *Adelberg*, above at para. 53. Indeed, when the Court suggested at the hearing that this was the case, counsel for the Crown did not disagree.

[112] The Federal Court thus erred in principle in exercising its remedial discretion. It was a palpable and overriding error to fail to consider whether Mr. McMillan's statement of claim could disclose a reasonable cause of action for members of the broader class, if the claim were to be amended to include material facts supporting such claims: *Situmorang v. Google, LLC*, 2024 BCCA 9 at para. 94.

(5) Did the Federal Court Err in Declining to Exercise its Residual Jurisdiction over the Claims of the Broader Class?

[113] The Supreme Court has held that where Parliament has created schemes for dealing with labour disputes (such as grievance or complaint processes), courts should generally defer to those processes: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, [1995] S.C.J. No. 59, at para. 58; *Vaughan v. Canada*, 2005 SCC 11 at para. 39; *Greenwood*, above at para.129.

[114] Courts do, however, retain a residual discretion to deal with employment disputes where internal grievance mechanisms are incapable of providing effective redress, or where the case is otherwise exceptional: *Ebadi v. Canada*, 2024 FCA 39 at para. 47, leave to appeal to SCC refused, 41260 (17 October 2024); *Greenwood*, above at para. 130; *Adelberg*, above at para. 58; *Bron v. Canada (Attorney General)*, 2010 ONCA 71 at paras. 27-30.

[115] Evidence will be admissible where a Court is asked to decline jurisdiction in favour of an alternate dispute resolution process. This is because evidence as to the nature and efficacy of the suggested alternate process is necessary to allow the Court to determine whether it ought to decline jurisdiction in favour of the administrative remedies: *Greenwood*, at para. 95.

[116] That said, courts should not jeopardize internal dispute resolution processes by permitting routine access to the courts, and the general rule of deference in matters arising out of labour relations should prevail: *Vaughan*, above at para. 39. This is especially so where, as here, no material facts have been provided in the statement of claim that would justify the exercise of the Federal Court's residual jurisdiction in this case, except as it relates to the claims of the Kelowna TCEs over the class period.

[117] A court's decision not to exercise its residual jurisdiction in a case such as this is a discretionary one that is thus reviewable on the palpable and overriding error standard: *Greenwood*, above at paras. 119–120; *Adelberg*, above at para. 39.

[118] The Federal Court found that the allegations contained in Mr. McMillan's statement of claim warranted the exercise of the Court's jurisdiction with respect to some of the claims: Federal Court reasons at para. 47. Not only had Mr. McMillan pleaded that he was the victim of repeated incidents of bullying, intimidation and harassment, his lack of success with the complaints process supported his allegation that the RCMP's complaints process was broken: Federal Court reasons at para. 45.

[119] That said, the Federal Court found that the pleadings and the evidence before it did not warrant the exercise of the Court's jurisdiction with respect to the claims of the broader proposed class: Federal Court reasons at para. 51.

[120] Mr. McMillan says that the Federal Court erred in several respects in declining to exercise its jurisdiction over the claims of the broader proposed class. First, he says that the Court erred in failing to have regard to the public reports before it, including the Tiller Report. Second, the Court erred by applying too high an evidentiary burden on Mr. McMillan to establish jurisdiction. Third, Mr. McMillan says that the Federal Court erred in weighing the evidence before it, and finally, he says that the Federal Court made inconsistent findings with respect to the efficacy of the RCMP's internal dispute resolution mechanisms.

[121] Each of these arguments will be considered in turn.

(a) *The Failure of the Federal Court to have Due Regard for the Public Reports*

[122] Insofar as the alleged error of the Federal Court in failing to rely on public reports (including the Tiller Report) is concerned, Mr. McMillan notes that evidence is admissible where a court's jurisdiction is challenged: *Greenwood*, above at para. 95. He further observes that in *Greenwood*, this Court found that public reports (not including the Tiller Report, which was not yet available), coupled with evidence from the representative plaintiffs, provided the Federal Court with a sufficient basis for finding that there were systemic deficiencies in the internal grievance and harassment processes available to RCMP members: at para. 124.

[123] Mr. McMillan submits that similarly, the public reports that were before the Federal Court in this case support his claim that there are multiple deficiencies in the RCMP's processes for reporting and investigating complaints of bullying, intimidation and harassment, and that the

RCMP's internal recourse system is ineffective for non-policing personnel. Mr. Craig also provided evidence with respect to the inadequacy of the grievance procedures that are available to some members of the proposed class who are not federal government employees, but who may have recourse to grievance procedures under collective agreements.

[124] According to Mr. McMillan, the Federal Court erred by declining to assume jurisdiction over members of the broader proposed class in this case, given that there was evidence before the Court that demonstrated that there has been a systemic mishandling of harassment complaints from members of the entire proposed class.

[125] The first problem with Mr. McMillan's jurisdictional argument is that the Federal Court did not fail to have regard for the public reports, including the Tiller Report. While public reports may play a supportive role by putting the facts pleaded into context, they are not sufficient, on their own, to support the assumption of the Court's residual jurisdiction. This is because such reports cannot make up for the failure to plead material facts supporting the claims of the broader proposed class, and they cannot be used to fill in the gaps in the pleadings: *Bigeagle*, above at para. 44.

[126] Indeed, in *Greenwood*, this Court found that many of the same public reports that Mr. McMillan relies upon constituted "no evidence" with respect to the same categories of personnel that comprise the broader proposed class in this case: above at paras. 125–126; see also *Bigeagle*, above at paras. 44–47.

[127] The Federal Court also did not err by failing to rely on the Tiller Report, in combination with Mr. McMillan's affidavit, to find that the RCMP's internal recourse systems are ineffective for members of the broader proposed class. The Tiller Report addresses a different subject matter—namely the sexual harassment of women in the RCMP. Claims of gender-based harassment are specifically excluded from this action.

[128] Finally, reports such as the Tiller Report are not admissible for the truth of their contents, although they can put the facts pleaded into context, or supplement direct evidence. As the Federal Court found Mr. McMillan's evidence to be of "limited scope", there was no direct evidence that could be supplemented by the Tiller Report, beyond that relating to TCEs working at the Kelowna OCC during the class period. Consequently, Mr. McMillan has not persuaded me that the Federal Court erred in its treatment of the public reports, including the Tiller Report.

(b) *The Use of the Wrong Test in Deciding Whether to Exercise Residual Jurisdiction*

[129] Mr. McMillan also says that the Federal Court erred by applying the wrong test in assessing whether it should exercise its residual jurisdiction over members of the broader proposed class, imposing too high an evidentiary burden on him to establish jurisdiction. According to Mr. McMillan, the Federal Court did this by conflating the concept of an "exceptional case" with that of a "high evidentiary burden".

[130] Mr. McMillan submits that exceptional cases are ones that arise rarely, whereas an evidentiary burden relates to whether and how to weigh evidence. A factual rarity should not be confused with an evidentiary burden.

[131] In support of this argument, Mr. McMillan points to paragraph 40 of the Federal Court's reasons where it stated that "… 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* [*v. Canada*, 2022 FC 694] at para. 22 [*sic*]). The evidentiary burden on the Plaintiff is therefore high".

[132] I do not accept Mr. McMillan's argument.

[133] Evidentiary and legal burdens are distinct concepts. An evidentiary burden refers to a party's responsibility to provide evidence as to the existence or non-existence of a fact for that fact to be considered by the trier of fact. In contrast, a legal or persuasive burden refers to the party's obligation to prove or disprove a fact to the applicable standard of proof: *R v. Fontaine*, 2004 SCC 27 at paras. 11–12.

[134] The initial legal burden is on the party seeking to establish that a pleading fails to disclose a reasonable cause of action: *Brink*, above at para. 44; *La Rose v. Canada*, above at para. 19. In this case, that would be the Crown.

[135] However, once that party satisfies the Court that there is a dispute resolution scheme in effect to which the Court must defer, the onus or burden will shift to the plaintiff to demonstrate, on a balance of probabilities, that the Court should exercise its residual jurisdiction: *Davis*, above at para. 74; *Lebrasseur*, above at para. 19. The Federal Court thus did not err in finding that Mr. McMillan bore a heavy evidentiary burden in persuading the Federal Court to exercise its residual jurisdiction over what were essentially workplace disputes. As the Supreme Court observed in *Vaughan*, above, while courts retain a residual jurisdiction over workplace disputes, that jurisdiction should be exercised sparingly and only in exceptional cases.

[136] Indeed, the Supreme Court of Canada cited eight different reasons in *Vaughan* why courts should generally decline to exercise its jurisdiction in cases such as this: above at paras. 34–41.

[137] Accordingly, the Federal Court did not use the wrong test in finding that there was a high evidentiary burden on Mr. McMillan to establish that the Court should exercise its residual jurisdiction in this case.

(c) *The Federal Court Erred in Weighing the Evidence before It*

[138] Mr. McMillan also says that the Federal Court erred in weighing the evidence before it. That is, Mr. McMillan submits that the Court made a palpable and overriding error in assigning little weight to the Workman-Stark Report. The Court further erred by failing to consider that Dr. Workman-Stark was not just an expert witness, but was also a fact witness.

[139] It will be recalled that Dr. Workman-Stark provided evidence with respect to the culture of workplace bullying, harassment and discrimination within RCMP workplaces. It was her opinion that RCMP harassment policies and practices do not come anywhere near to meeting the RCMP's commitment to providing a safe and respectful work environment, free of discrimination, offensive behaviour and harassment. Dr. Workman-Stark further asserted that members of Mr. McMillan's proposed class continue to be exposed to bullying, harassment, and intimidation.

[140] The Federal Court found that Dr. Workman-Stark's evidence was admissible, but it chose to assign little weight to her opinion because her objectivity had been compromised by an inappropriate question posed to her by Mr. McMillan's counsel. The Court was particularly troubled by the second question that she was asked to address in her report, which was whether there were any "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 by the Federal Court].

[141] Mr. McMillan's counsel evidently agreed with the Federal Court that the wording of this question was suggestive, and that it tainted Dr. Workman-Stark's evidence to some extent. The Federal Court found that the phrasing of this question indicated to Dr. Workman-Stark that Mr. McMillan was looking for evidence to support his allegations of bullying, intimidation, and harassment, presumably requiring her to assume the mantle of an advocate rather than a neutral expert.

[142] Given that the entire subject matter of Dr. Workman-Stark's report was bullying, intimidation and harassment in RCMP workplaces and the inadequacies in the RCMP's response to such behaviours, the Federal Court found that "the tainted nature of question 2 flavours the rest of the report": Federal Court reasons at para. 57. This was a finding that was open to the Federal Court on the record before it, and it is not the role of this Court to re-weigh the evidence on this question.

[143] Mr. McMillan has thus failed to persuade me that the finding that Dr. Workman-Stark's report was insufficient to justify the Court's exercise of residual jurisdiction in this case was vitiated by a palpable and overriding error.

[144] It is also evident from Dr. Workman-Stark's Report that she was retained to provide an opinion as an expert witness. While she did have personal experience working with the RCMP, it does not appear that she was providing evidence to the Federal Court as a fact witness.

[145] Dr. Workman-Stark held no organizational responsibilities in the RCMP until after 2005, and her personal experience prior to 2005 was in her capacity as a regular member of the force, rather than as a member of the proposed class. Although she says that she "frequently interacted" with various categories of workers, Dr. Workman-Stark does not provide any evidence, based on her own observations, if any, about those workers' experiences with harassment and bullying or their efforts to use the recourse mechanisms available to them.

[146] Mr. McMillan has thus failed to persuade me that the Federal Court erred in failing to consider Dr. Workman-Stark as a fact witness.

[147] Mr. McMillan also says that the Federal Court erred in failing to deal with the public reports as "a discrete set of evidence", independent of Dr. Workman-Stark's report. I do not accept this submission.

[148] As was noted earlier, the Federal Court had due regard for the public reports before it, including the Tiller Report. However, the Court found that such reports could not be relied on to make up for Mr. McMillan's failure to plead the necessary material facts supporting the claims of the broader proposed class, nor could they be used to fill in the gaps in the pleadings.

[149] Reports such as the Tiller Report are not admissible for the truth of their contents, although they can put the facts pleaded into context, or supplement direct evidence. As noted earlier, the Federal Court found Mr. McMillan's evidence to be of "limited scope". There was thus no direct evidence that could be supplemented by the Tiller Report, beyond that relating to TCEs working at the Kelowna OCC during the class period.

[150] Mr. McMillan has thus failed to demonstrate that the Federal Court erred in weighing the evidence before it.

(d) *The Federal Court Made Inconsistent Findings with respect to the Efficacy of the RCMP's Internal Dispute Resolution Mechanisms*

[151] Mr. McMillan observes that in considering the certification requirement that a class proceeding be the preferable process for resolving the issues raised by the claim, the Federal Court found that Mr. McMillan had demonstrated through the public reports and the evidence of Dr. Workman-Stark that the RCMP mishandled harassment complaints at a systemic level: citing the Federal Court's reasons at para. 99. Mr. McMillan submits that this finding should have equal application with respect to the mishandling of harassment complaints at a systemic level for the entire proposed class, thereby establishing jurisdiction.

[152] The finding made by the Federal Court at paragraph 99 of its reasons actually relates to the "common questions" criterion for certification, and not to the "preferable procedure" criterion. Moreover, the finding was made with respect to the RCMP's purported mishandling of harassment complaints lodged by Kelowna TCEs, and not with respect to alleged defects in the recourse mechanisms on a class-wide basis. Given the low "some basis in fact" threshold that must be satisfied for certification to issue, I am not persuaded that the Federal Court erred by making inconsistent findings in this regard.

(e) *Conclusion on the Crown's Motion to Strike*

[153] I have thus concluded that the Federal Court did not err in striking Mr. McMillan's statement of claim for failure to disclose a reasonable cause of action, except as it related to

TCEs working at the RCMP's Kelowna OCC in the period between January 1, 2003 and March 31, 2005.

[154] The Federal Court did, however, err in denying leave to the representative plaintiff to amend the statement of claim. As noted earlier, a court should only deny leave to amend a statement of claim in a class proceeding in the clearest of cases. There is a potentially tenable cause of action in negligence as it relates to other members of the proposed class, and the defects in the claim that were identified by the Federal Court are potentially curable by amendment.

[155] This then takes us to the arguments with respect to Mr. McMillan's certification motion. These will be addressed next.

B. *Mr. McMillan's Certification Motion*

[156] Rule 334.16(1) of the *Federal Courts Rules* governs motions to certify an action as a class proceeding. It provides that a judge shall certify a proceeding as a class proceeding if the following five requirements are met:

1. the pleadings disclose a reasonable cause of action;
2. there is an identifiable class of two or more persons;
3. the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

4. a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
5. there is a representative plaintiff or applicant who would , amongst other things, fairly and adequately represent the interests of the class.

[157] Each of these requirements will be addressed below.

(1) Does Mr. McMillan's Statement of Claim Disclose a Reasonable Cause of Action?

[158] The first requirement for an action to be certified as a class proceeding is that the pleadings disclose a reasonable cause of action: Rule 334.16(1)(a). This is to be assessed on the same standard that applies on a motion to strike a pleading: *Brink*, above at para. 48; *Pro-Sys Consultants Ltd.*, above at para. 63; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 14. In other words, for an action not to be certified, it must be plain and obvious that the claim discloses no reasonable cause of action, assuming the facts pleaded in the statement of claim to be true: *Greenwood*, above at para. 143.

[159] I have already found that the Federal Court did not err in finding that, as currently pleaded, Mr. McMillan's statement of claim fails to disclose a reasonable cause of action, except as it relates to TCEs working at the RCMP's Kelowna OCC during the class period.

[160] The list contained in Rule 334.16(1) is conjunctive: that is, all five requirements must be satisfied in a given case before the Court can certify an action as a class proceeding: *Samson*

Cree Nation v. Samson Cree Nation (Chief and Council), 2008 FC 1308 at para. 35, aff'd 2010 FCA 165 at para. 3.

[161] It follows from this that the Federal Court did not err in dismissing Mr. McMillan's certification motion, except as it relates to the Kelowna TCEs, based on the failure of the statement of claim to disclose a reasonable cause of action.

(2) The Identifiable Class, Common Questions and Preferable Procedure Criteria

[162] The Federal Court found that there was some basis in fact to find that TCEs working at the Kelowna OCC during the class period constituted "an identifiable class of two or more persons" for the purpose of the second element of the certification test: Federal Court reasons at para. 92. The Court further found that there was some basis in fact to find that the claims of members of the modified class raised common questions of law or fact. As a result, the third element of the certification test was also satisfied: Federal Court reasons at para. 101.

[163] The Federal Court further found that there was some basis in fact to find that a class proceeding would be fairer, more efficient, and more manageable than requiring class members to pursue the individual claims of the Kelowna TCEs. As a result, it was the preferable procedure for the just and efficient resolution of the common questions of law or fact, and the fourth element of the certification test was therefore met: Federal Court reasons at para. 108.

(3) Is Mr. McMillan an Adequate Representative Plaintiff?

[164] The final requirement for the certification of a class proceeding is that there be a representative plaintiff who can satisfy the Court that he or she would, amongst other things, "fairly and adequately represent the interests of the class": Rule 334.16(1)(e)(i). The Federal Court found that Mr. McMillan was not an adequate representative plaintiff in this case, as his own claims were statute-barred: Federal Court reasons at para. 115.

[165] Mr. McMillan accepts that a person who is not a member of a proposed class cannot be an adequate representative plaintiff in a class proceeding in the Federal Court: see the discussion of this issue at paragraphs 103–110 of *Jost*, above.

[166] That said, Mr. McMillan contends that the Federal Court erred in law in finding that his personal claims were statute-barred. He further submits that the Federal Court made a palpable and overriding error in deciding the limitation question at the certification stage of the proceeding.

[167] As noted earlier, the last day of the class period is March 31, 2005—the day before the jurisdictional bar contained in section 236 of the *FPSLRA* came into force. Mr. McMillan's statement of claim was issued some 16 years later, on October 4, 2021.

[168] Mr. McMillan contends that he was at a "breaking point" when he left the RCMP in 2008, and that he was "defeated, exhausted, and frustrated". He also says in his affidavit that he

was suffering from depression and anxiety at this time, although he has not provided any medical evidence to support his claims.

[169] Mr. McMillan addresses this issue at paragraph 30 of his statement of claim. There he asserts that he "was unable to bring an action in respect of his injury, damage or loss as a consequence of the symptoms of anxiety that he suffered as a result of ongoing bullying, intimidation and harassment by the RCMP, its management and its employees, agents and servants". Mr. McMillan goes on in the same paragraph to plead that he "could not reasonably have brought an action prior to this time, when his psychological state has progressed to a point where he finally has the emotional strength to pursue this claim".

[170] The Federal Court recognized that it is not always appropriate to assess the applicability of a limitation period at the certification stage of a class proceeding: citing *Hudson*, above at para. 141. The Court further acknowledged that where the resolution of a limitation question requires a factual inquiry, such as when a plaintiff discovered or ought to have discovered the claim, the issue should not be decided on a motion for certification: Federal Court reasons at para. 110.

[171] The Federal Court went on, however, to observe that "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": Federal Court reasons at para. 110.

[172] Based on Mr. McMillan's statement of claim and his affidavit, the Federal Court found that March 31, 2005, was the last date on which an actionable incident of harassment, bullying, or intimidation could have occurred: Federal Court reasons at para. 111.

[173] In finding that Mr. McMillan's personal claim had definitively expired by the time that he commenced this action, the Federal Court found that there was nothing in his statement of claim or in his affidavit that would suggest that he was unaware of his injuries before 2021. Indeed, Mr. McMillan claims that the reason for his delay in bringing this action was that he was managing the mental consequences of the bullying, intimidation, and harassment that he had experienced. This suggests that Mr. McMillan was well aware of the harm that had been caused by the alleged harassment soon after it began.

[174] While Mr. McMillan asserts that he only decided to pursue this claim once he regained his emotional strength, the Federal Court stated that what it called the "emotional fortitude" of a plaintiff is not a relevant factor in assessing the applicability of a limitation period: Federal Court reasons at para. 114.

[175] The parties agree that the Federal Court correctly found that the *Limitation Act*, R.S.B.C. 1996, c. 266 (1996 *Limitation Act*) applies to claims occurring before the *Limitation Act*, S.B.C. 2012, c. 13 came into force in 2013. Subsection 3(5) of the 1996 *Limitation Act* creates a general limitation period of six years from the date of the last actionable incident, which in this case was March 31, 2005. The relevant limitation period would thus have expired in March of 2011. As noted earlier, Mr. McMillan's statement of claim was issued on October 4, 2021.

[176] Mr. McMillan's claim that he was unable to commence his action before 2021 because of the symptoms of anxiety and depression that he suffered because of the bullying, intimidation and harassment he experienced while working at the Kelowna OCC engages the postponement provisions of the 1996 *Limitation Act*.

[177] Paragraph 6(4)(b) of the 1996 *Limitation Act* provides, in part, that time will not begin to run against a plaintiff with respect to an action until the facts within the plaintiff's means of knowledge are such that a reasonable person would regard those facts as showing that the person "ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action" [emphasis added].

[178] Mr. McMillan submits that the Federal Court erred in law in finding that his personal claim had definitively expired, and that it made a palpable and overriding error in determining the limitations question at the certification hearing.

[179] In support of these contentions, Mr. McMillan notes that in *Novak v. Bond*, [1999] 1 S.C.R. 808, [1999] S.C.J. No. 26, the Supreme Court of Canada observed that "sometimes a plaintiff's individual circumstances and interests may mean that he or she cannot reasonably bring an action at the time it first materializes". The Supreme Court went on to state that "[t]his approach makes good policy sense", and that forcing a plaintiff to sue "without having regard to his or her own circumstances may be unfair to the plaintiff and may also disserve the defendant by forcing him or her to meet an action pressed into court prematurely": at para. 85.

[180] Mr. McMillan says that the Federal Court erred in law by stating that a plaintiff's "emotional fortitude" is not a relevant factor in assessing the applicability of a limitation period. He notes that in *Davidson v. Canada (Attorney General)*, 2015 ONSC 8008, the Superior Court of Ontario held that a plaintiff's emotional state is a relevant factor in determining when a limitation period should start to run.

[181] In *Davidson*, the Court found that based on the pleadings in that case, it was arguable that the running of the relevant limitation period was postponed "because Ms. Davidson was incapable of commencing her action because of her physical, mental, or psychological condition". Ms. Davidson's statement of claim had pleaded that she had suffered "considerable mental suffering, including a plea of a diagnosis of Post-Traumatic Stress Disorder", and that, as a result, she "has an argument that the limitation period did not run in respect of her claims": at para. 32.

[182] Mr. McMillan further contends that it is not appropriate to determine a limitation question on a certification motion, submitting that the Federal Court had observed in *Hudson*, above, that such a question is typically "heavily dependent on [a] factual inquiry": at para. 143. Mr. McMillan says that the Ontario courts have taken a similar approach in dealing with limitation issues in the context of class proceedings: citing *Levac v. James*, 2023 ONCA 73 at para. 106; *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 6098 at paras. 12–17.

[183] The cases relied on by Mr. McMillan do not assist him, however, as they do not involve the assessment of whether the claim of a specific representative plaintiff was statute-barred. In

the cases cited by Mr. McMillan, the defendant was seeking a finding that a limitation period had expired on a class-wide basis.

[184] It was in this context that the Court stated in *Fresco* that the question of whether a particular claim was statute-barred typically requires an individualized assessment, and is usually left to the individual hearings phase: at para. 12. Similarly, the Court of Appeal for Ontario observed in *Levac* that courts have generally been hesitant to certify limitations questions as common issues in class proceedings because discoverability involves an inquiry into each individual claimant's state of knowledge: at para. 106.

[185] This is not what the Federal Court was being asked to do in this case. The question for determination here was not whether the limitation question could be determined on a class-wide basis (which would necessarily have required an individualized inquiry into the capacity and the state of knowledge of each of the class members), but rather whether Mr. McMillan's personal claim was statute-barred.

[186] This was the situation that confronted the Court of Appeal for Ontario in *Stone v. Wellington County Board of Education* (1999), 120 O.A.C. 296; [1999] O.J. No. 1298, leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 336. In *Stone*, the plaintiff had commenced a class action alleging that she and the other members of the proposed class had suffered serious personal injuries from exposure to toxic emissions from hazardous waste allegedly lying below the city of Guelph: at para. 2.

[187] The defendants moved to have the action dismissed on the basis that Ms. Stone's individual right of action was statute-barred as against both defendants. The motions judge found this to be the case and dismissed the action against both defendants, without prejudice to the parties, including those persons described in the statement of claim as putative class members: at para. 4.

[188] The Court of Appeal for Ontario upheld this finding, stating that "[w]here a representative plaintiff, for reasons personal to that plaintiff, is definitively shown as having no claim because of the expiry of a limitation period, he or she cannot be said to be a member of the proposed class". The Court went on to observe that continuing the action in such circumstances "would be inconsistent with the clear legislative requirement that the representative plaintiff be anchored in the proceeding as a class member, not simply a nominee with no stake in the potential outcome": both quotes from *Stone*, above at para. 10.

[189] In light of this jurisprudence, Mr. McMillan has not persuaded me that the Federal Court erred in law in determining the limitations question at the certification hearing. Indeed, Rule 334.16(1)(e)(i) requires the Court to confirm that there is a representative plaintiff who is anchored in the proceeding.

[190] The question then is whether the Federal Court erred in finding that Mr. McMillan's personal claim was statute-barred.

[191] As this Court observed in *Newman v. Canada*, 2016 FCA 213, the test to be applied in assessing whether the test set out in subsection 6(4) of British Columbia's 1996 *Limitation Act* should be applied to postpone the running of a limitation period has rightly been described as "mysterious, obscure, and inartistic": at para. 39, citing *Edgeworth Construction Ltd. v. Thurber Consultants Ltd.*, 2000 BCCA 453 at para. 1. That said, this Court has nevertheless found that the postponement test contains both objective and subjective elements: *Newman*, above at para. 39.

[192] This Court further stated in *Newman* that the subjective element of the test for postponement under paragraph 6(4)(b) of the 1996 *Limitation Act* asks whether a plaintiff, in light of his or her own circumstances and interests, could bring an action. The objective component of the test will be satisfied if a reasonable person would find that a plaintiff could not bring an action, as their personal circumstances were serious, significant and compelling: at para. 51. See also *Novak v. Bond*, above at para. 81.

[193] The Supreme Court affirmed in *Novak v. Bond* that the postponement of a limitation period will only be justified "if the individual plaintiff's interests and circumstances are so pressing that a reasonable person would conclude that, in light of them, the plaintiff could not reasonably bring an action at the time his or her bare legal rights crystallized": at para. 90.

[194] As the party seeking certification, Mr. McMillan had the burden of showing some basis in fact that he was an appropriate representative plaintiff. This would require him to show he had a viable claim. As the Federal Court found, there was no evidence that Mr. McMillan was

unaware of his injuries at the time they arose, with the result that the issue of discoverability does not arise.

[195] Insofar as the question of postponement is concerned, Mr. McMillan did not provide any independent evidence as to his inability to bring an action prior to 2021, despite the burden being on him under Rule 334.16(1)(e) to show some basis in fact that he has a viable claim. Although his statement of claim asserts that he was unable to bring an action because he had symptoms of depression and anxiety caused by the alleged harassment, this is insufficient to postpone the running of the limitation period.

[196] While Mr. McMillan's affidavit states that he suffered from depression and anxiety and that he felt "defeated, exhausted and frustrated", he does not affirm that he lacked the ability to bring an action. Nor did he provide any evidence that he ever sought medical attention for his psychological difficulties, or that he suffered from a diagnosed condition.

[197] It is not enough for a plaintiff to baldly assert that they were unable to bring an action because they suffered from depression and anxiety caused by the conduct at issue in the proceeding. The individual must, rather, demonstrate that their circumstances and interests were so compelling that it cannot be reasonably said that they could bring an action within the prescribed limitation period: *Novak v. Bond*, above at para. 40.

[198] Indeed, Mr. McMillan's case is similar to other cases where courts have found that a plaintiff's psychological state, even one allegedly stemming from the defendant's conduct, was

not serious, significant or compelling enough to demonstrate that it would have been unfeasible for them to initiate their action earlier. As a result, these individuals were found not to be entitled to the benefit of the postponement provision in paragraph 6(4)(b) of the 1996 *Limitation Act*: see for example, *Cowen v. Gray*, 2001 BCSC 487 at paras. 52−53; *Lorette v. Thorson Health Centre*, 2008 BCSC 552 at paras. 102−108.

[199] As the Supreme Court observed in *Novak v. Bond*, limitations legislation is designed to strike a balance between the interests of plaintiffs and defendants. That is, to balance a plaintiff's circumstances and his or her interest in bringing an action to redress a wrong, and a defendant's interest in ensuring that he or she will not be accountable for ancient obligations or be required to preserve evidence indefinitely: above at paras. 64, 66.

[200] The Federal Court Judge considered Mr. McMillan's personal circumstances and found that they were not so compelling that it could reasonably be said that he could not have brought his action within the limitation period. As there was no basis in fact elicited to show that Mr. McMillan's pre-April 1, 2005 claims could be viable in the face of the provisions of the 1996 *Limitation Act*, the Federal Court did not err in concluding that the "adequate representative plaintiff" branch of the certification test had not been met.

[201] Mr. McMillan also argues that the Federal Court erred in finding that his cause of action expired on March 31, 2005, asserting that he continued to pursue his complaints of bullying, intimidation and harassment by RCMP members while he worked as a municipal employee in

2007-2008. Even if that were the case, his cause of action would have expired in 2014, at the latest, some seven years before he commenced his action.

(4) Conclusion on the Certification Motion

[202] Having concluded that Mr. McMillan's statement of claim did not disclose a reasonable cause of action (except as it relates to the Kelowna's TCE's) and that he was not a suitable representative plaintiff, it follows that the Federal Court did not err in dismissing his certification motion.

C. *The Crown's Cross-Appeal*

[203] The Crown cross-appeals from the Federal Court's judgment, asserting that the Court erred in law in finding that it was not plain and obvious that a private law duty of care is not owed to Kelowna TCEs who were hired by the RCMP pursuant to contracts of employment. The Crown further asserts that the Federal Court erred in applying the wrong evidentiary standard in assessing whether to assume jurisdiction over the claims of the Kelowna TCEs with respect to claims arising during the class period.

(1) Did the Federal Court Err in Law in Finding that it is not Plain and Obvious that no Private Law Duty of Care is Owed to Kelowna TCEs Hired Pursuant to Contracts of Employment?

[204] The Crown asserts that even if there were grounds for the Federal Court to have assumed jurisdiction over the claims of the Kelowna TCEs during the class period, the Court nevertheless

erred in law in refusing to strike Mr. McMillan's pre-March 31, 2005 claims. According to the Crown, it is plain and obvious that Mr. McMillan does not have a reasonable cause of action against the RCMP in negligence.

[205] There is no dispute about the fact that the RCMP employed Mr. McMillan and the other Kelowna TCEs through individual contracts of employment. The Crown submits that there are numerous appellate authorities (including decisions of this Court) holding that employers (including the RCMP) do not owe a private law duty of care to employees who are engaged through contracts of employment. In the absence of a duty of care, it follows that these employees do not have a cause of action in negligence against their employer for workplace harassment.

[206] This does not mean that such employees are out of luck: relief for workplace harassment may be available to these individuals through contract and employment law actions (such as those for wrongful or constructive dismissal), or through other torts (such as intentional infliction of mental suffering), but not through claims in negligence.

[207] In support of this contention, the Crown cites the decision of the Court of Appeal for Ontario in *Piresferreira v. Ayotte*, 2010 ONCA 384, where the Court declined to recognize a duty of care owed by an employer to a former employee. Noting that no Canadian appellate court had recognized the existence of such a duty, the Court found that it was neither necessary nor desirable to extend negligence principles to the context of workplace harassment: at paras.

61–62. See also *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 at para. 43, where the Court of Appeal for Ontario came to a similar conclusion.

[208] In finding that it was not necessary to extend the law in this regard, the Court found that sufficient relief was already available to aggrieved employees through the laws of contract and employment, and through the tort of intentional infliction of mental suffering. The Court found that extending negligence principles into the workplace was also not desirable, as it would mark "a considerable intrusion by the courts into the workplace, [that] has a real potential to constrain efforts to achieve increased efficiencies, and the postulated duty of care is so general and broad it could apply indeterminately": *Piresferreira*, above at para. 62.

[209] Referring, by analogy, to the Supreme Court of Canada's decision in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, [1997] S.C.J. No. 94, the Court of Appeal for Ontario concluded in *Piresferreira* that the recognition of a negligence-based tort in the employment context is a matter better left to the legislature: at paras. 56–57.

[210] This Court came to a similar conclusion in *Greenwood*, holding that a claim in negligence for workplace harassment—whether brought on an individual or a systemic basis—is liable to being struck where it is brought by or on behalf of individuals whose relationship with the RCMP is governed by written or unwritten contracts of employment: above at para. 155.

[211] The Federal Court was well aware of this jurisprudence, discussing it at paragraphs 70 to 75 of its reasons. While recognizing that these cases have found that no common law duty of

care is owed to employees whose relationship with their employer is governed by employment contracts, the Federal Court nevertheless found that the appellate authority was divided "on the question of tortious negligence in the context of workplace harassment": Federal Court reasons at para. 72.

[212] In making this finding, the Federal Court stated that the British Columbia Court of Appeal had come to the opposite conclusion in *Sulz v. Minister of Public Safety and Solicitor General*, 2006 BCCA 582. There, the Court upheld an award in tort for workplace harassment suffered by an RCMP member at the hands of her superior officer.

[213] An internal investigation had confirmed that sexual harassment had taken place, but the RCMP did not offer any compensation to Ms. Sulz, and it took no disciplinary action against the superior officer as he had retired. The trial judge found the Province of British Columbia to be vicariously liable in negligence for the actions of the superior officer, under the terms of the policing agreements between the federal government and the province. This finding was upheld on appeal.

[214] I do not agree with the Federal Court's characterization of the British Columbia Court of Appeal's decision in *Sulz*. That Court did not address the question raised by this case: that is, whether a common law duty of care can be owed to employees whose relationships with their employers are governed by employment contracts. It is not surprising that the British Columbia Court of Appeal did not engage with this question, as it did not arise in Ms. Sulz's case.

[215] This is because Ms. Sulz was not an RCMP employee—she was a member of the force, and RCMP members are not employed pursuant to employment contracts: they are statutory office holders, not employees: *Greenwood*, above at para.156, citing *Davidson*, above at para. 37.

[216] The result of this is that the *Piresferreira* line of authority had no application to people in Ms. Sulz's situation: *Greenwood*, above at para. 156. The decision of the British Columbia Court of Appeal in *Sulz* thus does not represent a conflict in the appellate jurisprudence insofar as RCMP employees are concerned.

[217] This Court did find there to be conflicting appellate authority on the question of whether RCMP members may recover damages in tort for workplace harassment: *Greenwood*, above at para. 159. However, when it came to claims in negligence for workplace harassment—on either an individual or systemic basis—brought by individuals whose relationship with the RCMP were governed by contracts of employment, this Court was clear: such claims are liable to being struck: *Greenwood*¸ above at para. 155.

[218] All of that said, however, the door has not been firmly and forever shut on the question of whether a common law duty of care could ever be owed to employees whose relationships with their employer are governed by employment contracts. Indeed, the Court of Appeal for Ontario concluded its analysis in *Merrifield*, above, by stating that it "[did] not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts": at para. 53.

The Court was simply not persuaded that a compelling reason existed to recognize a new tort of harassment in that case.

[219] There are also decisions, albeit decisions of the Federal Court, that suggest that employees may be able to recover damages in tort for workplace harassment in some circumstances.

[220] For example, the Federal Court refused to strike a statement of claim brought by female employees of the Correctional Services Canada, in which they alleged that their employer was negligent in its response to the gender-based harassment, discrimination, and sexual assault they experienced in the workplace: *Hudson*, above at paras. 107–116.

[221] In refusing to strike the claim, the Federal Court observed that it should be "circumspect" in finding at a preliminary stage of the proceedings that the employer did not owe a duty of care to the plaintiffs and other members of the proposed class: *Hudson*, above at para. 116.

[222] In the *Merlo* case discussed earlier, a class proceeding was brought on behalf of regular RCMP members, civilian members and public service employees for gender-based workplace bullying, discrimination, and harassment. Amongst other causes of action asserted, the claim was framed in negligence.

[223] In reasons reported as 2017 FC 51, the *Merlo* claim was certified as a class proceeding by the Federal Court. It is true that the Crown consented to the issuance of the certification order in

Merlo for the purpose of settlement, which potentially reduces the precedential value of the Court's decision, but it cannot be completely ignored: *Greenwood*, above at para. 160.

[224] Indeed, even if the certification order in *Merlo* went on consent, the Federal Court nevertheless had to be satisfied that the claim disclosed a reasonable cause of action before it could approve the settlement. The same argument may be made with respect to the certification order in *Tiller*.

[225] Other decisions have been to a similar effect. For example, in *Bouchard v. Attorney General of Canada*, 2018 QCCS 1486, the Superior Court of Québec authorized a class action brought on behalf of former employees of the Government of Canada, for claims, including claims in negligence, resulting from the problems encountered with the implementation of the Phoenix pay system.

[226] Moreover, as was noted earlier, courts have recognized that the law is not static, and that judges must err on the side of permitting novel, but arguable claims to proceed to trial: *R. v. Imperial Tobacco*, above at paras. 19–25; *Mohr*, above at para. 48.

[227] Given this, and recognizing that the threshold that a plaintiff has to meet to establish that a claim discloses a reasonable cause of action is a low one, the Crown has not persuaded me that the Federal Court erred in finding that it was not plain and obvious that a negligence-based claim for workplace harassment brought by employees against the Crown was bound to fail.

(2) Did the Federal Court Err in Applying the Wrong Evidentiary Standard in Assessing Whether to Assume Jurisdiction over the Claims of the Kelowna TCEs with respect to Claims Arising during the Class Period?

[228] As noted earlier, courts should generally defer to schemes for dealing with labour disputes (such as grievance or complaint processes): *Weber*, above at para. 58; *Vaughan*, above at para. 39; *Greenwood*, above at para. 129. Courts do, however, retain a residual discretion to deal with employment disputes where internal grievance mechanisms are incapable of providing effective redress, or where the case is otherwise exceptional: *Ebadi*, above; *Greenwood*, above at para. 130; *Adelberg*, above at para. 58; *Bron*, above at paras. 27–30.

[229] The Crown accepts that the Federal Court identified the correct legal test for determining whether a court should exercise its residual jurisdiction over a matter in the face of an existing workplace dispute resolution scheme. It contends, however, that the Court failed to apply that test to Mr. McMillan's claims on behalf of the Kelowna TCEs.

[230] According to the Crown, it was a legal error for the Federal Court to assume jurisdiction over these claims based solely on the assumption that the facts pleaded in Mr. McMillan's statement of claim are true. The Federal Court was required to consider whether Mr. McMillan had established, through evidence, that there was a basis for taking jurisdiction over the claims of the Kelowna TCEs.

[231] The Crown submits that if the Federal Court had held Mr. McMillan to his burden and considered the adequacy of the evidentiary record, it could only have declined jurisdiction over

the pre-2005 claims of the Kelowna TCEs, in addition to declining jurisdiction over the claims of the rest of the proposed class.

[232] While Mr. McMillan provided an affidavit in support of the certification motion, the Crown says that he provided no evidence with respect to any attempt by him or by any other Kelowna TCE to engage any of the available statutory recourse processes.

[233] By way of example, the Crown notes that Mr. McMillan plead that there was no formal grievance process available to him as a TCE—a fact that the Federal Court assumed to be true. However, the evidence before the Federal Court (specifically the affidavit of John Park) establishes that in the pre-April 1, 2005 timeframe, Mr. McMillan had access to grievance and harassment complaint procedures made available to all "employees" under the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the predecessor to the *FPSLRA*).

[234] The Crown submits that there was no direct evidence before the Federal Court establishing any kind of systemic deficiency in these or any other procedures available to Mr. McMillan that could justify the Federal Court taking exceptional jurisdiction over Mr. McMillan's claims. Instead, the general rule of deference in matters arising out of labour relations should have prevailed: *Vaughan*, above at para. 39.

[235] In his statement of claim, Mr. McMillan provides details of his own negative experiences working as a TCE at the Kelowna OCC. He says that he made RCMP management aware of the situation, but they failed to address his concerns or to provide any constructive solutions.

According to Mr. McMillan, he continued to complain to RCMP management about the treatment he was receiving, without success. Sometimes managers would suggest that the problem lay with Mr. McMillan himself, or that the difficulties that he encountered were simply the result of interpersonal conflict. Mr. McMillan also asserted in his statement of claim that he faced retaliation from management for raising his concerns.

[236] Mr. McMillan also states in his statement of claim that there was no one else to whom he could report his complaints. According to Mr. McMillan, “there was no formal grievance process, no division representative, and no union”. Mr. McMillan’s statement of claim also states that it was difficult to pursue complaints against managers who had the ability to terminate his TCE contract if they wanted to.

[237] As noted earlier, these allegations are deemed to be true.

[238] Mr. McMillan also provided an affidavit that confirms the allegations that he makes in his statement of claim as to the unwillingness of RCMP management to address his complaints of bullying, intimidation and harassment in the workplace and the retaliation he experienced in trying to have his concerns addressed. Mr. McMillan’s affidavit also attests to his belief that he did not have access to formal dispute resolution processes, and states that it was difficult to pursue complaints against managers who had the ability to terminate his TCE contract if they wanted to.

[239] The Crown adduced evidence through the affidavits of Ken Cornell and John Park that provided a thorough description of the development of the RCMP's harassment policies and the availability of other recourse mechanisms. However, the Federal Court found that these affidavits were concerned with the content of these policies, and that "[t]hey pay little attention to the actual practice of the RCMP's management in light of those policies". The Court went on to find that "[b]eyond providing valuable context regarding the RCMP's structure and history, they provide little assistance on the question of residual jurisdiction": Federal Court reasons at para. 58. The Crown has not established that the Federal Court committed a palpable and overriding error in making this finding.

[240] The public reports before the Federal Court also documented the longstanding deficiencies in the RCMP's internal dispute resolution processes, and the unwillingness of RCMP management to address complaints of workplace bullying, intimidation and harassment.

[241] It appears that there is a dispute in the evidence as to whether Mr. McMillan had access to grievance and harassment complaint procedures under the *Public Service Staff Relations Act* while he was working as a TCE in the RCMP's Kelowna OCC.

[242] Whether or not this was the case, there was evidence before the Federal Court that there were deficiencies in the way that the RCMP responded to complaints of bullying, intimidation and harassment in the Kelowna OCC, and the unwillingness of RCMP management to address such complaints.

[243] In light of this, the Crown has not persuaded me that the Federal Court erred in taking exceptional jurisdiction over Mr. McMillan's claims.

(3) Conclusion with respect to the Crown's Cross-Appeal

[244] I have found that the Federal Court did not err in finding that it was not plain and obvious that a negligence-based claim for workplace harassment brought by employees against the Crown was bound to fail. I have also not been persuaded that the Federal Court erred in taking exceptional jurisdiction over Mr. McMillan's claims. Consequently, I would dismiss the Crown's cross-appeal.

IX. Overall Conclusion

[245] For these reasons, I have concluded that the Federal Court did not err in striking Mr. McMillan's statement of claim for failure to disclose a reasonable cause of action, except as it relates to TCEs working at the RCMP's Kelowna OCC in the period between January 1, 2003 and March 31, 2005.

[246] However, I have found that the Federal Court did err in denying leave to Mr. McMillan to amend his statement of claim, and I would allow his appeal to that extent, subject to the comment below regarding his status as the representative plaintiff in this proceeding.

[247] I also have found that the Federal Court did not err in dismissing Mr. McMillan's certification motion on the basis that his statement of claim fails to disclose a reasonable cause of action (except as it relates to the Kelowna TCEs). I have also upheld the Federal Court's finding that Mr. McMillan is not an adequate representative plaintiff in this case, as his personal claim is statute-barred. I do so, however, without prejudice to the right of members of the class of Kelowna TCEs to appoint a different representative plaintiff to represent their interests in this proceeding.

[248] Insofar as the Crown's cross-appeal is concerned, I have concluded that the Federal Court did not err in finding that it was not plain and obvious that a negligence-based claim for workplace bullying, intimidation and harassment brought by employees against the Crown was bound to fail. Nor have I been persuaded that the Federal Court erred in taking jurisdiction over Mr. McMillan's claims as they relate to the Kelowna TCEs. Consequently, I would dismiss the Crown's cross-appeal.

[249] In accordance with Rule 334.39 of the *Federal Courts Rules*, neither party seeks an award of costs with respect to either the appeal or the cross-appeal, and none are awarded.

"Anne L. Mactavish"
J.A.

"I agree.
Yves de Montigny C.J."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-9-24
STYLE OF CAUSE:	DUSTIN MCMILLAN v. HIS MAJESTY THE KING
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 10, 2024
REASONS FOR JUDGMENT BY:	MACTAVISH J.A.
CONCURRED IN BY:	DE MONTIGNY C.J. RENÉ LEBLANC J.A.
DATED:	NOVEMBER 27, 2024

APPEARANCES:

David Klein Nicole Hartigan Scott Ashbourne	FOR THE APPELLANT
Andrew Law Marilyn Venney	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Klein Lawyers LLP Vancouver, British Columbia	FOR THE APPELLANT
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT