Federal Court  Cour fédérale

Date: 20151209

Docket: T-907-14

Citation: 2015 FC 1372

Montréal, Quebec, December 9, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

CHRISTOPHER J. JONES
(REPRESENTING ALL MEMBERS OF THE
ROYAL CANADIAN MOUNTED POLICE
CIVILIAN MEMBER PILOTS)

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Nature of the Matter

[1] This is a motion under section 334.12 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*], seeking certification of the present action as a class action and the appointment of the plaintiff, Christopher J. Jones, as the representative plaintiff. The proposed class consists of the current and former Civilian Member Pilots (CMPs) of the Royal Canadian Mounted Police

(RCMP). There are approximately 70 members of the proposed class. The plaintiff's claim relates to the CMPs' right to compensation known as the "Extra Duty Allowance" (EDA).

II. Facts

[2] The RCMP Air Services Branch provides air services to the RCMP and occasionally to other branches of the federal public service. Since June 2000, all newly hired pilots of the RCMP Air Services Branch have been classified as CMPs. The duties and responsibilities of CMPs are substantially the same as those of pilots employed elsewhere in the federal public service, such as National Defence pilots and Coast Guard helicopter pilots, referred to collectively as Aircraft Operations Pilots (or AO Pilots).

[3] As members of the RCMP, CMPs are not entitled to participate in collective bargaining. They are excluded from the definition of "employee" in subsection 2(1) *Public Service Labour Relations Act*, SC 2003, c 22. It is to be noted that this exclusion was recently declared of no force and effect by the Supreme Court of Canada (SCC) in *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 [*MPAO*]. This declaration was suspended for one year from judgment on January 16, 2015.

[4] In 1972, the Treasury Board issued a decision directing that public service rates of pay apply to civilian members of the RCMP. CMPs and AO Pilots are accordingly pay-matched in relation to their annual salaries. The annual salary of AO Pilots is determined by collective bargaining between the Treasury Board and the Federal Pilots Association, which represents the AO Pilots, but not CMPs.

[5] AO Pilots receive the EDA. CMPs do not receive the EDA on the basis that it is their salary which is matched to AO Pilots, not other compensation. The CMPs' overall annual compensation is therefore less than that of AO Pilots.

[6] Compensation for CMPs is established through the Treasury Board submission process. This involves RCMP management presenting a draft submission to the Commissioner of the RCMP, who in turn may present this draft submission in writing to the Minister responsible for the RCMP, the Minister of Public Safety and Emergency Preparedness. If the Minister concurs with the submission, he or she may tender a formal submission to the Treasury Board requesting approval of the submission. The Treasury Board may then reject or approve the submission, possibly following discussion between the Treasury Board Secretariat (TBS, the administrative arm of the Treasury Board) and RCMP management, analysts, or members of the Pay Council.

[7] The Pay Council is an advisory body composed of two RCMP Member representatives, two representatives of RCMP management, and an independent chair. The Pay Council may make recommendations to the Commissioner of the RCMP with respect to compensation, allowances, and other benefits payable to RCMP Members, including CMPs. CMPs rely on the Pay Council as they are not entitled to participate personally in the Treasury Board submission process or to have access to documents prepared in the course of the process.

[8] CMPs may also share their thoughts concerning submissions to the Treasury Board by means of the RCMP's Staff Relations Representation Program by which Staff Relations Representatives (SRRs) who have been elected by RCMP Members may, in the absence of a

union to represent them, communicate their interests. SRRs' representations could be made to the Pay Council in the context of its advice to the Commissioner. Another body to which the SRRs' representations on behalf of CMPs may be made is the National Compensation Section (NCS). NCS reports to the Commissioner and deals with compensation programs for RCMP Members, including giving input to the TBS.

[9] Because the Crown is concerned about the secrecy of the deliberative process of the Treasury Board (being cabinet confidences), and is even concerned about the secrecy of discussions outside the Treasury Board concerning matters proposed to be brought before the Treasury Board, I will not detail in this decision the efforts made by or on behalf of CMPs since 2000 to obtain the EDA. It is enough to say that there have been repeated efforts through different channels, all without success. By limiting my discussion of these efforts, I should not be understood to agree with the Crown on the issue of secrecy. In my view, it is not necessary to make any finding in that regard, and I do not make any such finding.

[10] Mr. Jones commenced the present action in April 2014. It is a proposed class proceeding which seeks a declaration that CMPs are entitled to the EDA, and damages equal to the EDA from the commencement of their employment. In the alternative, the present action seeks a declaration that CMPs' right to freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms* (*The Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Charter]) has been violated, as well as damages arising from such violation, and an order requiring the Treasury Board to consider written submissions from the CMPs on the EDA and provide written reasons for its decision regarding same.

III. Issue

[11] The issue in the present motion is whether this action is suitable for certification as a class action.

IV. Analysis

A. *Applicable Law*

[12] The test for certification of a class action is set out in subsection 334.16(1) of the *Rules*, which reads as follows:

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	**334.16** (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
(*a*) the pleadings disclose a reasonable cause of action;	*a*) les actes de procédure révèlent une cause d'action valable;
(*b*) there is an identifiable class of two or more persons;	*b*) il existe un groupe identifiable formé d'au moins deux personnes;
(*c*) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	*c*) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(*d*) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	*d*) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(*e*) there is a representative	*e*) il existe un représentant

plaintiff or applicant who	demandeur qui :
(i) would fairly and adequately represent the interests of the class,	(i) représenterait de façon équitable et adéquate les intérêts du groupe,
(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,	(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,
(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and	(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.	(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[13] The questions on a motion for certification of a class action can therefore be summarized as follows:

- Do the pleadings disclose a reasonable cause of action?
- Is there an identifiable class?
- Do the class members' claims raise common questions of law or fact?
- Is a class proceeding the preferable procedure for the just and efficient resolution of the common questions?
- Has the plaintiff met the requirements for a representative plaintiff?

[14] It is important to bear in mind that the requirements for certification of a class action are conjunctive, so that the present motion will fail if any of them is not met. However, it is also important to note that, if the requirements are all met, I have no overriding discretion to refuse to certify: *Manuge v Canada*, 2008 FC 624 at para 24 [*Manuge*].

[15] The Court must evaluate whether each of the requirements enumerated in subsection 334.16(1) of the *Rules* is satisfied in this case. As the SCC stated in *AIC Limited v Fischer*, 2013 SCC 69 at para 48, the onus is on the plaintiff to show some basis in fact for all certification criteria. Mr. Jones must establish that there is some basis in fact for each of the Rule 334.16(1) criteria, except for the requirement that the pleadings disclose a reasonable cause of action: *Hollick v Toronto (City)*, 2001 SCC 68 at para 25.

[16] Certification is intended to be a meaningful screening device. The standard for assessing evidence at certification does not give rise to a determination of the merits of the proceeding, but it also does not involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny: *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 103 [*Pro-Sys*].

B. *Reasonable Cause of Action*

[17] As Justice Barnes stated in *Manuge* at para 38, it is clear from the authorities that the threshold which the plaintiff must meet to establish a reasonable cause of action is very low. The test is the same as that which is applied to a motion to strike; to find that there is not a reasonable cause of action it must be "plain and obvious" that the plaintiff cannot succeed. That is to say that the certification should be refused for failure to disclose a reasonable cause of action only where, even if the facts alleged in the statement of claim are true, the plaintiff's case has no chance of success: *Sylvain v Canada (Attorney General)*, 2004 FC 1610 at para 26.

[18] In the current case, the plaintiff submits that there are two reasonable causes of action. The first is the defendant's breach of its legal obligation, as the employer of the CMPs, to pay the EDA as part of its obligation to provide compensation equal to that of the AO Pilots. The second, in the alternative, is the defendant's violation of the CMPs' right to freedom of association under section 2(d) of the Charter.

(1) Breach of Obligation to Pay EDA

[19] Mr. Jones argues that the principle of pay-matching of CMPs to AO Pilots applies not just to salary, but also extends to other compensation such as the EDA. Mr. Jones cites two authorities to support this position:

- Section 60 of the *Public Service Employment Act*, SC 2003, c 22 [PSEA]; and
- The 1972 Treasury Board decision mentioned above.

[20] Section 60 of the PSEA provides as follows: “The rate of pay on appointment to a position shall be determined by the employer within the scale of rates of pay for that position or for positions of the same occupational nature and level as that position.”

[21] For its part, the defendant notes that CMPs do not fall within the definition of “employee” in the PSEA. The defendant argues that the PSEA therefore does not apply to CMPs. The word “employee” is defined in the PSEA to mean “a person employed in that part of the public service to which the [Public Service] Commission has exclusive authority to make appointments.” There is no dispute that CMP appointments are made by the Commissioner of the RCMP. There appears to be no dispute that CMPs do not fall within the definition of “employee” in the PSEA.

[22] Mr. Jones argues that section 60 of the PSEA makes no mention of “employee” and therefore there is no reason to conclude that it does not apply to CMPs. However, I see no indication that any part of the PSEA is intended to apply outside the context of employees as defined therein.

[23] More important, with regard to both section 60 of the PSEA and the 1972 Treasury Board decision, is the question of whether references to pay (and pay-matching) are intended to extend to compensation other than salary. Mr. Jones argues that pay includes allowances like the EDA. However, he cites no authority at all in support of this argument. The argument appears to be based entirely on Mr. Jones’ assertion that “pay” should be interpreted broadly and his reliance on the very low threshold for establishing a reasonable cause of action. But there must be

something more than a mere assertion. There must be some factual support for the argument. Now it is true that, for the purposes of this certification motion, the factual allegations in the Amended Statement of Claim are to be taken as true. It is also true that Mr. Jones has presented a number of background facts that relate to the claim for the EDA for CMPs. But many of the assertions in the Amended Statement of Claim are conclusory. They are essentially assertions of law. There is nothing factual in the record to support Mr. Jones' argument that "pay" includes "allowances".

[24] On the contrary, both the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [RCMP Act] and the *Financial Administration Act*, RSC 1985, c F-11 [FAA] clearly separate the idea of pay from that of allowances: see subsection 22(1) of the RCMP Act and paragraphs 11.1(1)(c) and (d) of the FAA.

[25] In my view, even assuming the factual allegations in the Amended Statement of Claim to be true, there is no indication that pay-matching for CMPs was intended to extend to allowances. Even applying the very low threshold for establishing a reasonable cause of action, I am not satisfied that Mr. Jones has met his burden on this requirement for certification, as it relates CMPs' legal right to be paid the EDA.

(2) Violation of section 2(d) of the Charter

[26] Mr. Jones' alternative claim of violation of CMPs' Charter right to freedom of expression involves three aspects. First, Mr. Jones seeks a declaration that CMPs' rights have been violated. Second, he seeks an award of compensatory and punitive damages. Third, he seeks an order

requiring the Treasury Board to (i) consider written submissions from the CMPs regarding the EDA (or an equivalent allowance); and (ii) provide written reasons for its decision thereon.

[27] The defendant counters Mr. Jones' alternative Charter violation claims on two grounds:

- Since freedom of association is a collective right, neither Mr. Jones nor any other CMP has an individual claim for violation of that right; and
- The remedies sought are not available.

(a) *Freedom of Association as a Collective Right*

[28] The defendant argues that the plaintiffs in a class action must have individual claims in order to have standing: *Soldier v Canada (Attorney General)*, 2009 MBCA 12 at paras 30, 32; *Horseman v Canada*, 2015 FC 1149 at paras 24 to 25 [*Horseman*]. Without standing, there can be no reasonable cause of action. This much is not disputed.

[29] The defendant also argues that individuals do not have standing to assert a claim for violation of the freedom of association under section 2(d) of the Charter, because freedom of association is a collective right. In support of this argument, the defendant cites paragraphs 62 to 65 of the SCC's decision in *MPAO*:

> [62] Section 2(*d*), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights protected by s. 2(*d*) are not merely a bundle of individual rights, but collective rights that inhere in associations. L'Heureux-Dubé J. put it well in *Advance Cutting*:

> In society, there is an element of synergy when individuals interact. The mere addition of individual goals will not suffice. Society is more than the sum of its parts. Put another way, a row of taxis do not a bus make. An arithmetic approach to *Charter* rights fails to encompass the aspirations imbedded in it. [para. 66]

[63] It has been suggested that collective rights should not be recognized because they are inconsistent with the *Charter*'s emphasis on individual rights, and because this would give groups greater rights than individuals. In our view, neither criticism is well founded.

[64] First, the *Charter* does not exclude collective rights. While it generally speaks of individuals as rights holders, its s. 2 guarantees extend to groups. The right of peaceful assembly is, by definition, a group activity incapable of individual performance. Freedom of expression protects both listeners and speakers: *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 28. The right to vote is meaningless in the absence of a social context in which voting can advance self-government: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 31. The Court has also found that freedom of religion is not merely a right to hold religious opinions but also an individual right to establish communities of faith (see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567). And while this Court has not dealt with the issue, there is support for the view that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection" of freedom of religion (*Hutterian Brethren*, at para. 131, per Abella J., dissenting, citing *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII (First Section), at para. 118). See also *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

[65] It has also been suggested that recognition of a collective aspect to s. 2(*d*) rights will somehow undermine individual rights and the individual aspect of s. 2(*d*). We see no basis for this contention. Recognizing group or collective rights complements rather than undercuts individual rights, as the examples just cited demonstrate. It is not a question of *either* individual rights *or* collective rights. Both are essential for full *Charter* protection.

[30] While I accept that freedom of association is a collective right and that it may be exercised collectively, I am not satisfied that *MPAO* supports an assertion that an individual (or more importantly, a group of individuals acting together) lacks standing to assert a claim for violation of the right to freedom of association.

[31] Mr. Jones argues that individuals have been allowed to assert collective claims like violation of freedom of association. In *Horseman*, an individual and a First Nation moved to certify a class proceeding concerning First Nations' treaty rights, which all agreed are collective rights. The defendant there argued that individuals lack standing to assert collective treaty rights. Though the certification motion was dismissed, it was not because of a lack of standing. The Court ruled that it was not plain and obvious that the plaintiffs had no standing such that the claim could not succeed as a class action: see para 40.

[32] Mr. Jones also refers to *Health Services & Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 [*Health Services*], in which a number of unions and a number of individuals who were not represented by unions were allowed to assert claims of violation of the freedom of association under section 2(d) of the Charter. I see no suggestion that the individual plaintiffs in that case lacked standing.

[33] Mr. Jones also notes that CMPs have no union or other association which can act on their behalf to assert a collective claim against the defendant. CMPs are therefore in a position similar to the individual plaintiffs in *Health Services*.

[34] I conclude that it is not plain and obvious that CMPs lack standing in the present action.

(b) *Remedies Claimed*

[35] The defendant argues that Mr. Jones has not made factual allegations that, if accepted as true, could support a claim for either (i) damages or (ii) an order providing for written submissions to, and written reasons from, the Treasury Board.

[36] With regard to Mr. Jones' claim for damages, the defendant cites the SCC's decision in *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 as authority for the principle that "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional": see para 78. The SCC continued at para 79, stating that:

> … the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded …

[37] The Federal Court of Appeal recently confirmed the limited availability of damages for Charter violations in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 29 [*Mancuso*]:

> … As a general rule, damages are not available from harm arising from the application of a law which is subsequently found to be unconstitutional, without more. The plaintiffs pleaded that the respondents' conduct was "clearly wrong, in bad faith or an abuse of power" – one of the elements typically required in order to found a damages claim under section 24(1) of the Charter – but failed to supply material facts on the question of how the *Regulations* and their enforcement constitute serious error, bad faith or abuse so as to trigger an entitlement to Charter damages. They also fail to give any particulars of any conduct that would support a damages claim.

[38] The Court in *Mancuso* also noted at para 16 that "[i]t is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought" and "the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action."

[39] The defendant argues that Mr. Jones has not alleged facts sufficient to support his claim for damages for violation of his freedom of association. In response, Mr. Jones argues that he specifically alleges (at para 58(b) of the Amended Statement of Claim) a failure of the Treasury Board to act in good faith, and that the underlying factual allegations are those found under para 55.

[40] I do not agree with Mr. Jones. In my view, none of the allegations under para 55 of the Amended Statement of Claim could be characterized as an allegation that any actions of the defendant were "clearly wrong, in bad faith or an abuse of power". For example, though the TBS allegedly took the position that the *Expenditure Restraint Act*, SC 2009, c 2 [ERA] prohibited payment of the EDA to CMPs (since it would be new remuneration) and refused to reconsider that position following an argument that the EDA was not new, and further the Treasury Board

allegedly refused to consider further submissions with respect to the EDA until after the expiration of the ERA, this appears to reveal no more than a simple disagreement as to the effect of the ERA. There is no indication that the Treasury Board's interpretation was clearly wrong, in bad faith or an abuse of power. My view is similar for all of the allegations under para 55 of the Amended Statement of Claim.

[41] I turn now to Mr. Jones' claim for an order for written submissions to, and written reasons from, the Treasury Board. There is a leap between establishing that a freedom under the Charter has been violated, and making a claim that a particular remedy should be granted. The claim for a declaration that the ban on collective bargaining for CMPs has essentially already been dealt with by the SCC in *MPAO*. There should be little controversy here. However, this merely establishes that there has been a violation. Mr. Jones has cited no authority for his claim to the remedies of written submissions to Treasury Board and written reasons in return. As stated in *Health Services* at para 91:

> [91] The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. … Finally, and most importantly, the interference, as Dunmore instructs, must be substantial – so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.

[42] In *Meredith v Canada (Attorney General)*, 2015 SCC 2 [*Meredith*], which was decided on the same day as *MPAO*, a majority of the SCC stated as follows at para 5:

> … The [RCMP Act] provides that the Treasury Board shall establish the pay and allowances paid to members of the RCMP. The Treasury Board is a committee of the federal Cabinet and deals with public sector unions and employee representatives through intermediaries. In the case of RCMP members, the relevant intermediaries are the Minister of Public Safety and Emergency Preparedness (the "Minister") and the RCMP Commissioner. In setting members' pay, the Treasury Board responds to requests from the Minister, who, in turn, acts on recommendations received from the RCMP Commissioner. …

[43] By his claim to the remedies of direct submissions to Treasury Board and reasons from Treasury Board, Mr. Jones seeks to impose his preferred method of collective bargaining. He is not entitled to that, and he has not cited any authority to the contrary.

[44] It is also relevant to consider that deliberations of the Treasury Board, as a committee of the federal Cabinet, are confidential. The claim for written reasons is incompatible with that.

(c) *Conclusions Concerning Charter Violations*

[45] For the foregoing reasons, I am of the view that it is plain and obvious that Mr. Jones' claims for damages and for an order that the Treasury Board consider written submissions from the CMPs and provide written reasons thereon have no chance of success. Other remedies might have a chance of success, but not those claimed by Mr. Jones in relation to his allegation of a violation of CMPs' right to freedom of association.

[46] In the absence of any argument to the contrary by the defendant, and in light of the decision in *MPAO*, I find that the Amended Statement of Claim does disclose a reasonable cause

of action as regards the claim for a declaration that CMPs' right to freedom of association has been violated.

C. *Identifiable Class*

[47] The defendant does not dispute that there is an identifiable class. It consists of the current and former CMPs, of which there are about 70, who are easily identified through RCMP employment records.

D. *Common Questions of Law or Fact*

[48] Mr. Jones listed common issues in paragraph 27 of the Litigation Plan that was attached as Schedule A to the notice of the present motion to certify a class action. The same Litigation Plan, including the same list of common issues at paragraph 27, was attached as Exhibit A to Mr. Jones' affidavit in support of the motion. At the hearing of the motion, Mr. Jones' counsel provided a revised Litigation Plan, including minor revisions to the list of common issues at paragraph 27. The list of common issues, as proposed by Mr. Jones, and as amended, is as follows:

a) Are the Class Members entitled to the EDA or its equivalent?
b) If so, are the Class Members entitled to retroactive payment of the EDA?
c) If so, what amount of retroactive payment are the Class Members entitled to receive from 2000 to the present?
d) In the alternative, have the constitutional rights of the Class Members to collective representation under section 2(d) of the *Charter of Rights and Freedoms* been breached?

e) If so, what is the appropriate remedy for the breach of constitutional rights?

[49] The defendant argues first that Mr. Jones has failed to meet his onus to identify the common issues and provide a factual and legal basis for those issues. The defendant seems to be concerned that, though the list of common issues was provided in schedules to the notice of motion and to Mr. Jones' affidavit, it was not provided in either the Amended Statement of Claim or Mr. Jones' memorandum of fact and law. The defendant argues that the Court should not have to hunt to find the list of common issues. However, the key requirement for Mr. Jones as regards the common questions is to establish some factual basis for same. I have not been shown any requirement that the list be provided in any particular place or form. In my view, it is enough that the judge hearing the certification motion be able to identify the common issues so that they can be considered and listed in an order certifying the proceeding as a class proceeding as contemplated in paragraph 334.17(1)(e) of the *Rules*.

[50] With regard to the issues listed by Mr. Jones as common issues, the defendant argues that Issue c) above is not common since the amount of retroactive payment due to each class member will depend on the date s/he became a CMP. Mr. Jones responds that there are common aspects that could affect the amount of retroactive payment of EDA to which CMPs are entitled. Though the defendant has not yet filed a Statement of Defence in this matter, it is possible that the defendant will assert one or more limitations periods that would limit the amount of retroactive EDA to which all CMPs are entitled. The effect of such limitations periods would be common to some extent. This is a reasonable point, but the list of issues would have to be amended to better identify the issues that are common.

[51] I am satisfied that Mr. Jones' claims do raise common questions of law or fact. Other than as discussed in the preceding paragraph, the list of issues proposed by Mr. Jones are common in that their resolution is necessary for the resolution of each class member's claim. If I were to certify the present action as a class action, I would modify Mr. Jones' list of common issues by removing Issues a), b) and c) on the basis that I have already found that the pleadings do not disclose a reasonable cause of action in respect of entitlement to the EDA. This would leave Issues d) and e) as common question.

E. *Is a Class Proceeding the Preferable Procedure?*

[52] Mr. Jones argues that a class action is the preferred procedure for the just and efficient resolution of the common questions of law or fact in this case. The defendant disagrees, arguing that a representative action under section 114 of the *Rules* would be preferable.

[53] In *Horseman*, Justice Russell Zinn provided the following instructions for assessing the preferable procedure at paras 72-74:

> [72] In assessing whether a class proceeding is the preferable procedure for the just and efficient resolution of the common issues, the Court must first assess whether such a proceeding would be a fair, efficient and manageable method of advancing the claim and, secondly, whether it would be preferable to other procedures: *Rumley* [2001 SCC 69] at para 35.
>
> [73] In assessing preferability, the common issues must be considered in the context of the action as a whole and the Court must take into account the "importance of the common issues in relation to the claims as a whole:" *AIC Limited v Fisher* [*sic*], 2013 SCC 69 at para 21 [*AIC*], citing *Hollick* [2001 SCC 68] at para 30. In *Hollick*, the Supreme Court accepted that the Court should adopt a "practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court." This requires that the Court look at all

> reasonably available means of resolving the claims, not just having the matter proceed as individual claims.
>
> [74] In *AIC* it was held that the preferability analysis is a comparative exercise where the Court is asked to consider the extent to which the proposed class action may achieve the goals of judicial economy, behaviour modification, and access to justice. The real question is whether "other available means of resolving the claim are preferable."

[54] The first of the issues for assessment is not problematic: I am satisfied that a class proceeding would be a fair, efficient and manageable method of advancing the claims. Accordingly, I must turn to the second issue for assessment: whether a class action would be preferable to other procedures. Following Justice Zinn's instructions, I have considered the common issues in the context of the action as a whole, and I have adopted a practical cost-benefit approach to this procedural issue, and considered the impact of a class proceeding on class members, the defendant, and the Court, looking at all reasonably available means of resolving the claims.

[55] Subsection 334.16(2) of the *Rules* provides a list of matters to be considered on the question of the preferred procedure:

334.16 (2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether	**334.16** (2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :
(*a*) the questions of law or fact common to the class members predominate over any questions affecting only	*a*) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

individual members;	
(*b*) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;	*b*) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;
(*c*) the class proceeding would involve claims that are or have been the subject of any other proceeding;	*c*) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;
(*d*) other means of resolving the claims are less practical or less efficient; and	*d*) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
(*e*) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.	*e*) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[56] Before assessing these points, it should be noted that this assessment should be done in light of the narrowed list of common issues determined in the previous section.

[57] In my view, paragraphs (a) and (b) of subsection 334.16(2) of the *Rules* favour Mr. Jones' position in favour of a class action. Firstly, the common issues predominate over any questions affecting only individual members. It would be difficult for the defendant to argue otherwise because the defendant's main argument here is that the Charter claim, being a collective claim rather than an individual claim, should be pursued as a representative action and not a class action. The defendant does not argue that there are significant issues affecting only individual members.

[58] On the second point, I have seen no indication that there is any interest by class members in pursuing the claims individually.

[59] However, in my view, all of the other paragraphs in subsection 334.16(2) of the *Rules* favour the defendant's position. Paragraph (c) concerns whether the class proceeding would involve claims that are or have been the subject of any other proceeding. The main remaining common issue, whether the CMPs' right to freedom of association under section 2(d) of the Charter has been violated, has essentially been addressed already in *MPAO*. Though *MPAO* concerned RCMP Members in general, and was not limited to CMPs, there would be considerable overlap if this matter were to proceed on this Charter issue.

[60] Paragraph (d) concerns whether other means of resolving the claims are less practical or less efficient. The defendant argues that there are three other possible procedures to be considered: (i) individual claims; (ii) a representative action under section 114 of the *Rules*; and (iii) a grievance.

[61] There appears to be no dispute that a grievance is not viable since it would be against the RCMP which is not responsible for setting pay and allowances for CMPs. A grievance could not address the CMPs' claim for the EDA. Also, it would seem less efficient to proceed by way of individual claims because each class member's claim would be so similar. There would be considerable overlap of issues, as well as the possibility of inconsistent decisions. This leaves a representative action as being worthy of further consideration as to whether it would be a more

practical or efficient means of resolving the claims (per paragraph (d)) as well as whether its administration would create lesser difficulties (per paragraph (e)).

[62] The defendant's argument in favour of a representative action is that it is intended for use in cases of collective claims. This includes, but is not limited to, First Nations' claims. Section 114 of the *Rules* concerning representative actions was repealed in 2002 and then later reinstated. Former Chief Justice Allan Lutfy and Ms. Emily McCarthy provided a history of this repeal and reinstatement in their article entitled "Rule-Making in a Mixed Jurisdiction: The Federal Court (Canada)" (2010), 49 SCLR (2d) 313. Though the reinstatement of section 114 was at the urging of members of the Aboriginal litigation bar (to facilitate collective claims without the need for some of the unnecessary complexities of a class action), it was recognized that other groups might also benefit from a simpler procedure for asserting collective claims. Labour litigation was cited as one area where this could be of assistance. Accordingly, it was decided that the reinstated Rule permitting representative actions would not be limited to the context of Aboriginal litigation.

[63] Mr. Jones argues that a class action would be preferable over a representative action because the latter would have no mechanism for CMPs to opt out (for whatever reason). Of course, since the claims in issue are collective in nature, a choice by a class member to opt out would have little practical effect since the decision on the collective claim would apply to all members of the class regardless of whether some opt out: see *Gill v Canada*, 2005 FC 192 at para 13. Mr. Jones argues that some CMPs may nevertheless wish to opt out. In my view, this

concern is more hypothetical than real. Quite aside from the lack of practical effect of opting out, there is no evidence suggesting that any CMP would want to opt out.

[64] I am mindful that the size of the class (about 70 members) is manageable as a representative action. Moreover, the evidence indicates that Mr. Jones has already received an expression of interest in participating in this proceeding from 52 of the 64 current CMPs. It would not add unreasonably to the potential claimants' burden to inquire as to the interest of the remaining 12 current CMPs as well as the former CMPs. I understand that current CMPs may not have contact information for the former CMPs, but that information could be obtained from the defendant.

[65] It is noteworthy that the *Meredith* case (which alleged that the ERA and a December 2008 Treasury Board decision thereunder violated RCMP Members' right to freedom of association under section 2(d) of the Charter) was a representative proceeding brought by two RCMP Members on behalf of all Members. If a representative proceeding was appropriate in *Meredith*, I see no reason that it would not be appropriate here.

[66] In my view, the principal disadvantage of a class action (*i.e.* additional administrative burden) outweighs the advantage of the possibility of opting out. With regard to paragraphs (d) and (e) in subsection 334.16(2) of the *Rules*, a representative action would be a more practical and efficient means of resolving the claims, and the administration of a class proceeding would create greater difficulties than those likely to be experienced if relief were sought by a

representative proceeding. To conclude on this issue, a class proceeding would not be the preferable procedure for the just and efficient resolution of the common questions of law or fact.

F. *Representative Plaintiff*

[67] Though I have determined that a class proceeding is not the preferable procedure in this case, and therefore the present motion should be dismissed, I have nevertheless assessed whether Mr. Jones is an appropriate representative plaintiff.

[68] Subsection 334.16(1) of the *Rules* provides four requirements for the representative plaintiff. Of these, the defendant argues that two are not met. Specifically, the defendant argues that Mr. Jones:

i. Would not "fairly and adequately represent the interests of the class"; and
ii. Has not provided "a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record."

(1) Represent the Interests of the Class

[69] In its argument that Mr. Jones would not fairly and adequately represent the interests of the class, the defendant refers to a number of exchanges during cross-examination on his affidavit in support of the present motion to certify a class action, and argues that Mr. Jones lacks sufficient knowledge or understanding of the case. For example, the defendant notes that, when Mr. Jones was asked to describe his claim, he mentioned the claim for the EDA, but failed to mention the alleged violation of section 2(d) of the Charter and the remedies he has claimed from

that. The defendant argues that the Charter argument is one of two distinct claims in the present action, and Mr. Jones' ignorance of it indicates that he will not "vigorously and capably prosecute the interests of the class" as required: see *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 41.

[70] In response, Mr. Jones notes that he has been involved in communicating with other CMPs about this case and their interest in it, and in preparing the Statement of Claim and the Litigation Plan. Mr. Jones also argues that he has a reasonable lay person's understanding of the claims and of the steps in a class action, including certification.

[71] The defendant notes that Mr. Jones has admitted that he had no involvement whatsoever in, nor any direct knowledge of, any efforts to engage the Treasury Board to obtain the EDA.

[72] The defendant further notes that Andrew Tuck, Assistant Chief Pilot of the RCMP (and also a CMP), does have such knowledge, and moreover it is Mr. Tuck who has been the person in direct communication with CMPs to date with regard to the present action.

[73] It is not surprising that Mr. Jones would have no direct knowledge of any efforts made to engage the Treasury Board to obtain the EDA since, as the defendant has asserted with some energy in the context of this certification motion, matters that are proposed to be brought before the Treasury Board are considered secret. The defendant asserts that this is the case even for proposed matters that were never finalized. A CMP would have no way of learning of such proposed matters, whether finalized or not, unless and until the secrecy is lifted. I understand that

Mr. Tuck's position is different; because he is Assistant Chief Pilot of the RCMP, he would have access to certain secret information. However, it appears that he is not free to use that information. I understand that a Security Incident Report was completed after Mr. Tuck provided information of this sort to Mr. Jones. That Report indicates that the release of this information may have been a security breach and may have been in contravention of the RCMP Code of Conduct.

[74] Though it is not necessary that Mr. Jones, to be the representative, establish that he is the best-placed member of the class, I see no other class member who is better placed than he is. The defendant suggested that Mr. Tuck might be a more appropriate representative of the class. In my view, and taking into account the Security Incident Report mentioned above, Mr. Tuck's position of authority and access to secrets could make it awkward and difficult for him to fairly and adequately represent the interests of the class.

[75] In my view, Mr. Jones has clearly demonstrated the required knowledge and energy to fairly and adequately represent the interests of CMPs in the present proceeding.

(2) Summary of any Agreements Respecting Fees and Disbursements

[76] As indicated above, the requirement of subparagraph 334.16(1)(e)(iv) of the *Rules* is that the representative plaintiff provide "a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record." The parties are agreed that the purpose of this requirement is to permit members of the class to know the financial terms under which counsel for the class has been retained, and thereby to estimate

what fraction of any eventual settlement or award of damages might go to counsel and how much might be left for the class members. This information could help class members to decide whether to opt out of the class action or to seek to modify the financial arrangement with counsel: *Rae v Canada (National Revenue)*, 2015 FC 707 at para 82; *Vézina c Canada (Défense)*, 2011 CF 79 at para 57.

[77] Mr. Jones argues that he has complied with this requirement by providing the affidavit of Trevor Dinwoodie, who is a member of the National Executive of the Mounted Police Members' Legal Fund (MPMLF). Mr. Dinwoodie indicated at paragraph 7 of his affidavit that:

> The MPMLF has approved an application to fund this proposed class action proceeding and assume all costs associated with the proceedings, including any legal fees, disbursements and court-ordered costs (if any).

[78] Mr. Jones argues that this is sufficient to inform class members that the entire cost of the class action will be assumed by the MPMLF, and that no portion of any eventual settlement or award of damages will be deducted to pay for counsel.

[79] The defendant counters that Mr. Jones has not complied with the requirement of subparagraph 334.16(1)(e)(iv) of the *Rules* in that he has not provided any summary of the agreement with his counsel respecting fees and disbursements. The evidence indicates who will pay the fees and disbursements, but not how much. The defendant also argues that, though Mr. Dinwoodie has indicated that the MPMLF will pay for the fees, disbursements and costs of the class action, he has not indicated whether any portion of a settlement or award of costs would be returned to the MPMLF to defray those expenses.

[80] In my view, Mr. Jones has complied with the requirement contemplated in subparagraph 334.16(1)(e)(iv) of the *Rules* in that class members are informed that they will not be liable to pay the fees, disbursements and costs of the class action. In my view, the failure to indicate the amount to be paid to counsel does not equal a failure to provide the required summary. I am also satisfied that the fees, disbursements and costs of the class action will not be defrayed from the proceeds of any settlement or award of damages. Though Mr. Dinwoodie was silent on that point, he did end his affidavit with the following statement: "I know of no fact material to the Plaintiff's motion for certification of the Action as a class proceeding that has not been disclosed in this Affidavit." Since an arrangement whereby the MPMLF's expenses of the class proceeding would be defrayed from the proceeds of any settlement or award of damages would clearly be relevant, I take this statement by Mr. Dinwoodie as implicitly stating that no such arrangement exists.

V. Conclusion

[81] I have concluded that the motion to certify the present action as a class action should be dismissed. Though Mr. Jones has met some of the requirements for certification, I have found that the Amended Statement of Claim discloses only one reasonable cause of action and that, in light of the nature of this cause of action and the size of the class, it is preferable that the present action proceed as a representative proceeding and not a class proceeding.

[82] Mindful of section 334.39 of the Rules, there will be no award of costs for this motion.

ORDER

THIS COURT ORDERS that the motion to certify the present action as a class proceeding is dismissed without costs.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-907-14
STYLE OF CAUSE:	CHRISTOPHER J. JONES (REPRESENTING ALL MEMBERS OF THE ROYAL CANADIAN MOUNTED POLICE CIVILIAN MEMBER PILOTS) v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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ORDER AND REASONS:	LOCKE J.
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