Federal Court Cour fédérale

Date: 20200123

Docket: T-1201-18

Citation: 2020 FC 119

Ottawa, Ontario, January 23, 2020

PRESENT: Madam Justice McDonald

PROPOSED CLASS PROCEEDING

BETWEEN:

GEOFFREY GREENWOOD AND TODD GRAY

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

Introduction

[1] On this motion for certification, the Plaintiffs, Mr. Greenwood and Mr. Gray, seek to certify a class proceeding against the RCMP for systemic negligence in the form of bullying, intimidation, and general harassment pursuant to Rule 334.16 of the *Federal Courts Rules*, SOR/98-106. This certification motion was heard on June 18, 19 and September 24, 2019.

[2] The Defendant (the Crown), on behalf of the Royal Canadian Mounted Police (RCMP), opposes the certification of the proceeding as a class action. The Crown says that the claim does not disclose a reasonable cause of action, that individual issues overwhelm the common questions, and that a class action is not the preferable procedure. The Crown describes the claims as "workplace disputes" for which there are various legislative remedies and avenues of redress within the RCMP.

[3] For the reasons that follow, I am allowing the certification motion. Although there may be challenges with this class proceeding, at this stage, those challenges are not a basis upon which to deny certification.

The Proposed Claim

[4] The Statement of Claim for this proposed class proceeding was filed on June 22, 2018. The Crown has not filed a Statement of Defence.

[5] The Plaintiffs allege that they were subjected to systemic bullying, intimidation, and harassment that was fostered and condoned by RCMP leadership. They say that this behaviour was permitted by statutory and institutional barriers and by, what they describe as, the "paramilitary structure" of the RCMP. Their claim is that the internal recourses are ineffective because they are dependant upon the "chain of command" comprised of the individuals who were either responsible for the offending behaviour, or acted to protect others, thus perpetuating the bulling, intimidation, and harassment. According to the Plaintiffs, this created a toxic work environment, characterized by abuses of power.

[6] They allege that the RCMP's attempts to prevent harassment have consistently failed and that a class proceeding is the only way to produce meaningful change within the organization.

[7] The proposed class is defined broadly, but would exclude those who are already included in other certified class actions against the RCMP including *Merlo v Canada*, 2017 FC 533 [*Merlo*], *Ross, Roy and Satalic v Her Majesty the Queen*, Federal Court Action T-370-17 [*Ross et al*], and *Tiller v Canada*, 2019 FC 895 [*Tiller*].

[8] The Plaintiffs claim to have suffered career limitations, physical and psychological injuries, and financial losses.

RCMP

[9] The RCMP is Canada's national police force and is governed by the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [*RCMP Act*], the *Royal Canadian Mounted Police Regulations*, 2014, SOR /2014-281 [*RCMP Regulations*] and the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2-14-289 [*CSO*].

[10] The RCMP provides policing services at the national, provincial, municipal levels, and serves over 600 Aboriginal communities. The RCMP is divided into 15 divisions and has detachments with over a thousand personnel and others with as few as two personnel. The RCMP currently employs over 28,000 people broken down into three main groups: the Regular Members, Civilian Members, and Public Service Employees. The RCMP also engages

individuals outside of these three groups, including municipal employees, contractors, volunteers, students, and Auxiliary Constables.

[11] In 2016, the then-RCMP Commissioner, Bob Paulson, acknowledged that there was a culture of "bullying, intimidation, and general harassment" in the RCMP.

[12] The following are some of the reports (the Reports) filed by the Plaintiffs addressing issues of harassment within the RCMP:

- The December 2007 report by the President of the Treasury Board to the Minister of Public Safety called “Rebuilding the Trust: Report of the Task Force on Governance and Cultural Change in the RCMP” [The Brown Report].

- The February 2013 report by the Chair of the Commission for Public Complaints against the RCMP called “Public Interest Investigation Into RCMP Workplace Harassment”.

- The 2013 report by the Canadian Senate’s Standing Committee on National Security and Defence called “Conduct Becoming: Why the Royal Canadian Mounted Police Must Transform its Culture” [Conduct Becoming].

- A 2014 report by the Honourable Grant Mitchell, Senator, and the Honorable Judy Sgro, Member of Parliament (MP), titled: Shattered Dreams: Addressing Harassment and Systemic Discontent within the RCMP [Shattered Dreams].

- The Civilian Review and Complaints Commission’s April 2017 Report into Workplace Harassment in the RCMP [2017 Commission Report].

- The March 2017 report by the Auditor General to the Minister of Public Safety and Emergency Preparedness entitled *Review of four cases of civil litigation against the RCMP on Workplace Harassment* [the Fraser Report].

The Evidence

[13] Both parties filed extensive evidentiary records on this Motion and conducted cross-examinations on the Affidavit evidence.

[14] The Plaintiffs rely upon the following evidence:

- Affidavit of Geoffrey Greenwood, sworn October 4, 2018. Mr. Greenwood is a proposed representative plaintiff. He is a Regular Member of the RCMP who began working with the RCMP in 1990. He is currently a Staff Sergeant and the Non-Commissioned Officer in charge of the General Investigative Section in Red Deer, Alberta.

- Affidavit of Todd Gray, sworn October 1, 2018. Mr. Gray is a proposed representative plaintiff. He is a Regular Member of the RCMP with the rank of Sergeant who is serving as the Operations Support Non-Commissioned Officers at the detachment in Airdrie, Alberta.

- Affidavit of Gigi Van Leeuwen, sworn October 9, 2018. Ms. Van Leeuwan is an associate at Kim Spencer McPhee Barristers P.C., the firm representing the Plaintiffs. Her affidavit provides an overview of the structure of the RCMP and its grievance processes.

[15] The Crown relies upon the following evidence:

- Affidavit of Pierre Lebrun, sworn March 13, 2019. Mr. Leburn was the Director General of Compensation, Benefits and Labour Relations for the RCMP from 2013 to 2018. He has been a public service employee with the RCMP since 2009. In each of his roles with the RCMP, he has been responsible for managing Human Resources (HR) professionals who were developing and implementing HR policies.

- Affidavit of Gordon Cook, sworn March 13, 2019. Mr. Cook has been the Director of Public Service Labour Relations for the RCMP since 2008 and has worked in various human resources positions with the RCMP since 1992. In his current role, he is responsible for final level grievances, providing recommendations to the Commissioner on terminations, and providing labour relations guidance. He is also responsible for amending various labour relations policies for public service employees with the RCMP.

- Affidavit of Stéphane Drouin, sworn March 13, 2019. Mr. Drouin is a Regular Member of the RCMP who has served continuously since 1990. He has been the Director General of the Workplace Responsibility Branch since July 2018. He is responsible for overseeing programs at the national policy and service delivery centres. Those programs are: Professional Ethics Office, National Public Complaints Directorate, Conduct of Employment Relations Directorate, Office for the Coordination of Harassment Complaints, Human Rights Section and Employment Requirements Section.

- Affidavit of James Lea, affirmed March 14, 2019. Mr. Lea has been a civilian member of the RCMP since 1996. He has been the Manager of Analysis and Reporting in the Strategic Policy and Planning Directorate of the RCMP since 2016. He has also overseen

the RCMP's Government Reporting, Integrated Risk Management, and managed the RCMP Survey Centre.

- Affidavit of Chantal Boisclair-Dalton, affirmed March 13, 2019. Ms. Boisclair-Dalton has been a Disability Benefits Program Specialist with Veterans Affairs Canada (VAC) since 2015. She has worked for VAC 34 years and provided an overview of the benefits and services available to current and former members of the RCMP in her affidavit.

Issues

[16] There are two issues addressed in these Reasons:

A. Should the Court decline to exercise jurisdiction in this proposed class proceeding?

B. If the Court assumes jurisdiction, have the Plaintiffs met the certification test in Rule 334.16(1) of the *Federal Courts Rules*?

Analysis

A. *Should the Court decline to exercise jurisdiction in this proposed class proceeding?*

[17] The Crown argues the Court should decline to certify this proceeding as a class action because there are legislative remedies and internal processes within the RCMP to address the issues the Plaintiffs propose to certify.

[18] The Crown made extensive submissions on this issue. I have therefore chosen to address this issue first. However, I note that much of the analysis on this issue applies equally to the preferable procedure considerations of the certification test under Rule 334.16(2).

[19] The Crown argues that the claims sought to be certified are at their core, workplace disputes, which are more appropriately addressed internally within the RCMP. The Crown argues that by certifying this class the Court would effectively be put in the position of adjudicating the RCMP's harassment complaints.

[20] The Crown points to the processes available through the *RCMP Act*, *Federal Public Sector Labour Relations Act*, SC 2003 c 22 s 2 (*FPSLRA*), the *Pension Act*, RSC 1985 c P-6, and the *CSO*.

[21] The current grievance process for Regular Members was put in place in 2014, and is set out and governed by Part III of the *RCMP Act*, the *RCMP Regulations*, the *CSO*, and the *FPSLRA*. The process involves both informal resolution as well as two levels of formal grievance review, from which judicial review can be sought. The Crown says that this process protects individuals from reprisal.

[22] Additionally, individuals who meet the definition for "employee" in the *FPSLRA* (including former employees) who are not members can grieve under section 208 of the *FPSLRA*. This process is set out in regulations and collective agreements. The final level of this grievance process is judicial review.

[23] Regular Members with service-related medical conditions are entitled to disability pension under the Pension Act, which is administered by VAC.

[24] The Crown relies upon a number of cases where courts have declined jurisdiction including: *Vaughan v Canada*, 2005 SCC 11 [*Vaughan*]; *Lebrasseur v Canada*, 2006 FC 852 (affirmed 2007 FCA 330) [*Lebrasseur*]; *Desrosiers v Canada (Attorney General)*, 2004 FC 1601[*Desrosiers*]; *Galarneau v Canada (Attorney General)*, 2005 FC 39 [*Galarneau*].

[25] In *Vaughan*, the Supreme Court of Canada held that, generally, the Court should decline to exercise its residual jurisdiction in disputes arising from regulation-conferred benefits when the enabling Act sends "an unambiguous signal" that the decision of the Deputy Minister or his or her designate should be final (*Vaughan* at paras 17 and 34).

[26] In *Lebrasseur*, the Court concluded that as the plaintiff's claim had the same factual basis as her successful pension claim, it was caught by s. 9 of the *Crown Liability and Proceedings Act* (*CLPA*) which barred claims for which a pension or compensation had been paid out (*Lebrasseur* at para 31).

[27] In *Desrosiers*, where the relevant legislation gave grievance officers the ability to grant damages and declaratory relief, the Court held that the plaintiffs' application was premature as it was possible that their claim could be resolved through internal mechanisms (*Desroriers* at paras 36 and 37).

[28] In *Galarneau*, the Court found that there was an internal procedure for the plaintiff's occupation health and safety grievance and the statutory scheme excluded the Court's jurisdiction over the claim (*Galarneau* at para 70).

[29] Having considered the above cases as against this proposed claim, I am not convinced the circumstances are comparable. It is not immediately apparent that the proposed claims are compensable through a regulation-conferred benefits program (*Vaughan*), or a pension (*Lebrasseur*). Further, I am not satisfied that the claims could be fully adjudicated through the available internal mechanisms within the RCMP (*Desrosiers* and *Galarneau*). I would further note that none of these cases were assessed as class proceedings.

[30] Prior to 2015, RCMP members were unable to unionize under the *RCMP Regulations* and had to use the Staff Relations Representative Program. However, the Supreme Court of Canada determined in *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 [*MPAO*] that this system was not independent from management, and that excluding RCMP members from collective bargaining violated their right to freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms*. In this decision, the Court commented that this grievance structure was inadequate (*MPAO* at paras 113-116).

[31] As well, the Plaintiffs argue that there is no comprehensive regime in place within the RCMP to address the issues they raise in this proposed claim. The Plaintiffs point to the findings in the Reports and argue that the internal mechanisms within the RCMP are, in fact, the problem.

[32] For example, the 2017 Fraser Report on the RCMP Grievance System, states:

> 69. … notwithstanding a considerable amount of good intentions by many individuals involved, the organization as an entity has difficulty formally acknowledging that some of its workplace units are dysfunctional.
> …
>
> 70. In trying to decipher causal links, I am led to conclude that there is a strong predisposition within the RCMP to defend its actions in order to protect its image…
>
> 73. My overall conclusion is that these four individuals believed that they had no other option but to take their employer to court. In many ways, it is an indication of the failure of the internal mechanisms that are established to deal with workplace conflict. Workplace harassment has existed for a long time in the RCMP. The sense one gets is that it is pervasive and, according to many, a product of its culture and of its hierarchical structure. Furthermore, there exists a perception that, because it is embedded in its culture, there is little probability that the RCMP will be able to fix this on its own.

[33] The Fraser Report concluded that:

> [l]egal proceedings against one's employer are not undertaken lightly. There are significant financial and emotional costs. That these women felt this was necessary is an indication of the failure of the RCMP to effectively deal with their cases. Other redress mechanisms were available to these individuals, yet none were considered effective (Fraser Report at paras 2-3). [emphasis added]

[34] The 2017 Commission Report (Leeuwen Affidavit Exhibit 49) was prepared at the request of the then Public Safety Minister, Ralph Goodale, who asked for a comprehensive review of the RCMP's policies and procedures on workplace harassment, and specifically an examination and evaluation of implementation of recommendations made in the 2013 Commission Report. This report found that the RCMP has not adequately implemented the recommendations made in the 2013 Commission Report, and that efforts by senior RCMP

leaders to prevent harassment have been "limited and ad hoc, and have not received the necessary support from National Headquarters."

[35] Against this backdrop, I do not see the proposed claims as "ordinary" employment disputes. The Reports support the Plaintiffs' claim that there are systemic issues with the internal dispute resolution processes within the RCMP. The Reports also support the Plaintiff's arguments that the systemic issues go beyond gender-based or sexual orientation-based issues, and are widespread and pervasive.

[36] The RCMP internal processes do not appear to be equipped to provide redress or compensation for negatively impacted career paths or harm to the family members impacted by the alleged conduct. Therefore, the internal processes may not be able to provide an appropriate remedy, or any remedy at all, for some of the claims advanced. Finally, the internal processes and how they are, or are not administered, forms a core component of the claims advanced by the Plaintiffs.

[37] The proposed class action is an attack on, and takes direct issue with, the RCMP processes, including the grievance system as a whole. One of the common questions advanced is whether the RCMP was negligent in how it ran its grievance process.

[38] I pause here to note that in certifying this action, this Court is not assessing or evaluating the merits of the proposed claims. It is possible that the Crown will have successful defences to

the claims, but at this stage, it is premature to assess the merits of either the proposed claims or the possible defences.

[39] Finally, the Crown did not argue that the Court does not have jurisdiction, rather, it argues that the Court should decline jurisdiction in favour of other processes. However, for the reasons outlined above, I am not convinced that the internal options, which have been acknowledged to be problematic and deficient, provide a fulsome remedy, or any remedy, for the claims sought to be advanced in this class proceeding.

B. *Have the Plaintiffs met the certification test in Rule 334.16(1) of the Federal Courts Rules?*

[40] Rule 334.16(1) of the *Federal Courts Rules* states:

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 plaintiff or applicant who	e) il existe un représentant 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.

Reasonable Cause of Action

[41] The task of the Court on a certification motion is not to resolve conflicting facts and evidence or assess the strength of the case. Rather, the task is simply to answer, at a threshold level, whether the proceeding can go forward as a class proceeding *(Wenham v Canada*

(Attorney General), 2018 FCA 199 at para 28 [*Wenham*] citing *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 paras 99 and 102 [*Pro-Sys Consultants*].

[42] The relevant facts in support of the claims advanced by Mr. Greenwood and Mr. Gray are contained in paras 40 - 106 of the Statement of Claim. In assessing "a reasonable cause of action" it is assumed that the facts outlined in the Statement of Claim are true (*Condon v Canada*, 2015 FCA 159 at para 13).

[43] In addition to their own particular factual circumstances, the Plaintiffs also rely upon the findings in the Reports referred to above.

[44] Courts have recognized "systemic negligence" claims in *Davidson v Canada (Attorney General)* (2015 ONSC 8008) [*Davidson*] and *Rumley v British Columbia* (2001 SCC 69) [*Rumley*]. Similarly, claims of systemic harassment within the RCMP were found to meet the cause of action requirement in *Merlo*, and *Tiller*.

[45] The claim against the Crown is based upon its vicarious liability for the collective actions of the RCMP's leadership. Namely, that it was systemically negligent in its individual acts, omissions and decisions (see: *White v Canada (Attorney General)*, 2002 BCSC 1164 at para 47 [*White*]).

[46] The Crown argues that the Plaintiffs have not pled a cause of action with a reasonable prospect of success (*R. v Imperial Tobacco Canada Ltd*, 2011 SCC 42 and *AIC Limited v*

Fischer, 2013 SCC 69 [*Fischer*]). The Crown argues that this case is similar to *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 [*Merrifield*], where the Ontario Court of Appeal found that there is no tort of harassment.

[47] Further, the Crown argues that this Court should take direction from the Ontario Court of Appeal decision in *Piresferreira v Ayotte*, 2010 ONCA 384, where the Court rejected a claim by an employee for negligent infliction of mental suffering against the employer. The Court found that as there are other remedies available to the employee, such as a constructive dismissal claim, and therefore the Court should not provide a remedy. The Crown says that this principle from *Piresferreira* has been re-affirmed in *Merrifield, Colistro v Tbaytel* (2019 ONCA 197), and *Boucher v Wal-Mart Canada Corp*. (2014 ONCA 419).

[48] In my view, the Crown, in relying upon these cases (*Piresferreira* and *Merrifield*), has taken too narrow an interpretation of the nature of the claims proposed in this class proceeding. These claims are not "just" workplace disputes. The claims are based upon systemic negligence for bullying, intimidation and harassment and they attack the very processes and systems that the Crown claims can and should provide a remedy.

[49] Accordingly, I am not convinced that it is "plain and obvious" the claims will fail (*Bennett v Hydro One*, 2017 ONSC 7065 at para 62 [*Hydro One*]). Although the Crown objects to the Plaintiffs' reliance on the various reports noted above, for the purpose of certification, and the "some basis in fact" requirement, in my view, the facts outlined in the Statement of Claim along with the Reports, provide the necessary evidence to support a reasonable cause of action.

[50] I am satisfied that a reasonable cause of action has been established pursuant to Rule 334.16(1)(a).

Identifiable Class

[51] An identifiable class requires "…'some basis in fact' supporting an objective class definition that bears a rational connection to the common issues and that is not dependent on the outcome of the litigation" (*Wenham* at para 69 citing *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 38 [*Western Canadian Shopping Centres*] and *Hollick v Toronto (City)*, 2001 SCC 68 at paras 19 and 25 [*Hollick*]).

[52] In *Pro-Sys*, the Supreme Court of Canada confirmed (at para 108) that it is not necessary for class members to be identically situated, but all class members must benefit from the successful prosecution. In *Cloud v Canada (Attorney General)*, 247 DLR (4th) 667 at para 45, the Ontario Court of Appeal explained the requirement as:

> …an obligation, although not an onerous one, to show that the classes are not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues.

[53] The Plaintiffs' proposed class is defined as follows:

> All persons who reside in Canada who were or are Regular Members, Special Constables Members, Reservists, Supernumerary Special Constables, Civilian Members, and Public Service Employees under s. 10 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, Volunteers, Auxiliary Constables, Non-Profit Employees, Temporary Civilian Employees, Casual Employees, Term Employees, Cadets, Pre-Cadets, Students,

> Contract Employees, Municipal Employees, and others who work or worked with the RCMP (the "Class"); and
>
> All individuals who are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990 c F.3, and equivalent or comparable legislation in other provinces and territories (the "Family Class").

[54] The class will exclude anyone who is covered under other settlements involving the RCMP (specifically those who have gender-based and sexual harassment-based claims under *Merlo* and those with sexual orientation-based harassment claims *Ross et al*).

[55] While the plaintiffs acknowledge that the class, as defined, may potentially include thousands of individuals, they say the class is identifiable nonetheless. The Plaintiffs assert that the RCMP is aware of these individuals as they have all been involved with the RCMP in some capacity, and would be identified in the Human Resources Management Information Services (HRMIS) system.

[56] The definition of the class to include persons who worked for or with the RCMP has the shared characteristics of professional involvement with the RCMP and being subject to the internal policies within the RCMP. In my view, these shared characteristics bear a rational connection to the systemic negligence claim for workplace bullying, intimidation, and harassment.

[57] The Crown argues that the class is overly broad and includes individuals who are statutorily barred pursuant to the *FPSLRA*. In my view, the size of the class alone is not a ground

to refuse to certify the class. The argument that some claims may be barred is a defence that can be raised by the Crown, but it does not form a ground upon which to deny certification.

[58] Here, the class definition, while potentially covering a large group of people, meets the requirements of Rule 334.16(1)(b) and the Plaintiffs have satisfied the "identifiable class" requirement of the certification criteria.

Common Issues

[59] In *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para 46 [*Vivendi*], the Supreme Court of Canada explained that:

> …a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.

[60] In *Vivendi*, at para 72, the Supreme Court of Canada confirmed that the threshold requirement for the common issues "is a low one." Similarly, Courts should take a purposive approach in assessing common issues (*Pro-Sys* at para 108). However, there must be some evidentiary basis or "some basis in fact" demonstrating that common issues exist beyond a bare assertion in the pleadings (*Hollick* at para 25).

[61] The Plaintiffs propose the following common questions:

> Negligence
>
> 1) Did the RCMP, through its agents, servants and employees owe a duty of care to the plaintiffs and other Primary Class Members to take reasonable steps in the operation or management of the Force to provide them with a work environment free from bullying, intimidation and harassment?
>
> 2) If yes, was there a breach of this duty by the RCMP through its agents, servants and employees?
>
> 3) If yes, was the Crown vicariously liable for the failure of its agents, servants and employees at the RCMP, to take reasonable steps in the operation and management of the Force to provide a work environment free from bullying, intimidation and harassment?
>
> Damages
>
> 4) Can the Court make an aggregate assessment of any damages as part of the common issues trial? If so, to who? In what amount?
>
> 5) Does the conduct justify an award of aggravated, exemplary and/or punitive damages?

[62] Here, like in *Rumley*, the question is whether the class members are owed a duty of care by the RCMP and whether that duty was breached in relation to the alleged ineffectiveness of the RCMP's harassment policy. The Plaintiffs submit that the issues are common to each class member because they were all exposed to the "general culture of bullying and intimidation and general harassment". The Plaintiffs say that the RCMP has a single harassment policy across the entire organization. Accordingly, any duty of care applies across the class.

[63] The second question relates to the breach of the duty, and is the core of the Plaintiffs' claim. In my view, this may be the most challenging aspect of the claim. However, as

challenging as this may be, at this stage, it is not a basis upon which to deny certification (*Cloud* para 97).

[64] The Plaintiffs submit that the determination of vicarious liability is also common to all, as it looks at whether the Crown is liable for the failure of the RCMP. The vicarious liability question is tied to the systemic nature of the claims against the RCMP.

[65] The Plaintiffs note that non-sexual harassment was recognized in the Reports including: the 2017 Commission Report, the Brown Report from 2007, and the December 2014 report "Shattered Dreams". The Plaintiffs argue that these reports provide "some" evidence for the common issue. In particular, these reports highlight that harassment went beyond gender-based harassment.

[66] On the issue of damages, the Plaintiffs say an aggregate assessment of damages is possible (*Cloud* at para 70). They also argue that punitive damages may be appropriate based upon the knowledge and conduct of those in charge of the RCMP.

[67] The Plaintiffs submit that the common questions meet the requirement as the threshold for this requirement is low (*Wenham* and *Pro-Sys Consultants*). I agree with the Plaintiffs that they meet the low evidentiary bar for this part of the test, even if there are individual issues. The existence of individual issues does not negate common issues, and it is more pertinent to the preferability analysis than to the common issue analysis (*Cloud* at paras 61 and 65).

[68] The Crown argues that the there are few, if any, common issues. They say that the proposed class here is similar to that in *Hydro One*, where the claim related to Hydro One overcharging customers. In *Hydro One*, the inadequacy of the system's design was not found to be a substantial ingredient in each member's claim, therefore systemic negligence was not an issue common to all members of the class. The Court held, therefore, that not all class members would benefit from the successful prosecution of the action, and some may even be harmed by a potential counter claim (*Hydro One* at para 96).

[69] I do not find the *Hydro One* analysis applicable to the claims made here, as the interests of the proposed Class Members are aligned with regard to the prosecution of the action. While I acknowledge that the RCMP operates in a number of different environments, the common feature here is that the RCMP is "one" organization and it applies the same harassment policy across the organization. Unlike in *Hydro One*, all of the proposed Class Members would benefit from a finding on the common issues. Similarly, there is no counter-claim scenario in this case as there was in *Hydro One*.

[70] The facts outlined in the Statement of Claim and in the Reports are sufficient to meet the "some basis in fact" requirement. I am therefore satisfied that the common question objective as required by Rule 334.16(1)(c) is met here.

Preferable Procedure

[71] The factors relevant to determining if a class proceeding is the preferable procedure are set out in Rule 334.16(2) as follows:

(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	(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 individual members;	a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;
(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.

[72] In addition to the factors above, the preferability analysis also considers three principle goals: (1) judicial economy, (2) behaviour modification, and (3) access to justice (*Fischer* at para

22). Plaintiffs are not required to prove that the class action will achieve all of the goals, only that it is a better option than the alternative (*Fischer* at para 23). Additionally, the "…preferability requirement is broad enough to take into account" all reasonably available means of resolving the class members' claims" including avenues of redress other than court actions" (*Fischer* at para 19). An alternative process does not need to decide "the precise legal and/or factual questions raised by the common issues provided that it effectively resolves the class members' claims" (*Fischer* at para 19). Therefore, the proper approach is to ask which plan best meets the three goals, keeping in mind that not all of the goals have to be achieved, and that a resolution does not necessarily have to involve the Court, but does have to resolve the proposed class members' claims.

[73] Rule 334.16(2)(a) asks the Court to consider whether common questions of law or fact predominate over the other issues. The cause of action here is framed as systemic negligence, therefore the common questions of fact and law will necessarily predominate because the issue is the cumulative effect of "individual acts, omissions or decisions [that were] directed towards a general rather than a specific set of circumstances" (*White* at para 47). As an example, the claim that the RCMP's failure or omission to have an effective anti-harassment policy is an "essential question" in this litigation, that question being: should the RCMP have responded differently to address bullying, intimidation and harassment (see: *Rumley* at para 36). This omission is general in nature and ties together all of the Class Members, as the failed policy applied to them all.

[74] On Rule 334.16(2)(b) and (c), here there is no evidence that others have or are attempting to bring a similar claim. Further, the members of the other certified class actions against the RCMP are exempt from this class proceeding.

[75] With regard to 334.16(2)(d), the only other "available" proceedings are the internal RCMP processes which I have addressed in detail above. In addition to those observations, I note that it may be more practical to address issues that relate to the policies and administration of a large organization like the RCMP through a class action than through individual actions (*Rumley* at para 38). A class proceeding reduces the financial burden on individuals and allows them "…to invest in experienced class counsel and leading medical experts who can contribute to the Courts understanding of the matter" (*Wenham* at para 86).

[76] The considerations regarding 334.16(2)(e), whether the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means, also favours certification. According to the evidence, bullying, intimidation and harassment has taken a mental and physical toll on both Mr. Greenwood and Mr. Gray. Mr. Greenwood suffers from post-traumatic stress disorder. Mr. Gray was diagnosed with depression and a stress disorder. It is likely that others in the class have similar conditions. As a result, I find that a class proceeding would likely mitigate the difficulties faced by members of the class coming forward with their claims, without fear of reprisal. All of these have been held to be barriers to access to justice (*Fischer*, at para 27).

[77] As noted above, the issue of judicial economy was raised by the Crown as a basis for the Court to decline certification. However, even if some of the class members have internal mechanisms to exhaust, others may not. Those who have internal mechanisms could seek judicial review of the individual decisions they received or bring a civil claim. Class counsel advise that they have been approached by hundreds of potential class members. If they were to initiate their own proceedings, there would most certainly be duplication of fact-finding and legal analysis. This does not serve the judicial economy goal of class actions (*Hollick* at para 15).

[78] Access to justice is often framed as an economic issue, which is almost certainly a concern for most of the proposed class members, as few people can afford litigation. Proceeding as a class addresses the economic issue by spreading out the costs, and may, to a certain extent, address the vulnerability of some class members. By having representative plaintiffs represent the class, others are spared the stress associated with bring their own proceeding. Additionally, class members would be less fearful of personal reprisal as there is an element of anonymity in a class proceeding.

[79] This class action also has the potential to address the behavioural modification goal. The Reports demonstrate that the RCMP has failed to create meaningful change. There may be various reasons for this including that senior management is mostly comprised of those officers who moved up in the ranks during a period of time in which the RCMP had a culture problem. As well, it is possible that issues persist because of the RCMP's failure to track data relating to the level of harassment, the efficacy of anti-reprisal provisions, the number of individuals who

are off duty because of harassment, and the number of individuals who receive pensions because of harassment.

[80] Although the RCMP has taken positive steps in the creation of the Civilian Oversite Committee, which was announced in January 2019, this is forward-looking and may not be a remedy for those who have already suffered from misconduct.

[81] Given the nature of the claim, systemic negligence, it is my view that a class procedure serves the underlying rationales of judicial economy, behavioural modification, and access to justice.

Appropriateness of the Representative Plaintiffs

[82] The Plaintiff, Mr. Greenwood, is a Regular Member who is currently a Staff Sergeant. He began his career in 1990. At para 9 of his Affidavit, he describes working with others within the RCMP as follows:

> Throughout my career in various detachments and positions, I have worked with civilian members, public service employees, municipal employees (including temp and casual municipal employees), temporary civilian employees, special constables, special constable members, supernumerary special constables (summer students), commissionaires, auxiliary constables, and other volunteers like victim services. The RCMP could not operate without the work of these individuals. I believe that collectively these people carry approximately 80% of the workload of the RCMP, that they become immersed in RCMP culture and that they are expected to conduct themselves in accordance with the RCMP core standards.

[83] Mr. Greenwood states in his affidavit that he has suffered career limitations and physical and psychological harm as a result of the way he was treated by the RCMP. He says that he has been ridiculed, subjected to unfounded complaints and Code of Conduct violations, and received unsubstantiated negative performance assessments.

[84] At paragraphs 41, 42, and 43 of his affidavit, Mr. Greenwood explains the physical and psychological impacts of the harassment. At paragraph 50, he states that he feared reprisal, sanction and punishment for speaking out against the system. He also notes that the cost of financing his own litigation has prevented him from taking civil action which is why he now seeks to certify this class action on behalf of others who have suffered a similar fate.

[85] The Plaintiff, Todd Gray, is a Regular Member who currently holds the rank of Sergeant. He began his career in 1988. At paragraph 8 of his Affidavit, he describes the various capacities in which he has worked with the RCMP:

> I have had the opportunity to work in and observe the culture of the RCMP across the country over the course of my career. I worked at the Clinton, British Columbia detachment from 1989 to 1990, and the Coquitlam, British Columbia detachment from 1990 to 1995. In 1995 I started working on the RCMP Musical Ride. After the RCMP Musical Ride, I worked on the Emergency Response Team ("ERT") in Ottawa, Ontario, from 1998 to 2000. In 2000 I was transferred to the Kugluktuq detachment in Nunavut. In 2002 I returned to the ERT until 2005. In 2005 I went to work at Depot, in Saskatchewan, first as an Applied Police Sciences facilitator and then in the area of Police Defence Tactics until 2010. In 2010 I transferred to Prince George, British Columbia where I worked as a Sergeant until 2014. In 2014 I moved to Hinton, Alberta. I worked at the Hinton detachment until 2017 when I was posted to be the NCO in charge at the Fox Creek detachment. I recently started work at the Airdrie detachment as set out above.

[86] At paragraph 11 he describes his experiences that relate to the common issue:

> Over the course of my career I observed and have been subjected to instances of bullying, intimidation and harassment. Three instances stand out for me: 1) my experiences on the RCMP Musical Ride, 2) the way I was treated as a result of reporting concerns with my commanding officer's behaviour towards First Nations peoples in Kugluktuq, Nunavut, and 3) the environment I worked in in Hinton, Alberta, following the filing of a complaint against me that was held to be unfounded.

[87] Mr. Gray believes he has suffered physical injuries and psychological harm due to the way he was treated throughout his career. He says that he was forced to ride a horse while he was suffering from a back injury. He also claims to have suffered reprisals in the form of Code of Conduct violations. He claims to have been physically assaulted, and was exposed while naked to a female supervisor.

[88] At paragraph 37 of his affidavit, Mr. Gray discusses the psychological stress he has suffered. At paragraph 43 and 44 of his affidavit, he discusses the impact that his treatment has had on his wife's employment. He says his wife and son have suffered as a result of his treatment.

[89] At paragraphs 46 and 49 of his affidavit, Mr. Gray says that he was concerned about repercussions if he were to take action against the RCMP on his own. He also noted that financially, he could not afford litigation if this class action is not certified.

[90] Both Mr. Grey and Mr. Greenwood state that they are prepared to monitor the case as it proceeds, to consult with and instruct legal counsel, and participate as necessary. They also state

that they will ensure that class members are kept informed of key developments as the matter proceeds and that they will do their best to protect the interests of the class members.

[91] The Crown argues that both Mr. Greenwood and Mr. Gray are statutorily barred from making a claim because of the provisions of the *Pension Act*; they therefore argue that they do not have sustainable claims. The Crown relies upon section 9 of the *Crown Liability and Proceedings Act*, RSC 1985 c C-50, which states that no proceedings lie against the Crown if a pension has been paid out (*Sarvanis v Canada*, 2002 SCC 28, at para 28) . However, in *Sarvanis*, the Supreme Court of Canada also pointed out, at para 27, that "the key is to recognize that the loss the recovery of which is barred by the statute must be the same loss that creates an entitlement to the relevant pension or compensation." The Court further noted at para 28 that:

> …the language in s. 9 of the *Crown Liability and Proceedings Act*, though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred.

[92] It is premature to assess the applicability of section 9 here. While Mr. Greenwood is receiving a pension, it is not obvious that he is in receipt of this pension for reasons that have the same factual basis of the proposed common issue. Similarly, although Mr. Gray is not in receipt of a pension, *Sarvanis* is inapplicable to his circumstances for the same reason, being that it is not clear that he would receive a pension for reasons that have the same the factual basis that underlies the common issue.

[93] In any event, the Crown will have the opportunity to raise these issues as defences.

[94] I am therefore satisfied that Mr. Greenwood and Mr. Gray will serve as satisfactory representatives of the class and they meet the requirements of Rule 334.16(1) (e) to be the representative plaintiffs.

Litigation Plan

[95] In *Wenham*, the Federal Court of Appeal noted that litigation plans are a work in progress, that courts must recognize that they are "not cast in stone", and that they can be amended as the litigation proceeds (*Wenham* at para 103).

[96] Although the Court is not to scrutinize the litigation plan in detail, the Court must be satisfied that the plan meets the minimum requirements and that the plan demonstrates that the litigation is workable (*Griffin v Dell Canada Inc*, [2009] OJ No 418 at para 102).

[97] The litigation plan filed here contains the essential ingredients for the next steps in this matter including, a communication plan, a notice program, plans with respect to oral and documentary discovery, retention of experts, and the assessment of damages.

[98] Although I anticipate future Motions may be necessary to refine the litigation plan, at this stage, the litigation plan meets the minimum requirements.

Conclusion

[99] For the reasons outlined above, I grant the Motion and order that this matter be certified as a Class Proceeding.

ORDER in T-1201-18

THIS COURT ORDERS that:

1. This matter is hereby certified as a Class Proceeding.

2. The definition of the Class shall be:

All persons who reside in Canada who were or are Regular Members, Special Constables Members, Reservists, Supernumerary Special Constables, Civilian Members, and Public Service Employees under s. 10 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, Volunteers, Auxiliary Constables, Non-Profit Employees, Temporary Civilian Employees, Casual Employees, Term Employees, Cadets, Pre-Cadets, Students, Contract Employees, Municipal Employees, and others who work or worked with the RCMP (the "Class"); and

All individuals who are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990 c F.3, and equivalent or comparable legislation in other provinces and territories (the "Family Class"); and

3. Geoffrey Greenwood and Todd Gray are appointed as the Representative Plaintiffs for the Class.

4. The common questions are approved as follows:

Negligence

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

2) If yes, was there a breach of this duty by the RCMP through its agents, servants and employees?

3) If yes, was the Crown vicariously liable for the failure of its agents, servants and employees at the RCMP, to take reasonable steps in the operation and management of the Force to provide a work environment free from bullying, intimidation and harassment?

Damages

4) Can the Court make an aggregate assessment of any damages as part of the common issues trial? If so, to whom? In what amount?

5) Does the conduct justify an award of aggravated, exemplary and/or punitive damages?

5. The litigation plan, including the Certification Notice and its proposed distribution, is approved. These documents shall be made available in both official languages.

6. No other class proceeding may be commenced with respect to the matters addressed in this action, absent leave of this Court.

7. Pursuant to Rule 334.39(1) of the *Federal Courts Rules* there will be no costs.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1201-18
STYLE OF CAUSE:	GEOFFREY GREENWOOD AND TODD GRAY *v* HMTQ
PLACE OF HEARING:	TORONTO, ONTARIO
DATES OF HEARING:	JUNE 18-19 AND SEPTEMBER 24, 2019
ORDER AND REASONS:	MCDONALD J.
DATED:	JANUARY 23, 2020

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