Federal Court of Appeal  Cour d'appel fédérale

Date: 20210921

Docket: A-42-20

Citation: 2021 FCA 186

CORAM: **WEBB J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

GEOFFREY GREENWOOD and
TODD GRAY

Respondents

Heard by online video conference hosted by the Registry on January 21, 2021.

Judgment delivered at Ottawa, Ontario, on September 21, 2021.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] Class proceedings in the Federal Court provide a procedural vehicle to advance or defend similar claims by members of a group. For plaintiffs, pursuit of such claims via a class proceeding, commenced by one or a few representatives on behalf of members of a larger class, is meant to facilitate access to justice, advance judicial economy and encourage defendants and potential defendants to modify behaviours that give rise to liability. In the Federal Court, as

elsewhere in Canada, a representative plaintiff who wishes to pursue a class proceeding must have a judge certify (*i.e.* authorize) the proceeding as a class proceeding before it can proceed.

[2] Certification is a procedural step that does not create substantive rights or give rise to new causes of action. Under the *Federal Courts Rules*, SOR/98-106 (the Rules), Part 5.1 of which governs class proceedings, certification is available only if the judge hearing the certification motion determines that five criteria are met.

[3] As set out in rule 334.16(1) of the Rules, these criteria are the following in the context of an action that a plaintiff wishes to have certified. First, the pleadings must disclose a reasonable cause of action. Second, there must be an identifiable class of two or more plaintiff members. Third, the claims of the class members must raise common questions of law or fact, whether or not such questions predominate over questions affecting only individual members. Fourth, the class proceeding must be the preferable procedure for the just and efficient resolution of such common questions of fact or law. Finally, the representative plaintiff must meet the criteria set out in paragraph 334.16(1)(*e*) of the Rules. Those applicable to the representative plaintiffs relevant in the case at bar are that they: (i) would fairly and adequately represent the interests of the class; (ii) have prepared a litigation plan that sets out a workable method of advancing the proceeding; and (iii) do not have, in respect of the common issues, an interest that is in conflict with the interests of other class members.

[4] In an Order issued January 23, 2020 and amended on consent on April 21, 2020, reasons for which are reported as *Greenwood v. Canada*, 2020 FC 119, the Federal Court

(*per* McDonald, J.) certified a class proceeding on behalf of a class consisting of, at a minimum, over two hundred thousand potential members. The class includes, with certain exceptions, virtually everyone who has ever worked for or with the Royal Canadian Mounted Police (the RCMP) or at RCMP premises, regardless of whether they were Members or employees of the RCMP or employed in the public service and assigned to work with the RCMP.

[5] In their underlying action, the representative plaintiffs seek, on their own behalf and on behalf of class members, damages for non-sexual bullying, intimidation and harassment, which they allege is systemic in RCMP workplaces, and for related reprisals they say have been suffered by those who have raised complaints. They further request damages for the consequential loss of care, companionship and guidance suffered by the families of class members under the Ontario *Family Law Act*, R.S.O. 1990, c. F.3 or comparable legislation in other provinces.

[6] Under the amended certification order, the class certified by the Federal Court more specifically includes:

> 2. […]
>
> All persons who worked with or for the RCMP being all current or former:
>
> (a) RCMP Members: including all Regular Members, Civilian Members, Special Constable, Special Constable Members, Supernumerary Special Constables, Reservists, and Recruits;
>
> (b) Public Services Employees (“PSEs”) who are not able to grieve under s. 208 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (“FPSLRA”);
>
> (c) Others who work within RCMP workplaces: including but not limited to: temporary civilian employees, community constables,

> auxiliary constables, cadets, pre-cadets, students, independent and subcontractor employees (including Commissionaires, custodial worker, guards/matrons, individuals employed through temporary agencies, and interns – e.g. Youth Internship Program), other government employees (including municipal, regional or similar levels of government employees and seconded officers and employees, including Interchange Canada participants) who are not entitled to grieve under s. 208 of FPSLRA, volunteers, and non-profit organization employees; individuals working or attending courses on RCMP premises; and other individuals who worked with or for the RCMP and who have a Human Resources Management Information Services ("HRMIS") identification.
>
> 2.1 This Class Proceeding excludes claims that are covered under *Merlo v Her Majesty the Queen*, Federal Court File No. T-1685-16, *Ross et al v Her Majesty the Queen, Federal Court* File No. T-370-17, *Gaétan Delisle et al c Sa Majesté La Reine* Québec Superior Court No. 500-06-000820-163, and *Tiller v Her Majesty the Queen*, Federal Court File No. T-1673-17.

[7] The class proceedings mentioned in paragraph 2.1 of the amended certification order comprise, generally speaking, previously certified class proceedings in which damages were sought for some of those who would otherwise come within the class certified by the Federal Court in the case at bar. In those previously certified proceedings, damages were claimed in respect of: (i) sexual discrimination, bullying and harassment experienced by females; (ii) sexual orientation-based discrimination, bullying and harassment; and (iii) in the province of Quebec, discrimination, harassment or abuse of authority by reason of grounds other than sex or sexual orientation, including by reason of linguistic profile or desire to form a trade union.

[8] The common questions certified by the Federal Court were:

> 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?

[9] In this appeal, the appellant, Her Majesty the Queen (whom for ease of reference I call, simply, the Crown) alleges that the Federal Court erred in certifying this class and in its application of each of the criteria for certification. The Crown in addition submits that the Federal Court made several other reviewable errors. It seeks to have this Court overturn the Federal Court's certification order, arguing that claims of the sort advanced by the representative plaintiffs cannot be pursued by way of class proceeding.

[10] For the reasons more fully detailed below, I disagree. It is my view that, with two exceptions, the Federal Court did not commit a reviewable error. The first exception concerns the scope of the class certified, which is overly-broad. The second concerns the fourth question

certified by the Federal Court, which is not an appropriate common question in the circumstances of this case.

[11] I would accordingly grant this appeal in part to amend the class definition and common questions certified by the Federal Court.

[12] In terms of the class definition, I would narrow it to include only RCMP Members (*i.e.* Regular Members, Special Constable Members and Civilian Members) and Reservists. I would also temporally limit the class by establishing a class period that commences on January 1, 1995 and ends, for each category of class member, on the date a collective agreement comes or came into force for the bargaining unit to which such class members belong. I would further amend the certification order to delete the fourth question certified as a common question.

I. Background

[13] It is useful to commence with a review of the claims made in the statement of claim and of the pertinent evidence that was before the Federal Court on the motion for certification. I note, parenthetically that, as is often the case in class proceedings, the Crown elected to refrain from filing a defence prior to the disposition of the certification motion.

A. *The Statement of Claim*

[14] In their statement of claim, the two representative plaintiffs, who are full-time Regular Members of the RCMP, claim on their own behalf and on behalf of class members:

- a declaration that the Crown was negligent in failing to provide them and other class members with a workplace that is free from bullying and harassment;

- a declaration that that the Crown failed to fulfil and/or breached its common law, contractual and statutory duties to provide them and other class members with a workplace free from bullying and harassment;

- general damages in the amount of $1,000,000,000.00 plus damages equal to the cost of administering the plan of distribution of the recovery in the action;

- damages for loss of income, including for loss of promotional opportunities, early retirements and losses to pension;

- special damages in an amount to be determined for medical expenses and other out-of-pocket expenses incurred by class members;

- exemplary and punitive damages in the amount of $100,000,000.00;

- damages under the *Family Law Act*, R.S.O. 1990, c. F-3 (FLA) and comparable legislation in other provinces in the amount of $30,000,000.00;

- an order directing a reference or providing other directions to determine issues not settled at the common issues trial; and

- interest and costs.

[15] They describe the nature of their claims in paragraphs 2 to 9 of the statement of claim. Because the scope of a claim is directly tied to the common questions and the scope of the class that may be certified in respect of them, it is useful to reproduce these paragraphs in full. They provide:

> THE NATURE OF THIS ACTION
>
> 2. This action concerns the systemic bullying, intimidation and harassment of individuals who worked for the Royal Canadian Mounted Police ("RCMP") and/or with the RCMP.
>
> 3. For decades, the RCMP leadership fostered and condoned a culture of bullying and intimidation and general harassment within the Force, creating a toxic workplace. The harassment of the RCMP Members was bolstered by statutory and institutional barriers that prevented RMCP Members from engaging in collective bargaining and/or obtaining other meaningful redress for their grievances.
>
> 4. These barriers, codified in the Royal Canadian Mounted Police Regulations, amplified a stark power imbalance which was exacerbated by the paramilitary structure of the RCMP, and had the effect of silencing RCMP Members who fell victim to bullying and intimidation and harassment, as their sole recourse was through the chain of command who were often protective of the very individuals who had inflicted and perpetuated the bullying, intimidation, and harassment.
>
> 5. This cultivated the existence of a toxic work environment characterized by abuse of power and fear of reprisal. In this environment, the plaintiffs allege that they and the other Class Members […] experienced pervasive bullying, intimidation and harassment which was either inflicted, condoned, or tolerated by the RCMP, through its agents, servants and employees. Any efforts by the plaintiffs and other Class Members to report, speak out, complain or pursue

> internal grievances respecting harassment were diminished, ignored, dismissed, and/or mischaracterized, including as interpersonal conflict.
>
> 6. Complaints of any kind were treated as an affront to the chain of command in the paramilitary structure of the RCMP, leading to direct and indirect retaliatory conduct against the plaintiffs and other Class Members, including but not limited to unjustifiable and improper use of the following: loss of promotional opportunities, negative performance evaluations, involuntary transfers, denial of leave, social isolation, and assignment of menial tasks below the Class Member's capabilities in order to demean the Class Member.
>
> 7. In allowing this culture to manifest and permeate the organization from its highest levels, the RCMP, through its agents, servants and employees, failed to fulfill its statutory, contractual, and common law duties to provide the plaintiffs and the other Class Members with a work environment free of bullying, intimidation and harassment.
>
> 8. As a result of the bullying, intimidation and harassment in the RCMP, the plaintiffs and other Class Members have suffered significant career limitations, as well as serious physical and psychological damages, along with out-of-pocket expenses and loss of income.
>
> 9. While the RCMP has admitted a toxic "culture of harassment" and provided redress to members who experienced gender based harassment (*Merlo and Davidson v. Her Majesty the Queen*, Federal Court Action No. T-1685-16 ("*Merlo Davidson*") and LGBT members (*Ross, Roy and Satalic v. Her Majesty the Queen*, Federal Court Action No. T-370-17 [*Ross, Roy and Satalic*], it has not provided redress to the majority of the members of the Force who are not part of these actions. The scope of this claim excludes gender-based harassment and discrimination matters covered under *Merlo Davidson* and *Ross, Roy and Satalic*.

[16] In the balance of the statement of claim, the representative plaintiffs set out their own experiences of suffering bullying, intimidation, harassment and reprisals. They further detail the negative impact they claim this had on their careers, health and family members. They also provide some generalized assertions regarding the alleged systemic nature of bullying, intimidation and harassment in the RCMP, which they claim was condoned by RCMP leadership and fostered by the paramilitary structure of the RCMP and by statutory and institutional barriers that, until 2017, prevented RCMP Members from unionizing and engaging in collective

bargaining. They further allege that the remedies available to at least some class members to raise harassment complaints were ineffective. They plead on the latter point in paragraph 26 of the statement of claim that "although an independent agency was created for the adjudication of civilian complaints, no independent adjudicative body exists for RCMP Member grievances". They also plead what they allege were admissions by RCMP leadership and findings of several official inquires as to the existence of systemic bullying, intimidation and harassment in the RCMP and the lack of effective remedy to redress these problems.

[17] Of particular relevance to this appeal are the particulars of systemic negligence. In paragraph 110 of their statement of claim, the representative plaintiffs allege the RCMP owed class members the following duties:

> 110. Specifically, the RCMP, through its agents, servants and employees, had a duty of care to:
>
> a) use reasonable care to ensure the safety and well-being of the plaintiffs and the other Class Members;
>
> b) provide safe workplace environments free from bullying, intimidation, and harassment;
>
> c) provide equal employment training and advancement opportunities to the plaintiffs and the other Class Members;
>
> d) establish and enforce appropriate policies, codes, guidelines, and procedures to ensure that the plaintiffs and the other Class Members would be free from bullying, intimidation, and harassment;
>
> e) implement standards of conduct for the RCMP work environment and for RCMP Employees, to safeguard the plaintiffs and the other Class Members from bullying, intimidation, and harassment;

f) educate and train RCMP Employees to promote a universal understanding amongst all RCMP Employees that bullying, intimidation, and harassment are dangerous and harmful and will not be tolerated;

g) properly supervise the conduct of RCMP Employees so as to prevent the plaintiffs and the other Class Members from being and/or being exposed to bullying, intimidation, and harassment;

h) investigate and adjudicate complaints of bullying, intimidation, and harassment fairly and with due diligence and make efforts to prevent retaliation;

i) act in a timely fashion to resolve situations of bullying, intimidation, and harassment, and to work to prevent re-occurrence; and,

j) ensure that the plaintiffs and the other Class Members would not suffer from reprisals or retaliation by RCMP Employees for reporting or objecting to incidents of bullying, intimidation, harassment and other misconduct.

B. *The Evidence before the Federal Court*

[18] The representative plaintiffs each filed an affidavit and also filed an affidavit from an associate lawyer at the law firm acting for them that attached various reports and other documents. The Crown filed affidavits from Civilian Members of the RCMP with responsibility for human resources and labour relations matters, from a Regular Member of the RCMP with responsibility for overseeing programs related to harassment, and from a disability benefits specialist at Veterans Affairs. All affiants were cross-examined.

[19] No evidence was filed regarding the conduct of an aggregate damages assessment and no suggestion was made in the proposed litigation plan to provide any meaningful detail regarding how such assessment could be undertaken.

[20] Because of the nature and number of arguments raised by the Crown in this appeal, it is necessary to review the evidence that was before the Federal Court in some detail.

(1) The Class

[21] The RCMP is a "police force for Canada", to quote section 3 of its constituent statute, the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (the RCMP Act). It operates across the country and is divided into 15 separate Divisions, based on provincial and territorial boundaries. Many Divisions are further sub-divided into Districts. In each District (or Division, where there are no District subdivisions), there are a number of Detachments, where various categories of personnel work. According to one of the Crown's affiants, the RCMP is the most decentralized department of the federal government, with over 700 service points located across the country.

[22] The RCMP is also unique among agencies and departments of the federal government in that it engages a wide variety of personnel, many of whom have different legal status *vis-à-vis* the Crown. Depending on the date and the provisions of the Act then in force, such personnel include or have included: Regular Members, Civilian Members, Special Constable Members, Auxiliary Constables, Reservists, Supernumerary Special Constables, public service employees,

temporary civilian employees, recruits and cadets, volunteers, employees of municipalities or subcontractors and independent contractors. Individuals from all of these categories were included by the Federal Court in the class it certified.

(a) *RCMP Members*

[23] Turning first to RCMP Members, they are comprised of Regular Members, Civilian Members and Special Constable Members. They are all appointed pursuant to the RCMP Act.

[24] Regular Members are appointed to a rank and are responsible to carry out the RCMP's policing functions. The ranks range from Governor-in-Council appointees at the top end, through various levels of commissioned and non-commissioned officers to Constable, at the lower end. According to the RCMP's Human Resources Management System (HRMS), its computerized records containing data on some of those who worked for the RCMP or at RCMP premises, up to the date materials were sworn for filing with the Federal Court, there have been 42,528 Regular Members of the RCMP.

[25] RCMP Members and Reservists were excluded from collective bargaining until 2017. Non-managerial RCMP Members and Reservists were afforded the right to engage in collective bargaining in 2017 via amendments to what is now called the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the FPSLRA). The amendments were enacted in response to the 2015 decision of the Supreme Court of Canada in *Mounted Police Association of Ontario v. Canada (Attorney General*), 2015 SCC 1, [2015] 1 S.C.R. 3, which held that the exclusion of

RCMP Members from collective bargaining violated the freedom of association guaranteed to them by the *Canadian Charter of Rights and Freedoms*.

[26] However, under these amendments, non-managerial RCMP Members and Reservists, unlike members of the public service, are only entitled to file and submit to independent third party adjudication grievances alleging a breach of their collective agreements (FPSLRA, ss. 238.24-238.25). RCMP Members and Reservists thus cannot access third party adjudication under the FPSLRA for the broader range of employer actions that are open to being grieved and adjudicated by public servants under the FPSLRA.

[27] Public servants to whom Part II of the FPSLRA applies can grieve a wide range of employer decisions and a narrower range of decisions may be referred to adjudication. For non-managerial public servants, adjudicable decisions are those resulting in certain types of discipline, certain types of demotions, deployments or terminations, decisions alleging breach of provisions in the *Accessible Canada Act*, S.C. 2019, c. 10 and claims of breach of the collective agreement by the employer (FPSLRA, ss. 209-209.1).

[28] That said, it is my view that non-managerial RCMP Members and Reservists would be able to access adjudication before the Federal Public Sector Labour Relations and Employment Board (the FPSLREB) for grievances related to bullying, harassment or intimidation if prohibitions against the same were included in a collective agreement applicable to them. While the FPSLRA limits the matters that may be included in a collective agreement applicable to RCMP Members and Reservists, in my view, such limitation would not prohibit inclusion of

provisions in a collective agreement dealing with harassment, bullying and intimidation, although this issue falls within the exclusive jurisdiction of the FPSLREB to determine. It is, however, necessary for this Court to consider this issue in the context of the present appeal as the Crown has asserted that the availability of collective bargaining means that the Federal Court erred in certifying a class proceeding in the instant case.

[29] Section 238.19 of the FPSLRA, applicable to RCMP Members and Reservists, provides:

238.19 A collective agreement that applies to the bargaining unit determined under section 238.14 must not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if	**238.19** La convention collective qui régit l'unité de négociation définie à l'article 238.14 ne peut pas avoir pour effet direct ou indirect de modifier, de supprimer ou d'établir une condition d'emploi :
(a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition; or	*a)* soit de manière à nécessiter l'adoption ou la modification d'une loi fédérale, exception faite des lois affectant les crédits nécessaires à son application;
(b) the term or condition is one that has been or may be established under the Royal Canadian Mounted Police Superannuation Act, the Royal Canadian Mounted Police Pension Continuation Act, the Public Service Employment Act, the Public Service Superannuation Act or the Government Employees Compensation Act.	*b)* soit qui a été ou pourrait être établie sous le régime de la Loi sur la pension de retraite de la Gendarmerie royale du Canada, de la Loi sur la continuation des pensions de la Gendarmerie royale du Canada, de la Loi sur l'emploi dans la fonction publique, de la Loi sur la pension de la fonction publique ou de la Loi sur l'indemnisation des agents de l'État.

[30] While the RCMP Commissioner is provided authority under paragraph 20.2(1)(*l*) of the RCMP Act to establish procedures to resolve and investigate harassment of RCMP Members, subsection 31(1.1) of the RCMP Act excludes from the internal RCMP grievance procedures those grievances that allege a breach of a collective agreement. Section 31 of the RCMP Act provides in relevant part as follows:

31 (1) Subject to subsections (1.01) to (3), if a member is aggrieved by a decision, act or omission in the administration of the affairs of the Force in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner's standing orders, the member is entitled to present the grievance in writing at each of the levels, up to and including the final level, in the grievance process provided for by this Part.	**31 (1)** Sous réserve des paragraphes (1.01) à (3), le membre à qui une décision, un acte ou une omission liés à la gestion des affaires de la Gendarmerie causent un préjudice peut présenter son grief par écrit à chacun des niveaux que prévoit la procédure applicable aux griefs prévue par la présente partie dans le cas où la présente loi, ses règlements ou les consignes du commissaire ne prévoient aucune autre procédure pour réparer ce préjudice.
(1.01) A grievance that relates to the interpretation or application, in respect of a member, of a provision of a collective agreement or arbitral award must be presented under the Federal Public Sector Labour Relations Act.	**(1.01)** Tout grief qui porte sur l'interprétation ou l'application à l'égard d'un membre de toute disposition d'une convention collective ou d'une décision arbitrale doit être présenté sous le régime de la Loi sur les relations de travail dans le secteur public fédéral.
(1.1) A member is not entitled to present a grievance in respect of which an administrative procedure for redress is provided under any other Act of Parliament, other than one provided for in the Canadian Human Rights Act.	**(1.1)** Le membre ne peut présenter de grief si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception d'un recours administratif prévu par la Loi canadienne sur les droits de la personne.
(1.2) Despite subsection (1.1), a member is not entitled to present a grievance in respect of the right to equal pay for work of equal value.	**(1.2)** Malgré le paragraphe (1.1), le membre ne peut présenter de grief relativement au droit à la parité

	salariale pour l'exécution de fonctions équivalentes.
(1.3) A member is not entitled to present a grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.	**(1.3)** Le membre ne peut présenter de grief portant sur une mesure prise en vertu d'une instruction, d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.
(1.4) For the purposes of subsection (1.3), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, direction or regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.	**(1.4)** Pour l'application du paragraphe (1.3), tout décret du gouverneur en conseil constitue une preuve concluante de ce qui y est énoncé au sujet des instructions, directives ou règlements établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada

[31] In my view, the combined effect of the foregoing provisions allows for the inclusion in a collective agreement applicable to RCMP Members provisions dealing with workplace harassment, bullying and intimidation. And, were such a provision included in a collective agreement applicable to RCMP Members, an alleged breach of the provision could be referred to the FPSLREB for adjudication.

[32] On July 12, 2019, the FPSLREB certified the National Police Federation as bargaining agent on behalf of a national bargaining unit comprised of all Reservists and RCMP Members, excluding Civilian Members and those of the rank of Inspector or above, who were deemed to be managerial (*National Police Federation v. Treasury Board*, 2019 FPSLREB 74). Encompassed

in the bargaining unit therefore are the following categories of individuals: Regular and Special Constable Members, below the rank of Inspector, and Reservists.

[33] As of the date this appeal was argued, a collective agreement had not yet been finalized by the parties in respect of this bargaining unit, but a posting on the website of the Minister of Public Safety and Emergency Preparedness indicates that an agreement in principle has recently been reached, which is out for ratification (https://www.canada.ca/en/public-safety-canada/news/2021/06/government-of-canada-reaches-first-collective-agreement-for-rcmp-members-and-reservists.html).

[34] In 1988, amendments to the *Royal Canadian Mounted Police Regulations,* SOR/88-361, as repealed and replaced by SOR/2014-281, s. 58, introduced the rank of Special Constable Member. Special Constable Members are engaged to perform specific functions (such as escorting prisoners or guarding certain sites, like embassies or the Prime Minister's residence) as opposed to performing the full range of police duties. HRMS indicates that, as of the date materials were sworn for filing with the Federal Court, there have been 1,646 Special Constable Members of the RCMP. They were previously excluded from collective bargaining, but, as noted, since July 2019 have been included within the national bargaining unit of RCMP Members certified by the FPSLREB.

[35] The RCMP engages Reservists to temporarily fill Regular Member vacancies for periods of up to three years. Only former RCMP Regular Members or police officers from provincial or municipal police forces are eligible to be Reservists. As noted, Reservists are included in the

same national bargaining unit as Regular and Special Constable Members that was certified by the FPSLREB in July 2019. HRMS indicates that, as of the date materials were sworn for filing with the Federal Court, there have been 612 Reservists.

[36] Civilian Members of the RCMP are appointed to their positions under the RCMP Act, but are appointed to a position as opposed to a rank. They provide support for RCMP operations through operational, scientific and other technical expertise. HRMS indicates that, as of the date materials were sworn for filing with the Federal Court, there have been 7,902 Civilian Members of the RCMP. They were likewise previously excluded from collective bargaining, but were afforded the right to engage in collective bargaining under the same 2017 amendments to the FPSLRA that extended the right to unionize to RCMP Regular Members, Special Constable Members and Reservists.

[37] The Public Service Alliance of Canada (the Alliance) was certified by the FPSLREB on November 26, 2020 for 14 occupational groups of Civilian RCMP Members: *Public Service Alliance of Canada v. Treasury Board*, 2020 FPSLREB 105, *Public Service Alliance of Canada v. Treasury Board*, 2020 FPSLREB 106, *Public Service Alliance of Canada v. Treasury Board*, 2020 FPSLREB 107, *Public Service Alliance of Canada v. Treasury Board*, 2020 FPSLREB 108, *Public Service Alliance of Canada v. Treasury Board*, 2020 FPSLREB 109. Each group has been included within the larger bargaining units represented by the Alliance for such groups within the federal public service. RCMP Civilian Members are subject to the same collective agreements that apply to the federal public service in these bargaining units. It is impossible to ascertain from the materials that were before the Federal Court or that are in the reported case

law of the FPSLREB whether the foregoing certification orders encompass all groups of non-managerial Civilian Members of the RCMP.

(b) *Civilian employees*

[38] Turning now to the non-RCMP Members of the class certified by the Federal Court, the RCMP Act authorizes the Commissioner of the RCMP to employ civilian employees necessary for carrying out the functions and duties of the RCMP. Pursuant to section 10 of the RCMP Act, such employees are, and for some time have been, appointed under the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13. Since 1994, these employees have included indeterminate public service employees (*i.e.* those occupying permanent positions), term employees, casual employees, seasonal employees and students. The majority of these employees are included within federal public service bargaining units.

[39] Under the amendments made on consent to the Federal Court's certification order in the instant case, public service employees who have the right to file grievances under section 208 of the FPSLRA are excluded from the class. Under the FPSLRA, those who cannot file such grievances (and who accordingly come within the scope of the class certified by the Federal Court in the case at bar) are those who do not meet the definition of "employee" in section 206 of that Act. These include those regularly working less than one-third the normal hours of work (typically, those working less than 12.5 hours per week), those employed on a casual basis, those employed for terms of less than three months and students (FPSLRA, paras. 206(1)(*c*), (*e*), (*f*) and (*h*).)

[40] There is no indication from the materials that were before the Federal Court whether the RCMP employed anyone who regularly worked less than one-third the normal hours per week.

[41] Temporary civilian employees were utilized by the RCMP to perform specific functions for a specific period of time. Effective November 28, 2014, the RCMP was no longer entitled to employ temporary civilian employees. Instead, since then, it has engaged casual or term employees to fill its short-term needs.

[42] The HRMS data is less complete for civilian employees than it is for RCMP Members. It indicates that, as of the date materials were sworn for filing with the Federal Court, there have been the following individuals who were engaged by the RCMP, some of whom would come within the scope of the amended class: 4,130 casual employees; 179 term employees employed for less than three months; prior to 1994, 2,533 temporary civilian employees working on an as and when required basis; prior to 2014, 1,867 other temporary civilian employees; 60 seasonal employees; and 1,374 students.

(c) *Non-employees*

[43] Coming within the scope of the class certified by the Federal Court are also the following categories of individuals, none of whom were, or are, employed by the RCMP or in the federal public service: independent contractors; employees of subcontractors, such as employees of the Corps of Commissionaires, who perform security functions in some detachments; employees of municipalities, who are seconded to work in some RCMP detachments; volunteers and

employees of non-profit organizations, who might provide services like victim counselling, crime watch or neighbourhood watch services; Auxiliary Constables; Supernumerary Special Constables; and cadets. The class also included recruits, a category that was abolished in 1994.

[44] The final four categories require some explanation. Auxiliary Constables, utilized only in some provinces, are volunteers, who may participate in activities such as safety education, crime prevention or assisting RCMP members at major events, with activities like traffic control or general duty patrol.

[45] Supernumerary Special Constables are typically members of municipal police forces outside their home jurisdictions or of foreign security services and are designated as Supernumerary Special Constables to acquire the ability to exercise the authority of a peace officer on a temporary basis while working on policing matters with RCMP Members. The RCMP Commissioner has authority to designate individuals as Supernumerary Special Constables for a period not exceeding twelve months. Supernumerary Special Constables remain employed by their home organizations during the period of the designation.

[46] Before 1994, recruits were RCMP Members and were trained at an RCMP training facility and then gradually assumed the duties expected of RCMP Regular Members. In 1994, the Cadet Training Program, a new form of induction into the RCMP, was established. Cadets are trained at a centralized training facility in Regina, Saskatchewan and are students as opposed to employees. Upon successful completion of their courses and passing applicable security and

reliability screening criteria, they may be offered a position as a Regular Member, in which case they will undergo further training and be subject to probation for two years.

[47] Some of the foregoing categories of personnel employed by other organizations include individuals who are unionized and subject to collective agreements between their own bargaining agents and employers, as would be the case, for example, with many municipal employees and many members of municipal police forces.

[48] HRMS indicates that, between 1998 and the date materials were sworn for filing with the Federal Court, there have been in excess of 167,000 individuals who would fall within the class certified by the Federal Court who had no employment relationship with the RCMP. Given the unlimited class period established by the Federal Court, it is to be anticipated that there would likely be several hundreds of thousands more who would come within the scope of the certified class as part of these non-employee groups.

(2) Evidence Before the Federal Court Regarding Instances of Harassment, Intimidation and Bullying in RCMP Workplaces

[49] I turn next to detail the relevant evidence before the Federal Court regarding the alleged systemic non-sexual harassment, bullying and intimidation in RCMP workplaces.

[50] The two representative plaintiffs detail in their affidavits their own experiences with bullying, harassment and intimidation and provide their impressions of the general work climate prevalent within the RCMP. As noted, both are Regular Members of the RCMP.

[51] Mr. Greenwood relayed that he experienced harassment and incidents of retaliation when he raised concerns over potential corruption within the RCMP, while working in Yellowknife between 2005 and 2010. As a result of what he alleges were retaliatory and unfounded Code of Conduct complaints launched against him in response to his reports of corruption, he says he was ineligible for promotion and blocked from obtaining other positions. He filed a harassment complaint under the RCMP's Harassment Policy, but it was dismissed by senior RCMP officers in the Division where he worked, even though an external review indicated that several of his concerns were ones that could be grieved. Mr. Greenwood states that he felt incapable of pursuing the matter further and that the incidents he experienced have plagued him since, causing his career to stagnate. He also asserts that his physical and psychological health were negatively impacted as a result.

[52] Mr. Greenwood applied for and was awarded disability benefits under the *Pension Act*, R.S.C. 1985, c. P-6, which provides for compensation to RCMP Members in respect of service-related disabilities. A portion of the benefits were awarded for post-traumatic stress disorder. A questionnaire submitted in respect of his application for PTSD-related benefits indicated that Mr. Greenwood's psychological health was negatively impacted by traumatic events he experienced in connection with the death of a colleague, with whom he was working on an undercover operation. While the questionnaire mentions nightmares and other symptoms associated with the unfounded complaints brought against him, it is unclear whether the benefits awarded for PTSD were awarded by reason of the same facts as he relies on in support of his claim in this proceeding.

[53] Mr. Gray described several instances of bullying, intimidation and harassment. While assigned to perform between 1995-1998 in the RCMP equestrian show, the Musical Ride, he says he was forced to ride in the trailer with the horses, and believes he was treated differently for speaking out against what he felt was an unsafe practice. On two occasions, he felt exposed when a female corporal entered the male showers while he was naked, and, although he wondered why this was allowable, says he felt he could not say anything as she was one of the people who would be completing his assessment. In addition, he was twice wrongfully accused of stealing a horse blanket. Further, an RCMP sergeant once struck Mr. Gray under his ribs with the tip of a metal tipped riding crop, apparently because he thought Mr. Gray had mocked the Musical Ride. Mr. Gray was bruised and sought medical treatment. He believes he was punished as a result of reporting the incident. For his last year on the RCMP Musical Ride, Mr. Gray was provided with a horse who he says was known to buck and kick other horses, and he sustained injuries when the horse reared up and they both fell. He also says he was also forced to ride after injuring his back, which exacerbated his injury, and was humiliated by being forced to wear a blazer that was too small for him.

[54] Later, while posted in Nunavut between 2000 and 2002, Mr. Gray reported inappropriate treatment of indigenous people by denouncing the behaviour of an RCMP corporal. Mr. Gray says he suffered retaliation, was denied promotional opportunities as a result and that the environment in the detachment became so toxic that he sought relief work in other units. He claims that his wife, who worked in the detachment as an employee of the Corps of Commissionaires, suffered discrimination after Mr. Gray denounced the corporal. He states that his wife was denied the opportunity to continue to work when she became pregnant, even though

other pregnant women continued to work in similar positions in the detachment. He advances her treatment in support of a claim under the FLA.

[55] In October 2016, while working in Hinton, Alberta, a harassment complaint was filed against Mr. Gray, which was later held to be unfounded. Mr. Gray believes the RCMP handled the situation poorly. Following the complaint, Mr. Gray says he was excluded and ostracized. Mr. Gray believes his reputation, health and career prospects have been negatively affected as a result of these events.

[56] Mr. Gray also applied for and was awarded disability benefits under the *Pension Act*, a portion of which were for musculoskeletal injuries, including back and knee injuries. He did not make a claim under the *Pension Act* for psychological injuries.

[57] Both representative plaintiffs provided generalized assertions that other class members have experienced instances of bullying, intimidation and harassment and claimed that they have witnessed bullying behaviour on the part of other RCMP Members, including those in positions of leadership, with whom they have worked. However, with the exception of the evidence about Mr. Gray's wife, neither gave any details of what category of employee or individual might have been subjected to such alleged bullying, harassment or intimidation nor of the impact on others of the alleged toxic work environment in RCMP workplaces. And, as noted, Mr. Gray alleged his spouse was singled out for discriminatory treatment as a retaliatory measure against him.

[58] The employee of the law firm acting for the representative plaintiffs indicated in her evidence that the firm had received inquiries from several hundred individuals who would fall within the scope of class certified by the Federal Court, but, once again, no details were given as to their experiences.

[59] The employee of the law firm, as noted, attached a number of reports to her affidavit (collectively, the Reports), namely: a June 2007 Report entitled “A Matter of Trust”, authored by an independent investigator appointed by the Minister of Public Safety and the President of the Treasury Board, who investigated irregularities in respect of RCMP pension and insurance matters and documented harassment experienced by the individuals who reported the irregularities; a December 2007 report entitled “Rebuilding the Trust” from a multi-member task force established by the Minister of Public Safety and the President of the Treasury Board, which made recommendations on governance and cultural change within the RCMP in the wake of the previous report; a 2012 report from the RCMP on gender-based harassment entitled “Summary Report on Gender Based Harassment and Respectful Workplace Consultations”; a February 2013 report from the Commission for Public Complaints Against the RCMP entitled “Public Interest Investigation into RCMP Workplace Harassment”; a 2013 report from the Senate Standing Committee on National Security and Defence entitled “Conduct Becoming: Why the Royal Canadian Mounted Police Must Transform its Culture”; a 2014 report presented by a Member of Parliament and a Senator entitled “Shattered Dreams: Addressing Harassment and Systemic Discontent within the RCMP”; a March 2017 report from the former Auditor General entitled “Review of four cases of civil litigation against the RCMP on Workplace Harassment”; a February 2017 report from the Office of the Auditor General of Canada entitled “Mental Health

Support for Members – Royal Canadian Mounted Police"; and, finally, an April 2017 report from the Civilian Review and Complaints Commission for the RCMP entitled "Report into Workplace Harassment in the RCMP".

[60] Some of the Reports document the existence of a workplace culture that permitted bullying and harassment to occur within the RCMP as well as a dysfunctional grievance process that failed to adequately respond to complaints of harassment filed by RCMP Members and public service employees assigned to work with the RCMP. On the latter point, several Reports document Members' concerns about the negative impact speaking out against bullying and harassment might have on their careers.

[61] However, with one exception, the Reports contain no specifics of harassment, bullying or intimidation experienced by individuals who were not Members of the RCMP or of the public service in a permanent position assigned to work with the RCMP. The one exception concerns an allegation of sexual harassment documented in 2014 "Shattered Dreams" report, which documents an allegation of sexual harassment made by an RCMP Member with respect to her experiences as a cadet while at the RCMP Training Facility in Regina.

[62] While the Reports and evidence of one of the Crown's witnesses do contain mentions of non-sexual harassment and bullying complaints made by RCMP Members and public service employees, assigned to work with the RCMP, there is no indication that any of these complaints might have been made by a public service employee falling within the scope of the amended class or by a temporary civilian employee. In other words, there is no indication that short

service employees, casual employees or student employees might have experienced similar problems with bullying and harassment. Perhaps this is not surprizing, given their shorter-term affiliations with the RCMP.

[63] Similarly, there was no evidence before the Federal Court to indicate whether the vast number of class members who were not Members or employees of the RCMP or employed in the public service might have been subject to non-sexual harassment, intimidation or bullying or experienced a toxic work environment at RCMP premises as a result of such harassment.

(3) Alternate Remedies Available

[64] In terms of the relevant factual backdrop, it is necessary to next detail the alternate recourses that might be available to class members in respect of the sort of intimidation, harassment and bullying for which redress is sought in this proceeding.

[65] For individuals employed by other employers, recourses were and currently are available under their own collective agreements or terms and conditions of employment. In most if not all Canadian jurisdictions, employers are required to maintain and enforce policies directed at preventing workplace harassment, which are enforceable via complaint and, in at least certain instances, via grievance in unionized workplaces (see, for example, *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, Part III.0.1). The evidence filed with the Federal Court is silent on the nature and efficacy of such processes.

[66] For others, the RCMP has had in place for several years policies that attempt to prevent harassment and which provide an internal redress mechanism for some class members. Under the current iteration of its harassment policy, RCMP Members, employees and public service employees (both in and excluded from the class certified by the Federal Court) are entitled to file complaints. (Previously, a separate policy applied to public service employees.)

[67] While the current policy provides for a centralized intake system and investigation of complaints, there is no recourse to independent adjudication. Final decision-making authority rests with the RCMP Commissioner. Class members who are not RCMP Members, RCMP employees or public service employees cannot file complaints under the RCMP's harassment policy. Likewise, they have no right to file grievances with the RCMP. However, the RCMP's harassment policy, like most workplace policies, does prohibit them and, indeed, anyone on RCMP premises, from engaging in conduct that violates the policy.

[68] There are additional statutory recourses for non-sexual harassment, bullying and intimidation available to at least some class members.

[69] Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2, (the Code) and the regulations under the Code, currently, the *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130 (the WPHVP Regulations), which have been in effect since January 2021, apply to the RCMP. They cast duties on the RCMP with respect to the prevention, investigation and correction of workplace violence and harassment. Previously, Part XX of the *Canada*

Occupational Health and Safety Regulations, SOR/86-304 governed employer obligations in matters of workplace violence, but did not squarely address workplace harassment.

[70] For employers the size of the RCMP, relevant duties since January 2021 of this year include the following. First, the adoption of a workplace policy on harassment and violence prevention, which must be jointly developed through the applicable joint occupational health and safety policy committee (the JOHSC) on which an equal number of employee representatives sit, who are to be appointed by the union(s) representing employees in unionized workplaces (WPHVP Regulations, s.10). Second, development or identification of training programs in respect of workplace violence and harassment jointly with the JOHSC (WPHVP Regulations, s. 12). Third, investigation of occurrences of workplace violence and harassment by investigators selected by the JOHSC, or, failing their ability to agree on an investigator, by someone named from a list compiled by the Canadian Centre for Occupational Health and Safety (WPHVP Regulations, ss. 25, 27). Fourth, implementation of investigators' recommendations to prevent a recurrence of workplace violence or harassment to which the JOHSC agrees (WPHVP Regulations, s. 31). If no agreement is reached, the employer may proceed unilaterally, provided it acts in compliance with its statutory obligations regarding workplace violence and harassment (WPHVP Regulations, s. 2). The Code also prohibits reprisal of those who complain (Code, s. 147).

[71] If an employer fails to carry out its obligations with respect to harassment and workplace violence, complaints may be made under Part II of the Code, which may be referred to an independent adjudicator, whose decisions may be appealed to the FPSLREB (Code, ss. 127.1-

129, 133; FPSLRA, s. 2, para. 240(1)(ii)). In addition, an employer may be subject to prosecution for failure to comply with Part II of the Code (Code, s.148).

[72] The *Public Servants Disclosure Protection Act,* S.C. 2005, c. 46 (the PSDPA) provides a mechanism for RCMP members and public service employees to disclose wrongdoings and obtain protection from reprisal for such disclosures. Disclosures may be made to the Public Sector Integrity Commissioner, who may investigate and recommend corrective action (PSDPA, ss. 19, 22). The Commissioner is also required to report systemic problems giving rise to wrongdoing to Parliament (PSDPA. s. 38). Complaints of reprisal may be made to the Public Servants Disclosure Protection Tribunal, which is comprised of federally-appointed judges (PSDPA, s. 20.4).

[73] RCMP Members are subject to the RCMP's Code of Conduct, set out in the Schedule to the *Royal Canadian Mounted Police Regulations, 2014,* SOR/2014-281. It prohibits inappropriate conduct, including harassment, intimidation and bullying. Complaints may be filed when a Member is alleged to have breached the Code of Conduct. Decisions rest ultimately with the RCMP Commissioner (RCMP Act, ss. 45.11 – 45.15 *Commissioner's Standing Orders (Conduct),* SOR/2014-291; *Commissioner's Standing Orders (Grievances and Appeals),* SOR/2014-289).

[74] RCMP Members also are afforded the right to grieve decisions made by the Force that impact them, other than harassment complaints, which for the last several years have been exclusively dealt with as grievances under the separate harassment policy (*Commissioner's*

Standing Orders (Investigation and Resolution of Harassment Complaints), SOR/2014-290). Such grievances cannot be referred to binding third party adjudication as final decision-making authority rests with the RCMP Commissioner, whose decisions may be judicially reviewed before the Federal Court (RCMP Act, Part III; *Commissioner's Standing Orders (Grievances and Appeals)*).

[75] With the possible exception of the mechanisms under Part II of the Code and the applicable regulations in a unionized environment, none of the foregoing additional statutory recourses falling outside a collective agreement would provide the degree of anonymity or collective representation that a class proceeding might provide to class members. However, such collective representation, and, depending on the circumstances, anonymity, would be available in a grievance arising under a collective agreement, which, as noted, may be referred to adjudication before the FPSLREB.

II. The Reasons of the Federal Court

[76] With this background in mind, I turn now to review the reasons of the Federal Court.

[77] The Federal Court divided its analysis into two parts. It first dealt with the Crown's request that it decline jurisdiction to certify the action and secondly considered whether the representative plaintiffs met the certification test set out in rule 334.16(1) of the *Federal Courts Rules*.

[78] On the first point, the Crown argued that the Federal Court should decline to certify the proceeding because there are legislative remedies and internal processes within the RCMP available to address the issues the representative plaintiffs wished to have certified, namely, those processes outlined above. The Federal Court cited a number of cases the Crown relied on in which courts have declined jurisdiction, including *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146 [*Vaughan*], *Lebrasseur v. Canada*, 2006 FC 852, 296 F.T.R. 166, 2006 CarswellNat 1934, aff'd 2007 FCA 330 [*Lebrasseur #1*], *Desrosiers v. Canada (Attorney General)*, 2004 FC 1601, 266 F.T.R. 7, 2004 CarswellNat 4124 [*Desrosiers*] and *Galarneau v. Canada (Attorney General)*, 2005 FC 39, 306 F.T.R. 1 [*Galarneau*].

[79] The Federal Court dismissed these arguments. It was not convinced that the circumstances were comparable to those arising in the cases cited by the Crown as the proposed claims were not "ordinary" employment disputes and did not relate to pension or benefits issues. It also noted that none of the cases relied on by the Crown were class proceedings. It further held that the Reports supported the allegations that there are widespread and pervasive systemic issues with the internal dispute resolution processes within the RCMP, that go beyond gender and sexual orientation-based discrimination. The Federal Court accepted that the proposed class action was an attack on the RCMP processes, including the grievance system as a whole, and was not convinced that the internal options provide an effective remedy for the claims sought to be advanced through the class proceeding. The Court therefore declined to defer to such processes for the resolution of class members' claims.

[80] Turning to the criteria set out in Rule 334.16(1) of the *Federal Courts Rules*, the Federal Court started by addressing whether the pleadings disclose a reasonable cause of action, observing that its task was "simply to answer, at a threshold level, whether the proceeding can go forward as a class proceeding", assuming the facts outlined in the statement of claim to be true (at para. 41).

[81] The Federal Court noted that courts have recognized systemic negligence claims in *Davidson v. Canada (Attorney General)*, 2015 ONSC 8008, 262 A.C.W.S. (3d) 648 [*Davidson*] and *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 [*Rumley*] and that claims of systemic harassment within the RCMP were found to meet the cause of action requirement in *Merlo v. Canada*, 2017 FC 533, 281 A.C.W.S. 3(d) 702 [*Merlo*], and *Tiller v. Canada*, 2019 FC 895, 307 A.C.W.S. (3d) 470 [*Tiller*]. It dismissed the Crown's suggestion that the decisions of the Ontario Court of Appeal in *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 145 O.R. (3d) 494 [*Merrifield #2*], and *Piresferreira v. Ayotte*, 2010 ONCA 384, 319 D.L.R. (4th) 665 [*Piresferreira*] established that there was no cause of action, holding that "the Crown in relying on these cases has taken too narrow an interpretation of the nature of the claims proposed" which "were not 'just' workplace disputes" but claims for systemic negligence that attacked "the very processes and systems that the Crown claims should provide a remedy" (at para. 48). The Federal Court accordingly was not convinced it was plain and obvious that the claims would fail; to the contrary, it was satisfied that a reasonable cause of action had been established.

[82] While, at paragraph 49 of its Reasons, the Federal Court mentioned the evidence before it in support of its determination that the pleadings disclosed a reasonable cause of action, such mention was offered as additional support for its conclusion that the first criterion for certification had been met.

[83] Regarding the identifiable class requirement, the Federal Court held that all class members shared characteristics of professional involvement with the RCMP and being subject to its internal policies, which bore a rational connection to the systemic negligence claim. The Court rejected its understanding of the Crown's argument that the class is overly broad and includes individuals whose claims are statutorily barred under the FPSLRA. It found that the size of the class alone is not a ground to deny certification and that the argument that some claims may be barred was a defence that the Crown could raise, but not a ground to deny certification.

[84] The Federal Court went on to find that the common issues would serve to advance the resolution of each class member's claim. Noting the evidentiary requirement was low, it found the facts outlined in the Statement of Claim and in the Reports were sufficient to meet the "some basis in fact" requirement.

[85] As for the inquiry into whether a class proceeding was the preferable procedure for the just and efficient resolution of the common questions, the Court pointed to the relevant factors set out in Rule 334.16(2) and emphasized that the preferability analysis considers three principal goals, namely, judicial economy, behaviour modification and access to justice. It observed that because the cause of action was framed as systemic negligence, the common questions of fact

and law would necessarily predominate. In addition, the Court noted in paragraph 76 that a class proceeding "would likely mitigate the difficulties faced by members of the class coming forward with their claims, without fear of reprisal". In terms of judicial economy, it noted that "even if some of the class members have internal mechanisms to exhaust, others may not" and without a class action "there would most certainly be duplication of fact-finding and legal analysis" (at para. 77). The Court held that a class proceeding also favoured access to justice. It was therefore satisfied that the class proceeding was the preferable procedure to address the class members' claims.

[86] With respect to the appropriateness of the proposed representative plaintiffs, the Federal Court did not accept the Crown's argument that they were statutorily barred from advancing a claim by reason of the *Pension Act* and section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985 c. C-50 (the CLPA). The Court found it was premature to assess the applicability of section 9 at the certification stage because it was not obvious that the representative plaintiffs were receiving or would receive a pension for reasons that have the same factual basis as the proposed common issues. The Federal Court noted that the Crown would be able to raise these issues as defences. It was thus satisfied that the representative plaintiffs would serve as satisfactory representatives of the class.

III. Issues

[87] I turn next to set out the several issues raised by the Crown in this appeal. It submits that the Federal Court erred in law in:

1) confusing the evidentiary standards for determination of the initial jurisdictional question and the reasonable cause of action standard with the "some basis in fact' standard for the remaining four branches of the certification test;

2) its admission of and reliance on the Reports in respect of the jurisdictional and cause of action requirements;

3) failing to provide adequate reasons;

4) assuming jurisdiction as the case is indistinguishable from *Vaughan* and similar cases, where jurisdiction has been declined and further erred in its jurisdictional analysis as it failed to follow the approach the Crown submits is mandated by the decision of the Supreme Court of Canada in *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666 [*Bisaillon*],which requires the Court to first assess the individual circumstances of each plaintiff before deciding to exercise jurisdiction;

5) finding that the negligence claim had a reasonable prospect of success and more specifically erred in:

   a. finding that there exists a reasonable cause of action in negligence related to workplace harassment;

   b. presuming that different requirements apply to a claim framed as systemic negligence; and

c. finding that the alleged class-wide duty of care is sustainable at law.

[88] The Crown further submits that the Federal Court made palpable and overriding errors of fact or of mixed fact and law in:

1) finding that there were systemic deficiencies in the recourse mechanisms available to class members as there was no admissible evidence upon which such a finding could be made;

2) finding that there was some basis in fact for the scope of the class certified;

3) finding some basis in fact for the common issues in that:

   a. they are so broad that they are incapable of resolution in an efficient or reasonable manner,

   b. they are not a substantial ingredient of each member's claims and will not advance class members' claims; and

   c. the common questions relating to liability and aggregate damages are inappropriate as causation can only be determined individually;

4) finding some basis in fact to show the plaintiffs had viable claims; and

5) finding some basis in fact that a class proceeding is the preferable procedure.

IV. Analysis

[89] The appellate standards of review from *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 apply to an order certifying an action as a class proceeding, such that errors of law are reviewable for correctness whereas errors of fact or of mixed fact and law, from which a legal error cannot be extricated, are reviewable for palpable and overriding error. I will turn first to the various errors of law that the Crown alleges the Federal Court made.

A. *Did the Federal Court err in its choice of evidentiary standards and in its use of the Reports?*

[90] The Crown first submits that the Federal Court erroneously applied the "some basis in fact" standard for the assessment of the jurisdictional and cause of action issues and erred in relying on the contents of the Reports in respect of these issues. On the latter point, the Crown submits that, "while the Reports may be used in addition with other admissible evidence in establishing some basis in fact for certification requirements, statements in these public reports are not admissible for the truth of their contents and should not have been relied upon in determining the jurisdictional question or the cause of action requirement" (Crown's Memorandum of Fact and Law at paragraph 28).

[91] It is true that the Federal Court mentioned the Reports as "providing the necessary evidence to support a reasonable cause of action" at paragraph 49 of its Reasons. This is an error of law because no evidence is admissible on this issue. Rather, the principles for assessment of the first criterion for certification are the same as those applicable on a motion to strike. The facts alleged in the statement of claim are presumed to be true, and no evidence may be considered. The test is whether it is "plain and obvious" that the pleadings, assuming the facts pleaded to be

true, disclose no reasonable cause of action: see, e.g. *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, [*Hollick*] at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corproation* 2013 SCC 57, [2013] 3 S.C.R. 477 [*Pro-Sys*] at para. 63; *Canada (Attorney General) v. Jost* 2020 FCA 212 [*Canada v. Jost*] at para. 29; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321 [*Hunt v. Carey*] at p. 980.

[92] Although the Federal Court erroneously referred to the Reports in paragraph 49 of its Reasons, it did not premise its determination on the cause of action requirement on this evidence but rather centred its analysis on whether, as a matter of law, the pleadings disclosed a cause of action. Its mention of the Reports was only made in passing.

[93] Thus, on a fair reading of the Federal Court's reasons, it relied on the Reports only in respect of the jurisdictional issue and the final four criteria for certification but not in respect of the cause of action requirement. Moreover, it applied the "some basis in fact" standard only to the final four criteria for certification.

[94] For the final four criteria for certification (identifiable class, common questions, preferable procedure and character of the representative plaintiff(s)), plaintiffs bear the burden of adducing evidence to show "some basis in fact" that these criteria have been met: *Hollick*, at para. 25; *Pro-Sys*, at para. 99; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 [*Fischer*] at para. 40. This threshold is lower than the balance of probabilities as certification is not the appropriate stage to resolve conflicts in the evidence. That said, the lower standard does require the plaintiff to lead enough evidence to satisfy the certification judge that the

requirements for certification have been met such that the proceeding should be allowed to be proceed: *Pro-Sys*, at paras. 102-105. As noted by Chief Justice Winkler in *McCracken v. Canadian National Railway Company*, 2012 ONCA 445, 111 O.R. (3d) 745, at paras. 75-76, cited with approval by the Supreme Court in *Fischer*, at para. 41:

> The "some basis in fact" principle is meant to address two concerns. First, there is a requirement that, for all but the cause of action criterion, an evidentiary foundation is needed to support a certification order.
>
> Second, in keeping with the procedural scheme of the [Class Proceedings Act], the use of the word "some" conveys the meaning that the evidentiary record need not be exhaustive, and certainly not a record upon which the merits will be argued.

[95] Evidence is admissible on a jurisdictional issue such as that which arose in this case, where the Court is asked to decline to exercise its jurisdiction in favour of alternate administrative processes. Evidence as to the nature and efficacy of the suggested alternate processes is necessary to provide a basis for the Court's determination of whether it ought to decline jurisdiction in favour of the alternate administrative remedies. A ruling on this sort of issue cannot be made in a factual vacuum: see, e.g., *Mil Davie Inc. v. Société d'Exploitation et de Développement d'Hibernia Ltée*, 226 N.R. 369, 85 C.P.R. (3d) 320, [1998] CarswellNat 814, at paras. 7-8; *Lebrasseur #1*, at para. 15).

[96] As the respondent rightly notes, evidence similar to the Reports has frequently been relied on in certification matters, along with other evidence, to support that there is some basis in fact for the final four criteria for certification: see, e.g. *Johnson v. Ontario*, 2016 ONSC 5314, 364 C.R.R. (2d) 17, at paras. 50-67; *Bigeagle v. Canada*, 2021 FC 504, 2021 CarswellNat 2031, at paras. 37-47; *R.G. v. The Hospital for Sick Children*, 2017 ONSC 6545, 2017 CarswellOnt

16865, at paras. 22-27, aff'd on other grounds 2018 ONSC 7058 (Ont. Div. Ct.); *Gay et al. v. Regional Health Authority 7 and Dr. Menon*, 2014 NBCA 10, 421 N.B.R. (2d) 1, at para. 18.

[97] Indeed, the Crown recognizes that the Reports could be admitted on this basis to establish, along with other evidence, that the final four criteria for certification were met. Here, there was such other evidence from the representative plaintiffs in respect of their own situations and observations. The Federal Court thus did not err in admitting and relying on the Reports along with the evidence from the representative plaintiffs in consideration of the final four criteria for certification.

[98] Given this, I see no error in the Federal Court's having likewise considered the Reports on the jurisdictional issue, which raises questions that are very similar, if not identical, to the preferable procedure criterion for certification.

[99] I accordingly do not believe that the Federal Court made a reviewable error of law in its consideration of the Reports.

B. *Are the reasons provided by the Federal Court adequate?*

[100] The Crown next contends that the Federal Court's reasons do not adequately demonstrate how it arrived at its conclusions, particularly in relation to the application of a class-wide exception to the *Vaughan* principle, acceptance of the proposed duty of care that the Crown

alleges has been soundly rejected by leading appellate authority and the conclusion that the common issues will predominate over numerous and complex individual issues.

[101] While none of these issues is explored in any detail by the Federal Court in its reasons, I do not believe that the certification order should be set aside due to inadequacy of the reasons, which, in any event, would not grant the Crown the remedy it seeks of having the certification order finally set aside. Reasons serve many purposes, including explaining the result and why the party who lost was unsuccessful, providing the basis for meaningful appellate review and satisfying the public that justice has been done: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 35, and *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 98. In the context of a civil appeal, the most important purpose of a trial court's reasons is to permit meaningful appellate review, as the Ontario Court of Appeal recently noted in *Manos v. Riotrin Properties (Flamborough) Inc.*, 2020 ONCA 211, 2020 CarswellOnt 3794, at para. 11.

[102] In the present case, where the Federal Court was not called upon to weigh competing evidence or to make credibility determinations, meaningful appellate review is possible in respect of each of the issues raised by the Crown before this Court. Thus, the alleged inadequacy of the Federal Court's reasons does not provide a basis for intervention. The Crown's concerns can be adequately addressed by this Court through consideration of the issues the Crown raises.

C. *Did the Federal Court err in assuming jurisdiction?*

[103] I turn next to the Crown's argument that the Federal Court erred in declining to follow *Vaughan*, *Bisaillon* and several other cases where courts have declined to hear workplace claims from plaintiffs subject to the FPSLRA (or the predecessor version of that statute) or to a collective agreement governed by other labour legislation. In this regard, the Crown relies, in addition to *Vaughan* and *Bisaillon*, on *Prentice v. Canada*, 2005 FCA 395, 346 N.R. 201, leave ref'd [2006] SCCA No 26 [*Prentice*]; *Moodie v. Canada*, 2008 FC 1233, 336 F.T.R. 269, aff'd 2010 FCA 6 [*Moodie*]*; Lebrasseur #1*; *Lebrasseur v. Canada*, 2011 FC 1075, 418 F.T.R. 49, aff'd 2012 FCA 252 [*Lebrasseur #2*]; *Tindall et al v. Royal Canadian Mounted Police et al.*, 2018 ONSC 4365 [*Tindall*]; *K.A. v. Ottawa (City)*, 80 O.R. (3d) 161 (CA), 269 D.L.R. (4th) 116; *Desrosiers*; *Galarneau*; *Rivers v. Waterloo Regional Police Services Board*, 2018 ONSC 4307; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360.

[104] The seminal case giving rise to this line of authority is the decision of Supreme Court of Canada in *Syndicat Catholique des Employés de Magasins de Québec Inc. v. Paquet Ltée*, [1959] S.C.R. 206, 18 D.L.R (2d) 346 at p. 212. It holds that, for employees covered by a collective agreement, the parties to the agreement are the employer and union and there is no room for individual contracts of employment. Claims for breach of contract by or against unionized employees therefore cannot be maintained.

[105] This principle was reinforced in the subsequent decisions of the Supreme Court of Canada in several cases, including *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, 54 D.L.R. (3d) 1, at p. 726, *General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537, 13 N.R. 233, at p. 548, *St. Anne Nackawic Pulp & Paper v. CPU*, [1986] 1 S.C.R. 704, 73 N.B.R. (2d) 236, at p. 718, and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 24 O.R. (3d) 358 [*Weber*] at para. 67. The latter two cases further hold that exclusive authority to interpret and apply a collective agreement generally rests with labour arbitrators by virtue of mandatory arbitration provisions in the relevant labour legislation and that a party consequently cannot sue in tort or under the *Charter* for claims that arise expressly or inferentially from the collective agreement.

[106] In *Weber*, writing for the majority at paragraph 67, Justice McLachlin (as she then was) stated the relevant principles as follows:

> I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario Labour Relations Act generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charter remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal.

[107] In *Vaughan* and *Bisaillon*, which the Crown principally relies on, the respondent employers sought to apply the exclusive jurisdiction model to claims by unionized employees arising under benefit and pension plans. *Bisaillon* was a proposed class proceeding where the plaintiff was subject to Quebec labour legislation, whereas Mr. Vaughan was a federal public servant.

[108] *Vaughan* more specifically concerned a claim seeking compensation under a complex workforce reduction plan that had not been incorporated into the collective agreement applicable to Mr. Vaughan but was instead provided by regulation. As noted, under the FPSLRA and predecessor versions of that statute, employees, like Mr. Vaughan, who possess grievance rights, are entitled to grieve decisions denying them benefits under plans outside the collective agreement but cannot refer such grievances to adjudication. Rather, such grievances are subject to determination by the employer's grievance authority (in that case a Deputy Minister), whose decisions may be judicially reviewed before the Federal Court. (As noted, RCMP Members possess similar grievance rights.)

[109] In *Vaughan*, the Supreme Court of Canada held that the Federal Court possessed jurisdiction over Mr. Vaughan's claim, but held that the courts below did not err in declining to exercise such jurisdiction in light of the statutory scheme for adjudication of grievances established under federal public sector labour legislation. The Court in *Vaughan* determined that it would undermine such scheme if it allowed Mr. Vaughan's civil claim to proceed. Writing for the majority on this point at paragraph 26, Justice Binnie noted:

> Moreover, in the usual labour relations context, many issues are reserved to the discretion of management. Not every dispute is necessarily grievable, much less arbitrable. There is nothing objectionable, in my view, in putting benefits earned through collective bargaining (such as a salary) on a different footing in terms of dispute resolution than benefits unilaterally conferred by regulation. The fact that only the former may go to arbitration (if the union wishes) reflects their different origins. When a benefit is conferred by statute or regulation, the conferring legislature is entitled to specify the machinery for its administration (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch*), [2001] 2 S.C.R. 781, 2001 SCC 52), subject to a dissatisfied party having recourse to judicial review.

[110] In so deciding, however, the Supreme Court stated that it was not purporting to set up an absolute rule such that workplace claims made by federal public servants could never be heard by the courts. Rather, it accepted that, in a narrow range of cases, a court could exercise its discretion to hear such claims. It offered the example of the harassment claim of a whistle-blower as an example of a case where a court might appropriately choose to hear a civil claim from a federal public servant as, in such circumstances, the grievance mechanism would not provide effective redress (at paras. 18-25).

[111] In *Bisaillon*, a unionized employee, working for Concordia University, commenced a class proceeding challenging the University's funding decisions (including taking a contribution holiday) under a pension plan that applied to employees in several bargaining units and to the non-unionized employees of the University. While the relevant collective agreement provided for the pension plan, it did not contain provisions dealing with the funding issues in dispute. However, the representative plaintiff's bargaining agent had agreed to the funding decisions that he sought to challenge. Unions representing other bargaining units at the University had not agreed and supported certification of the class proceeding.

[112] The Supreme Court held that the Court of Appeal had erred in finding that the Superior Court should have assumed jurisdiction and in failing to analyze whether grievances challenging the impugned decisions might have been arbitrable. The Court of Appeal had instead focussed on the fact that other bargaining agents could not have intervened in a grievance filed by the representative plaintiff. The Supreme Court held that the Court of Appeal had erred in focussing on the lack of standing of the other unions to participate in the representative plaintiff's

grievance and instead ought to have asked whether grievances that might have been filed on the representative plaintiff's behalf, had his union not agreed to the employer's funding mechanism, or by the other unions might have been arbitrable. As such grievances, according to the Supreme Court, were likely arbitrable even though the collective agreements did not specifically deal with the funding issues in dispute, the Supreme Court held that the Superior Court was correct in having declined jurisdiction over the class proceeding as its subject matter fell within the exclusive competence of labour arbitrators (at paras. 47-55). It expressed no opinion on whether a court could have accepted jurisdiction over a class proceeding seeking certification on behalf of non-unionized university employees brought by a non-unionized representative plaintiff.

[113] Turning more specifically to the most relevant post-*Vaughan* case law relied on by the Crown, in *Prentice*, *Moodie*, *Lebrasseur, Tindall, K.A.* and *Rivers*, the Federal and Ontario Courts declined to hear actions for workplace harassment brought by members of the RCMP, the Canadian Armed Forces or members of a provincial police force based on the principles set out in *Vaughan* and *Weber*. However, in *Prentice*, *Lebrasseur* and *Tindall*, the cases involving the RCMP, the decisions principally turned on other issues. In *Prentice* and the first *Lebrasseur* decision, the plaintiffs' claims were principally struck because they disclosed no reasonable cause of action and, in the second *Lebrasseur* case, because the action was an impermissible attempt to re-litigate the first decision (*Prentice*, at paras. 46-49, *Lebrasseur* #1, at para. 3, *Lebrasseur #2*, at para. 34.) In *Tindall*, summary judgment was principally granted because the claim was statute-barred (at paras. 23-25). There were different statutory regimes in place and at issue in *Moodie*, *K.A.* and *Rivers*. Thus, none of these cases is a binding authority that would have required the Federal Court to have declined jurisdiction in the case at bar.

[114] Standing in contrast to these cases relied on by the Crown, are several cases where the opposite conclusion was reached and actions for damages for workplace harassment brought by Members of the RCMP, subsequent to *Vaughan*, have been allowed to proceed, sometimes by way of class proceeding: see, *i.e.*, *Merrifield v. Canada (Attorney General)*, [2008] O.J. No. 2730, aff'd 2009 ONCA 127, leave to appeal refused, 2019 CanLII 86846 [*Merrifield #1*] *Sulz v. Minister of Public Safety and Solicitor General*, 2006 BCCA 582, 276 D.L.R. (4th) 391 [*Sulz*]*; The Attorney General of Canada et al. v. Smith*, 2007 NBCA 58, 316 N.B.R. (2d) 180 [*Smith*]*; Ladouceur c. Canada*, 2007 QCCA 1005, [2007] R.J.Q. 556; *Merlo*; *Tiller*; *Deslisle c. R.*, 2018 Q.C.C.S. 3855, 297 A.C.W.S. (3d) 248; *and Ross et al. v. Her Majesty the Queen*, Federal Court Action T-370-17 [*Ross*]. In three of these cases, *Merlo*, *Tiller* and *Ross*, the Federal Court certified class proceedings brought against the RCMP for workplace sexual harassment and harassment based on sexual orientation, albeit following the consent of the Crown to the certification orders for purposes of settlement.

[115] Central to the reasoning of several of the foregoing appellate cases was the fact that, at the time, RCMP Members could not unionize and had no access to independent third-party adjudication for their harassment grievances, which favoured granting access to the Courts.

[116] For example, in *Merrifield #1*, the Ontario Court of Appeal held at paragraphs 5-11:

> [5] The appellants submit that on a correct interpretation of *Vaughan*, the facts of this case compelled the motion judge to find that: (i) the RCMP Act and the *Commissioner's Standing Orders*, is a comprehensive regime entitled to deference by the courts; and (ii) this is not an exceptional case such that the courts should not give deference to the statutory regime.

> [6] We agree with the motion judge's decision that the appellants have not met the threshold to succeed on their motion under rule 21.01.
>
> [7] First, like the motion judge, we do not agree that the decision in *Vaughan* was intended to apply to all disputes that arise out of the employment relationship, with the exception of "whistle-blower" type cases. A harassment claim raises virtually the same credibility issues as a case of harassment due to a whistle-blowing employee.
>
> [8] Second, contrary to the appellants' arguments, the motion judge did consider whether the RCMP grievance process was a comprehensive regime. She found — correctly in our view — that this case militated against deferring to the statutory grievance process in view of the nature of the allegations made. Parenthetically, we note that other courts have held that the statutory framework of the *RCMP Act* does not oust the court's jurisdiction: for example, see *Phillips v. Harrison*, 2000 CarswellMan 648 (C.A.).
>
> [9] Importantly, the motion judge correctly noted that the RCMP grievance procedure does not have the necessary means to make findings of credibility, as it does not provide for oral hearings, and the factual findings of an investigator need not be followed by the adjudicator. Nor does the grievance procedure allow for independent third party adjudication.
>
> [10] In *Vaughan*, it was found that the grievance procedure could have provided the relief sought, namely, the provision of benefits. In the case at bar, however, the grievance mechanism cannot provide the remedies requested, namely, declarations and damages. We agree with the respondent: the facts pleaded in this case expose a "particular and individualized conflict" that cannot be resolved without a consideration of credibility by an independent third party.
>
> [11] In sum, the motion judge was entitled to find that this is an exceptional case such that the courts should not give deference to the statutory regime. She applied the correct test and committed no errors in her reasons for dismissing the appellants' rule 21 motion. Accordingly, the appeal is dismissed.

[117] To similar effect, in *Smith*, Justice Robertson, writing for the New Brunswick Court of Appeal stated at paragraph 56 that it was his opinion that "[…] an administrative scheme that does not provide for independent third party adjudication with respect to workplace harassment complaints is not owed any deference and, therefore, the general rule articulated in *Vaughan* is inapplicable".

[118] In *Sulz*, Justice Levine, writing for the British Columbia Court of Appeal, held at paragraphs 26-32:

> ***Vaughan*** concerned an action brought by a federal government employee alleging negligence by his employer in denying him early retirement benefits. […]
>
> Mr. Justice Binnie found that the legislation did not oust the court's jurisdiction, but held that the court should not exercise its "residual jurisdiction", giving deference to the statutory scheme. He determined that the absence of third party adjudication was not a sufficient reason for the court to involve itself in the dispute, which he described (at para. 23) as a "garden variety employment benefit case", and the action in tort as having "a degree of artificiality" (at para. 11).
>
> [27] The respondent relies on ***Pleau (Litigation Guardian of) v. Canada (Attorney General)*** (1999), 182 D.L.R. (4th) 373, 1999 NSCA 159, (leave to appeal to the Supreme Court of Canada dismissed [2000] S.C.C.A. No. 83) (applied by the trial judge), and ***Phillips v. Harrison*** (2000), 196 D.L.R. (4th) 69, 2000 MBCA 150. In both of those cases, the courts found they had jurisdiction in actions taken by employees against their employers despite the availability of a statutory dispute resolution scheme.
>
> [28] In ***Pleau***, the plaintiff's action was against the Attorney General of Canada and nine federal public servants for conspiracy to cause injury to him and his family in the context of his dismissal and subsequent reinstatement in the federal public service. His complaints included harassment by superiors and co-employees. […]
>
> [30] In ***Phillips***, the plaintiff, a civilian employee of the R.C.M.P., brought an action for defamation against her immediate supervisor. The complaint was investigated internally, and found not to constitute harassment. The plaintiff had the option to grieve the decision under the ***R.C.M.P. Act***, but instead she resigned and started the action. Madam Justice Steel, writing for the Manitoba Court of Appeal, found, after considering the principles in ***Weber***, that the court had jurisdiction over the claim. […]
>
> [31] In ***Vaughan***, Binnie J. did not criticize Cromwell J.A.'s analysis in ***Pleau*** of the factors the court considers in determining whether it should exercise jurisdiction in a workplace dispute. He found them inapplicable to the ***PSSRA***, on the facts in ***Vaughan***. […]
>
> [32] This case is more like ***Pleau*** and ***Phillipps*** than ***Vaughan***. The obvious difference from ***Vaughan*** is the factual difference: it does not involve a dispute over employment benefits, but a real tort claim for injuries suffered as a result of the conduct of a manager. Furthermore, most of the respondent's loss for which

> she was compensated in damages, her past and future loss of income, was not suffered during the course of the respondent's employment. Her income loss occurred after she was discharged, when she was no longer governed by, or could claim any benefit from, the grievance process under the ***R.C.M.P. Act***. The respondent's formal complaint resulted in a determination that Smith had harassed her. The internal process was then spent: there was nothing more to grieve. Nor could the internal process provide compensation for her loss. In that respect, the statutory scheme did not provide effective redress.

[119] The Federal Court's decision to accept jurisdiction over the claims advanced by the representative plaintiffs on behalf of the class certified in the case at bar is a discretionary one as was noted by this Court in *Prentice,* at paragraph 29.

[120] Accordingly, this Court may only intervene if the Federal Court erred in law by basing its exercise of discretion on an erroneous principle or made a palpable and overriding error of fact in its consideration of the factors relevant to the exercise of its discretion: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, at paras. 28 and 71-72; *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 F.C.R. 246, at paras. 18-19; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344, at para. 72.

[121] The Crown argues that the Federal Court erred in law in distinguishing *Vaughan* and the first decision in *Lebrasseur* on the basis that the instant case did not involve a pension or benefits claim. The Crown further submits that the Federal Court erred in assuming jurisdiction over a class proceeding for harassment as *Vaughan* establishes that the Court's residual jurisdiction to hear cases from those subject to a regime like the FPSLRA may only be exercised on an exceptional basis. The Crown adds that it does violence to the principles established by *Vaughan*

for the Federal Court to have accepted jurisdiction over a class composed of virtually all of an institution's employees and contractors. On the latter point, the Crown submits that the scale of the Federal Court's assumption of jurisdiction in the case at bar is unprecedented and will do permanent damage to the RCMP's labour relations and to the legislative regimes created by Parliament, precisely the result that *Vaughan* indicates is unacceptable.

[122] In the alternative, the Crown submits that *Bisaillon* required the Federal Court to first assess the claims of the representative plaintiffs to determine if it was appropriate for the Court to have accepted jurisdiction over them, a step that was omitted by the Federal Court. And, according to the Crown, had the Federal Court done so, it would have determined that the representative plaintiffs' claims do not fit within the narrow range of cases in which, under *Vaughan*, a court may decide to accept jurisdiction.

[123] In the further alternative, the Crown submits that the Federal Court made a palpable and overriding error of fact in finding that there were systemic deficiencies in the recourse mechanisms available to class members as there was no admissible evidence upon which such a finding could have been made.

[124] It is convenient to address the final point first. The Reports, which I have determined were admissible on this issue, coupled with the evidence from the representative plaintiffs, provided the Federal Court a sufficient basis for determining that there were systemic deficiencies in the internal grievance and harassment processes available to RCMP Members, employees and public service employees working for the RCMP, for at least a portion of the

class period established by the Federal Court. Such evidence supports a similar conclusion in respect of the Reservists, who occupy Member positions on a temporary basis and have such a community of interest with RCMP Members that Parliament required they be included in the same bargaining unit as RCMP Members (FPSLRA, s. 238.13).

[125] However, as noted, there was no evidence before the Federal Court as to the efficacy of redress mechanisms available to the hundreds of thousands of class members who were not RCMP Members, RCMP employees or employed in the federal public service. As noted, they cannot file grievances under the RCMP's grievance and harassment policies but do have other remedies available to them, about which the Federal Court received no evidence.

[126] The Federal Court premised its assumption of jurisdiction on the inefficacy of the recourse mechanisms available to class members. As there was no evidence before it to support a finding of inefficacy in respect of the hundreds of thousands of class members who were not RCMP Members, RCMP employees or employed in the federal public service, the Federal Court's assumption of jurisdiction in respect of these class members is tainted by palpable and overriding error and must be set aside.

[127] Turning to the remainder of the class and the Crown's first two arguments, I will address the situation of RCMP Members and Reservists, on one hand, and the remaining employees in the class, on the other, separately.

[128] In my view, the Federal Court did not commit a reviewable error in accepting jurisdiction over the claims made on behalf of RCMP Members and Reservists, but did so err in failing to set limits on the class period in respect of this group.

[129] The rationale underpinning *Vaughan* and the line of cases that rely on *Vaughan* involves the recognition by the courts that they ought not intervene in the field of labour relations, where specialized tribunals have been established by legislators for settlement of disputes. Such tribunals include grievance arbitrators, who generally possess exclusive jurisdiction over issues that arise expressly or inferentially under a collective agreement.

[130] Turning more specifically to the issues in the present appeal, a range of issues are not negotiable in the federal public sector (in contrast to the private sector). *Vaughan* and the cases that apply it hold that, in most instances, claims from employees subject to federal public sector labour legislation in respect of matters that are not adjudicable before the FPSLREB should not be heard by the courts, as this would constitute an impermissible incursion into the statutory scheme. However, an exception to this general rule allows courts to hear claims that may only be grieved under internal grievance mechanisms if the internal mechanisms are incapable of providing effective redress.

[131] There is nothing in *Bisaillon* that detracts from these principles. As noted, the Supreme Court's decision in *Bisaillon* turned on the availability of grievance arbitration for the representative plaintiff and the unionized members of the class. It does not stand for the proposition advanced by the Crown.

[132] As noted, it was open to the Federal Court to have made the factual determination that the internal recourse mechanisms available to RCMP Members and Reservists were ineffective for a portion of the class period set by the Federal Court. Under *Vaughan* and its progeny, including, notably, the decisions of other appellate Courts in *Smith*, *Merrifield* and *Sulz*, this finding, coupled with the nature of the RCMP Members' and Reservists' claims and lack of coverage under a collective agreement, provided an allowable basis for the Federal Court to have accepted jurisdiction over their claims for a portion of the class period.

[133] In terms of the commencement date of this period, the evidence that was before the Federal Court is incapable of supporting a class period commencing prior to 1995, the earliest possible date that one of the representative plaintiffs experienced harassment. 1995 was the first year Mr. Gray started with the Musical Ride, where he experienced his first instances of what he alleges were harassment, intimidation and bullying. He also deposed as to the reasons why he felt he could not seek redress under the RCMP's internal enforcement mechanisms for at least some of these incidents. The Reports all post-date 1995 by several years, the earliest one having been published in 2007. Given the lack of evidence regarding systemic problem with redress – or of any problems with harassment – prior to 1995, there was no basis upon which the Federal Court could find that the RCMP's internal enforcement mechanism were ineffective prior to 1995. It accordingly made a palpable and overriding error in allowing the class period to commence earlier than 1995.

[134] The Federal Court set no end date for the class period, but was aware that RCMP Members and Reservists had been afforded the right to engage in collective bargaining and that

in 2019 a trade union had been certified to represent many of them. The Federal Court should have been alive to the fact that this would eventually lead to a collective agreement covering this group.

[135] Given the sea change in Members' vulnerability that comes with unionization and the concomitant ability of a trade union to negotiate protections in respect of and seek redress for workplace harassment, intimidation and bullying, the Federal Court erred in assuming jurisdiction over a class period extending beyond the date a collective agreement comes or came into force for class members.

[136] In the circumstance of the present case, once a collective agreement comes into force, the principles from *Weber* are applicable and the exception mentioned in *Vaughan* can no longer obtain. At such point, an effective means of redress will be available to RCMP Members as their union may seek to have anti-harassment provisions included in the collective agreement. And, third party adjudication is available to remedy employer breaches of the collective agreement under the FPSLRA. For the purposes of *Vaughan* and the exception that it establishes, it matters not whether such a provision is actually included in the agreement; the union possesses a means to seek to obtain an anti-harassment provision through collective bargaining and, failing the employer's agreement, via interest arbitration in the case of the union representing RCMP Members and Reservists.

[137] In my view, such ability is enough to come outside the exceptional situations foreseen by *Vaughan*, where courts may accept jurisdiction over grievable but inarbitrable claims. In short,

once RCMP Members and Reservists have a collective agreement, it is no longer possible to say that there is no means available to effectively address their claims of harassment, intimidation or bullying within the narrow exception established under *Vaughan*. Once RCMP Members and Reservists are covered by a collective agreement, their circumstances will be the same as those of any other unionized employee subject to a collective agreement to whom the principles in *Weber* extend.

[138] Additionally, under the new regulations enacted under Part II of the Code, unions representing RCMP Members and Reservists will have an important role to play in curbing workplace harassment, violence and intimidation. This fact provides further support for finding that the Federal Court erred in setting no end date on the class period.

[139] Thus, the Federal Court erred in assuming jurisdiction over the claims of RCMP Members and Reservist pre-dating 1995 or arising after the date they were or become subject to a collective agreement.

[140] As concerns the remaining members of the class, namely temporary civilian, seasonal, short term, casual and student employees, I refrain from expressing an opinion as to whether the Federal Court erred in accepting jurisdiction over a class including them as, for the reasons set out below, the Federal Court committed a palpable and overriding error in including them in the class as there was no basis in fact for their claims.

[141] Considerations different from those which have led me to uphold the Federal Court's acceptance of jurisdiction in respect of the RCMP Members and Reservists may well pertain to these short term employees, given the temporary nature of their attachment to the RCMP. Moreover, a finding on this point could well have implications beyond the confines of this case. It is therefore preferable that this issue be addressed in a future case, where it squarely arises.

D. *Did the Federal Court err in finding that the negligence claim discloses a reasonable cause of action?*

[142] I turn next to the Crown's submission that the Federal Court erred in finding that class members' claims in negligence disclose a reasonable cause of action. As noted, the Crown advances three inter-connected arguments in support of this submission, namely, that the Federal Court erred in: (1) finding that there exists a reasonable cause of action in negligence related to workplace harassment; (2) presuming that different requirements apply to a claim framed as systemic negligence; and (3) finding that the alleged class-wide duty of care is sustainable at law.

[143] As also already noted, under this criterion for certification, the test to be applied is the same as on a motion to strike a pleading. It must be plain and obvious that the claim discloses no cause of action, assuming the facts pleaded in the statement of claim to be true: *Hollick*, at para. 25; *Pro-Sys*, at para. 63; *Canada v. Jost*, at para. 29; *Hunt v. Carey*, at p. 980.

[144] This an onerous test and the novelty of the claim will not, of itself, necessarily result in a claim being found to disclose no reasonable cause of action.

[145] The Crown rests its submissions on this issue primarily on the decisions of the Ontario Court of Appeal in *Piresferreira*; *Colistro v. Tbaytel*, 2019 ONCA 197, 145 O.R. (3d) 538; and *Merrifield #2*. In *Piresferreira*, the Ontario Court of Appeal found that no recovery lies in tort for the negligent infliction of mental suffering in the employment context and in *Merrifield* that there is no tort of harassment.

[146] More specifically, in *Piresferreira*, the Court had before it an appeal from a trial decision that granted an employee of Bell Canada damages for constructive dismissal and in tort for, among other things, a tort that the trial judge had described as "Negligent Infliction of Emotional Distress, Mental Suffering, Nervous Shock and/or Psycho-traumatic Disability". The plaintiff had suffered psychological injury caused by the harassment of her supervisors, which included a physical assault. Because an appellate court had not extended an entitlement to damages for negligent infliction of such harm in the employment context, the Court of Appeal undertook the analysis for the recognition of a new duty of care from *Anns v. Merton London Borough Council*, [1978] A.C. 728, as developed by the case law of the Supreme Court of Canada in *Coopers v. Hobart*, 2001 SCC 79 , [2001] 3 S.C.R. 537 and subsequent cases. This analysis asks, first, whether the relationship between the plaintiff and the defendant is sufficiently close or proximate to render injury of the type incurred reasonably foreseeable so as to justify the imposition of a duty of care and, next, whether there are countervailing policy considerations as to why a duty of care should be limited or not recognized.

[147] The Court of Appeal held that the employment relationship in that case was sufficiently proximate to have rendered the psychological damages suffered by the plaintiff reasonably

foreseeable as a result of the abusive and harassing conduct that the plaintiff had experienced at the hands of her supervisor and the actions of other members of management. However, the Court held that countervailing policy considerations prevented the recognition of recovery in negligence because the remedies open to employees in contract already provide adequate redress through a claim for wrongful dismissal or constructive dismissal. And, allowing an action in tort for less serious instances of harassment falling short of constructive dismissal, the Court reasoned, would give rise to an impermissibly broad duty of care and create an undesirable incursion into the workplace that would have the potential of undermining efficiency (at para. 62).

[148] In *Colistro*, Associate Chief Justice Hoy (as she then was) commented on *Piresferreira* as follows at paragraph 27:

> It is now well established that a plaintiff can recover in negligence for psychological injury. A plaintiff seeking recovery in negligence for mental injury must show that: (1) the defendant owed a duty of care to the claimant to avoid the kind of loss alleged; (2) the defendant breached that duty by failing to observe the applicable standard of care; (3) the claimant sustained damage; and (4) such damage was caused, in fact and in law, by the defendant's breach: *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13; *Mustapha v. Culligan of Canada*, 2008 SCC 27, [2008] 2 S.C.R. 114, at paras. 8-9. Frequently, the issue will be whether it is reasonably foreseeable that a person of ordinary fortitude would suffer the mental injury incurred as a consequence of the defendant's allegedly negligent behaviour. However, in *Piresferreira*, this court held, at paras. 50-63, that an employee cannot pursue a claim for negligent infliction of mental suffering in the employment context.

[149] As concerns the availability of recovery for mental injury in negligence generally, in 2017, in *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543 [*Saadati*], relying on its earlier decision in *Mustapha v. Culligan of Canada*, 2008 SCC 27, [2008] 2 S.C.R. 114 [*Mustapha*], the

Supreme Court of Canada confirmed that recovery lies in negligence for mental injury. However, both *Saadati* and *Mustapha* arose in contexts other than employment.

[150] In *Saadati*, writing for the Supreme Court of Canada, Justice Brown stated at paragraphs 23-24 as follows regarding the recoverability of damages for mental injury generally in negligence:

> [23] […] As to that first necessary element for recovery [in negligence](establishing that the defendant owed the claimant a duty of care), it is implicit in the Court's decision in *Mustapha* that Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one's mental health. That right is grounded in the simple truth that a person's mental health — like a person's physical integrity or property, injury to which is also compensable in negligence law — is an essential means by which that person chooses to live life and pursue goals (A. Ripstein, *Private Wrongs* (2016), at pp. 87 and 252-53). And, where mental injury is negligently inflicted, a person's autonomy to make those choices is undeniably impaired, sometimes to an even greater degree than the impairment which follows a serious physical injury (*Bourhill v. Young*, [1943] A.C. 92 (H.L.), at p. 103; *Toronto Railway*, at p. 276). To put the point more starkly, "[t]he loss of our mental health is a more fundamental violation of our sense of self than the loss of a finger" (Stevens, at p. 55).
>
> [24] It is also implicit in *Mustapha* that the ordinary duty of care analysis is to be applied to claims for negligently caused mental injury. With great respect to courts that have expressed contrary views, it is in my view unnecessary and indeed futile to re-structure that analysis so as to mandate formal, separate consideration of certain dimensions of proximity, as was done in *McLoughlin v. O'Brian*. Certainly, "temporal", "geographic" and "relational" considerations might well inform the proximity analysis to be performed in some cases. But the proximity analysis as formulated by this Court is, and is intended to be, sufficiently flexible to capture all relevant circumstances that might in any given case go to seeking out the "close and direct" relationship which is the hallmark of the common law duty of care (*Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 32, citing *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562 (H.L.), at pp. 580-81). As the Court has said, that analysis
>
> > focuses on factors arising from the relationship between the plaintiff and the defendant. . . .

[151] In *Merrifield #2*, the Ontario Court of Appeal had before it an appeal from a trial decision that awarded damages to a former RCMP Member for what the trial judge termed the tort of harassment. The trial judge found that, to ground entitlement under this tort, the plaintiff was required to establish that: (1) the conduct of RCMP management towards him was outrageous; (2) management intended to cause or had a reckless disregard for causing him mental distress; (3) he suffered extreme emotional distress; and (4) the outrageous conduct of the managers involved was the proximate cause of the distress the plaintiff suffered. The Ontario Court of Appeal set aside the decision of the trial judge, finding she had erred in law in recognizing such a tort and had made numerous palpable and overriding errors of fact that would have foreclosed recovery in any event.

[152] In terms of the availability of recovery in tort for harassment, the Ontario Court of Appeal held that Canadian law does not recognize the tort of harassment and that the case was not one "whose facts cry out for the creation of a novel remedy" (at para. 41). It further noted that adequate remedies already existed, including through the tort of intentional infliction of mental suffering. The Court reasoned as follows at paragraphs 48-53:

> [48] Plainly, the elements of the tort of harassment recognized by the trial judge are similar to, but less onerous than, the elements of IIMS [*i.e.*, the tort of intentional infliction of mental suffering]. Put another way, it is more difficult to establish the tort of IIMS than the proposed tort of harassment, not least because IIMS is an intentional tort, whereas harassment would operate as a negligence-based tort.
>
> [49] Given the similarities between IIMS and the proposed tort of harassment, and the availability of IIMS in employment law contexts, what is the rationale for creating the new tort?
>
> [50] Merrifield submits that the new tort must be created because there is an increased societal recognition that harassment is wrongful conduct. He notes that

> moral damages for mental distress can be awarded only at termination of employment, leaving a gap that the tort of harassment should fill. He asserts that the decision of the Supreme Court in *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, supports the creation of the tort of harassment, and that the test the trial judge recognized for the tort is sufficiently stringent to limit the reach of the tort.
>
> [51] We disagree.
>
> [52] *Saadati* is concerned with proof of mental injury in the context of a known cause of action. Although it may make damages for mental injury more readily available in negligence actions, it does not require the recognition of a new tort. Moreover, this court has not allowed negligence to ground a claim for mental suffering in the employment context: *Piresferreira v. Ayotte*, 2010 ONCA 384, 319 D.L.R. (4th) 665.
>
> [53] In summary, while we do not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts, we conclude that Merrifield has presented no compelling reason to recognize a new tort of harassment in this case.

[153] I agree with the Crown that the representative plaintiffs' claims relevant to this appeal are grounded in negligence and that the required elements that a plaintiff must establish are the same in all negligence claims, regardless of whether or not they are pursued on a systemic basis. While the scope and content of the duty of care owed by a defendant and the evidence required to establish a breach will be different when the claim is made on a systemic basis, the elements of the tort of negligence are the same.

[154] Justice Brown outlined the elements of the tort of negligence at paragraph 13 of *Saadati* in the following terms: "[l]iability in negligence law is conditioned upon the claimant showing (i) that the defendant owed a duty of care to the claimant to avoid the kind of loss alleged; (ii) that the defendant breached that duty by failing to observe the applicable standard of care; (iii) that the claimant sustained damage; and (iv) that such damage was caused, in fact and in law, by

the defendant's breach." To the extent that the Federal Court suggested otherwise or that different elements pertain in a systemic negligence claim, it erred.

[155] I also agree with the Crown that a claim in negligence for workplace harassment – whether brought on an individual or systemic basis – is liable to being struck when it is brought by or on behalf of those governed by written or unwritten contracts of employment. As held by the Ontario Court of Appeal, remedies available to employees in contract law militate against the recognition of the existence of a duty of care to take reasonable steps to prevent workplace harassment.

[156] However, the holding in *Piresferreira* does not apply to RCMP Members because no employment contract applies to them and they accordingly have no contractual remedies available in employment law. RCMP Members are statutory office holders and not employees. As noted by Justice Perell at paragraph 37 of *Davidson*:

> A series of cases from across the country, in which RCMP officers have brought wrongful dismissal claims, are authority that there is no contract of employment between the Crown or the RCMP with RCMP members and that the employment relationship with members of the RCMP is fashioned by statute not contract. See: *Clark v. Canada*, 1994 CanLII 3479 (FC), [1994] 3 F.C. 323 (T.D.); *Merrifield v. Canada (Attorney General)*, 2009 ONCA 12; *Aune v. Canada (Attorney General)*, 2013 BCSC 178; *Flanagan v. Canada (Attorney General)*, 2013 BCSC 1205, aff'd 2014 BCCA 487, leave to appeal to the S.C.C. dismissed [2015] SCCA No.77. The present case is indistinguishable and following these authorities, I conclude that the Crown's argument that Ms. Davidson has no claim in contract is correct.

[157] Thus, the policy reasons which led the Ontario Court of Appeal to decline to extend a duty of care in negligence to prevent workplace harassment in *Piresferreira* do not pertain to RCMP Members.

[158] Moreover, in *Merrifield #2*, the Ontario Court of Appeal left the door open to the recognition of a new tort of workplace harassment in an appropriate case (at para. 53).

[159] I also note that, standing in contrast to the decision in *Merrifield*, the British Columbia Court of Appeal came to an opposite conclusion in *Sulz* and upheld an award of damages against the provincial Crown in tort for workplace harassment incurred by an RCMP Member. There is thus divided appellate authority on the issue of whether RCMP Members may recover damages in tort for workplace harassment.

[160] Further, as noted by the respondents, common law class actions for workplace harassment have been certified in respect of RCMP Members in *Davidson*, *Merlo*, *Tiller* and *Ross*. While the latter three cases were decided in the context of the Crown's consent to the issuance of a certification order for purposes of settlement and the arguments made by the Crown in *Davidson* were different from those advanced by the Crown in the instant case, such that the cases may be of lesser precedential value, these cases cannot be completely ignored.

[161] In *Merlo*, *Tiller* and *Ross*, the Federal Court needed to be satisfied that it was not plain and obvious that the claims disclosed no cause of action before it could approve the settlements. Presumably, a similar view would have been required for the Crown to have agreed to the

settlements on a principled basis. As the respondent notes, *Tiller* was decided after the decision of the Ontario Court of Appeal in *Merrifield*.

[162] Given the foregoing and the high threshold for a successful motion to strike a pleading, it cannot be said that it is plain and obvious that there is no cause of action in negligence for workplace harassment experienced by an RCMP Member.

[163] As for the Crown's suggestion that there cannot be a class-wide duty of care owed to class members given the individual considerations that must be addressed in a workplace negligence claim, such assertion is without foundation. Actions claiming systemic negligence have often been certified: see, for example, *Rumley*; *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401, [2004] O.J. No. 4924*;* and *Francis v. Ontario*, 2021 ONCA 197, to name only a few. The circumstances in the foregoing cases are not so different as to render them inapplicable to the case at bar.

[164] Thus, the first criterion for certification is met in the instant case, albeit for a class that is substantially smaller than the one certified by the Federal Court.

E. *Did the Federal Court make a palpable and overriding error of fact or of mixed fact and law in finding that there was some basis in fact for the scope of the class certified?*

[165] I turn next to the various issues in respect of which the Crown alleges that the Federal Court made palpable and overriding errors of fact or of mixed fact and law, some of which have already been touched upon in these Reasons.

[166] It is useful to recall that the test for setting aside a decision for palpable and overriding error is an exacting one. An error is only palpable if it is obvious or plainly seen and only overriding if it affects the result reached. As stated by this Court in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286, at para. 46:

> Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006) 2006 CanLII 37566 (ONCA), 217 O.A.C. 269 (C.A.) at paragraphs 158-159; *Waxman*, *supra*. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[167] As already noted, a motion judge must be satisfied that there is some basis in fact for the final four criteria for certification. If there was no evidence before a motion judge that is capable of supporting a determination that there is some basis in fact for these criteria, the certification order will be tainted by palpable and overriding error and may be set aside.

[168] As concerns the second criterion for certification of an identifiable class more specifically, the evidence must support some basis in fact for an objective class definition that bears a rational connection to the litigation that is not dependent on the outcome of the litigation: *Hollick*, at para.17; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 [*Western Canadian Shopping Centres*] at para. 38; *Wenham v. Canada (Attorney General)*, 2018 FCA 199, 429 D.L.R. (4th) 166 [*Wenham*] at para. 69.

[169] While the some basis in fact requirement establishes a lesser standard than the balance of probabilities, a plaintiff is nonetheless required to set out a factual underpinning to support the existence of claims on behalf of class members, as was noted in *Hollick,* at para. 25; *Pro-Sys,* at para. 99; and *Fischer,* at para. 40.

[170] For the reasons already set out in paragraphs 125-126, above, the Federal Court made a palpable and overriding error of fact in finding there were systemic deficiencies in the recourse mechanisms available to the several hundred thousand non-employee members of the class it certified. There was not a shred of evidence before it in respect of the recourse mechanisms available to them. In the absence of any factual underpinning regarding the inadequacy of recourse mechanisms available for non-employee class members, there was no basis in fact for concluding they had no access to effective recourse mechanisms and thus no rational connection to the representative plaintiffs' claim, which rests in significant part on the absence of such mechanisms.

[171] Further, as also already noted, the only evidence before the Federal Court regarding harassment, intimidation or bullying experienced by non-employee members of the class certified by the Federal Court relates to a claim of sexual harassment, experienced by a cadet, and the discrimination allegedly suffered by Mr. Gray's spouse in retaliation against him. Sexual harassment falls outside the scope of the claim in the case at bar and is instead encompassed in the previous class proceedings certified by the Federal Court for sexual harassment in *Merlo* and *Tiller*. The allegations made relating to Mr. Gray's spouse give rise to an FLA claim and provide

no basis in fact for extrapolating that similar experiences might have been encountered by non-employee members of the class, who are not married to RCMP Members.

[172] There was therefore no evidence before the Federal Court to indicate that non-employee class members might have been subject to harassment, intimidation or bullying of the sort alleged by the representative plaintiffs. The absence of evidence in respect of them provides an additional reason for concluding that there was no basis in fact for their inclusion in the class. The mere fact that the RCMP's harassment policy generally applies to them and prevents them from engaging in harassing conduct is incapable of establishing a rational connection between them and the claim in the case at bar. The Federal Court therefore made a palpable and overriding error in including non-employees in the class it certified.

[173] Likewise, there was no evidence before the Federal Court to support inclusion of the non-indeterminate public service employees in the class because there is no indication that they had experienced harassment, bullying or intimidation. The representative plaintiffs' evidence and experiences cannot be extrapolated to provide some basis in fact for these other categories of personnel, given the significant differences in their degree of attachment to the RCMP. Moreover, a central component of the representative plaintiffs' claims are allegations that their careers were negatively impacted when they complained about the treatment they were afforded. There is no basis in fact for assuming that similar concerns might have been encountered by the short-service, casual public service employees included by the Federal Court in the class, who had no long term career prospects with the RCMP. The Federal Court therefore made a

reviewable error in including them within the scope of the class, as there was no basis in fact for a rational connection between their situations and that of the RCMP Members.

[174] Further, for the reasons also already noted, the Federal Court made a palpable and overriding factual error in finding systemic deficiencies in the recourse mechanisms available to RCMP Members and Reservists prior to 1995 or after the date a collective agreement comes or came into force for RCMP Members and Reservists.

[175] In sum, there was only evidence before the Federal Court to support the inclusion of RCMP Members and Reservists in the class in respect of the shorter class period I have determined it ought to have set. Thus, the broader class certified is tainted by palpable and overriding error and must be amended to include only RCMP Members and Reservists over a class period between 1995 and the dates collective agreements come or came into force for them.

F. *Did the Federal Court make a palpable and overriding error of fact or of mixed fact and law in finding that there was some basis in fact for the common questions it certified?*

[176] The Crown next makes three inter-related arguments in support of its submission that the Federal Court erred in finding a basis in fact for the common questions it certified. It submits in this regard that: (1) the common questions certified by the Federal Court are so broad that they are incapable of resolution in an efficient or reasonable manner; (2) the common questions are not a substantial ingredient of each member's claims and will not advance class members' claims; and (3) the common questions relating to vicarious liability and aggregate damages are inappropriate as causation can only be determined individually.

[177] Given the forgoing determination I have reached regarding the permissible scope of the class, it is necessary to address these and the other remaining issues in this appeal only in respect of the narrower class of RCMP Members and Reservists over the class period from 1995 to the date collective agreements come or came into force.

[178] Contrary to what the Crown asserts, there is a basis in fact for all but the fourth question certified by the Federal Court in respect of this smaller class and shorter class period.

[179] Turning first to the principles applicable to commonality, the presence of common questions of fact or law applicable to class members' claims lies at the heart of class proceedings as this Court recently noted in *Canada v. Jost,* at para. 82. If there are no such questions, certification of the class proceeding is inappropriate.

[180] Determining whether a proposed class proceeding displays the requisite commonality to justify certification is to be approached purposively to ascertain whether the common issue(s) are essential element(s) of each class member's claim and whether addressing them commonly will avoid duplication of fact-finding or legal analysis. It is not necessary that the common issues predominate over individual issues, that answers to them settle liability or that class members be identically situated in respect of the common issues. Rather, the requisite commonality will exist if the common issue will meaningfully advance class members' claims, which may be said to be the case unless individual issues are overwhelmingly more significant: *Pro-Sys,* at para. *108*; *Western Canadian Shopping Centres,* at paras. 38-40.; *Vivendi Canada Inc. v. Dell'Aniello,* 2014

SCC 1, [2014] 1 S.C.R. 3, at paras. 44-46; *Brake v. Canada (Attorney General)*, 2019 FCA 274, [2020] 2 F.C.R. 638 [*Brake*] at para. 76.

[181] Moreover, as this Court recently noted at paragraph 77 of *Brake*:

> […] the result of the determination of the common issues need not be the same for all class members. In particular,
>
> (a) for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members;
>
> (b) a common question can exist even if the answer given to the question might vary from one member of the class to another, and a common question may require nuanced and varied answers based on the circumstances of individual members;
>
> (c) the requirement of commonality does not mean that the answer for all members of the class needs to be the same or even that the answer must benefit them to the same extent as long as the questions do not give rise to a conflict of interest among the members; for example, the success of one member must not result in failure for another.
>
> (See *Vivendi* at paras. 44-46; *Rumley* at para. 36; *Hodge v. Neinstein*, 2017 ONCA 494, 136 O.R. (3d) 81 at para. 114.)

[182] Issues related to the scope of a duty of care, breach and punitive damages have frequently been certified as common issues in systemic negligence claims as the respondent rightly notes: see, *i.e.*, *Rumley*; *Cloud v. Canada (Attorney General)*, 2004 CarswellOnt 5026, [2004] O.J. No. 4924 (CA); *Gay et al. v. Regional Health Authority 7 and Dr. Menon*, 2014 NBCA 10; *Ross v. Canada (Attorney General)*, 2018 SKCA 12; and *Francis v. Ontario*, 2021 ONCA 197, to name only a few cases where such determinations were reached or upheld by various appellate courts. The Federal Court has also frequently certified class actions for systemic negligence: see, *i.e.*, *Merlo; Tiller; Ross*, *Paradis Honey Ltd. v. Canada*, 2017 FC 199, [2018] 1 F.C.R. 275; *McLean*

v. Canada (Attorney General), 2018 FC 642; and *Nasogaluak v. Canada (Attorney General)*, 2021 FC 656.

[183] The first two questions and the question related to punitive damages certified by the Federal Court in the case at bar focus on the conduct of RCMP management in respect of the existence and breach of similar duties that are alleged to be owed to all members of the class. Class members of the smaller class that I have determined that the Federal Court ought to have certified were and are subject to common policies and procedures, including the internal redress procedures that are alleged to be inadequate, and are managed under a unified hierarchical structure that reports to the Commissioner. Such class members' interests in respect of the workplace environment, promotion, redress and reprisal are substantially similar, given their similar legal status, roles and type of tenure. And, the systemic duties alleged to be owing to the class members of the smaller class and the alleged breach in respect of such duties are dependent on similar facts, which will centre principally on the actions taken – or not taken – by RCMP management. I note that the Crown led no evidence to show that different management styles pertained in any Division, District or Detachment, which would make the pursuit of these issues on a systemic basis a fruitless inquiry.

[184] Given the foregoing, the Federal Court did not make a palpable and overriding error in finding that there was some basis in fact for the requisite commonality for the first two systemic issues and the issue regarding punitive damages for members of the smaller class that I have determined it ought to have certified. In short, it was open to the Federal Court to have concluded that the same duties are alleged to be owed to all class members of the smaller class,

that the facts relevant to their breach could be assessed commonly and that so doing would avoid duplication and advance the interests of class members.

[185] Turning to the third issue certified relating to vicarious liability, while liability in negligence to individual class members does require individual assessment as damage is an essential element of a claim in negligence, the third question certified by the Federal Court does not depend upon a finding of liability to any individual class member. It rather asks whether the Crown was 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 workplace free from bullying, harassment and intimidation. Such a question, like the first two common questions and the question related to punitive damages, is focussed on the conduct of RCMP management. Moreover, the facts relevant to the existence and breach of the alleged systemic duties and to the punitive damages claim are substantially similar to those relevant to a vicarious liability assessment.

[186] Somewhat similar questions related to vicarious Crown liability have been previously certified in systemic negligence claims: see, *i.e.*, *The City of Saint John v. Hayes*, 2018 NBCA 51; *Ari v. Insurance Corporation of British Columbia*, 2019 BCCA 183.

[187] In light of the foregoing, the Federal Court did not make a palpable and overriding error in respect of the question related to vicarious liability.

[188] Which leaves the fourth question regarding an aggregate assessment of damages. As noted, the representative plaintiffs tendered no evidence to suggest a method for the conduct of such assessment and their litigation plan is similarly silent on the point. There was accordingly no basis in fact for the certification of a common question related to an aggregate damages assessment given the factual vacuum on the point before the Federal Court.

[189] The Federal Court thus committed a palpable and overriding error in certifying the fourth common question but not in certifying the others.

G. *Did the Federal Court make a palpable and overriding error of fact or of mixed fact and law in finding that there was some basis in fact to show the plaintiffs had viable claims?*

[190] The Crown next asserts that the Federal Court erred in accepting that the plaintiffs were suitable representative plaintiffs because they have no viable claims. The Crown says that their claims are barred under section 9 of the CLPA since Mr. Greenwood was in receipt of a pension that was partly awarded for PTSD and Mr. Gray chose not to apply for compensation in respect of his alleged psychological injuries, which, at a minimum, would necessitate a stay under section 111 of the *Pension Act*. However, the Crown brought no motion to strike or stay the plaintiffs' claims. Nor does it assert that the *Pension Act* would necessarily bar all actions in tort by RCMP Members for workplace harassment.

[191] Section 9 of the CLPA provides that no proceedings lie against the Crown in respect of a claim if compensation or a pension has been or is payable out of the Consolidated Revenue Fund

or any funds administered by the Crown in respect of the injury, damage or loss for which the claim is made. It provides:

> **9** No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.
>
> **9** Ni l'État ni ses préposés ne sont susceptibles de poursuites pour toute perte — notamment décès, blessure ou dommage — ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État.

[192] Under section 32 and 33 of the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11 (the RCMP Superannuation Act) and the *Pension Act*, RCMP Members shall be awarded disability pensions for psychological disabilities, such as PTSD, if they arise out of or are directly connected with their service with the Force. Section 32 of the *RCMP Superannuation Act* provides:

> **32** Subject to this Part and the regulations, an award in accordance with the Pension Act shall be granted to or in respect of the following persons if the injury or disease — or the aggravation of the injury or disease — resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person's service in the Force:
>
> *(a)* any person to whom Part VI of the former Act applied at any time before April 1, 1960 who, either before or after that time,
>
> **32** Sous réserve des autres dispositions de la présente partie et des règlements, une compensation conforme à la Loi sur les pensions doit être accordée, chaque fois que la blessure ou la maladie — ou son aggravation — ayant causé l'invalidité ou le décès sur lequel porte la demande de compensation était consécutive ou se rattachait directement au service dans la Gendarmerie, à toute personne, ou à l'égard de toute personne :
>
> *a)* visée à la partie VI de l'ancienne loi à tout moment avant le 1er avril 1960, qui, avant

has suffered a disability or has died; and	ou après cette date, a subi une invalidité ou est décédée;
(b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act and who has suffered a disability, either before or after that time, or has died.	*b)* ayant servi dans la Gendarmerie à tout moment après le 31 mars 1960 comme contributeur selon la partie I de la présente loi, et qui a subi une invalidité avant ou après cette date, ou est décédée.

[193] Subsection 111(2) of the *Pension Act* provides that an action against the Crown for damages in respect of a disability shall be stayed until an application is brought for a pension in respect of such disability. It provides:

111(2) An action that is not barred by virtue of section 9 of the Crown Liability and Proceedings Act shall, on application, be stayed until	**111(2)** L'action non visée par l'article 9 de la Loi sur la responsabilité civile de l'État et le contentieux administratif fait, sur demande, l'objet d'une suspension jusqu'à ce que le demandeur, ou celui qui agit pour lui, fasse, de bonne foi, une demande de pension pour l'invalidité ou le décès en cause, et jusqu'à ce que l'inexistence du droit à la pension ait été constatée en dernier recours au titre de la Loi sur le Tribunal des anciens combattants (révision et appel).
(a) an application for a pension in respect of the same disability or death has been made and pursued in good faith by or on behalf of the person by whom, or on whose behalf, the action was brought; and	
(b) a decision to the effect that no pension may be paid to or in respect of that person in respect of the same disability or death	

> has been confirmed by an appeal panel of the Veterans Review and Appeal Board in accordance with the Veterans Review and Appeal Board Act.

[194] In *Sarvanis v. Canada*, 2002 SCC 28, [2002] 1 S.C.R. 921, the leading case interpreting section 9 of the CLPA, the Supreme Court of Canada held that section 9 of the *Pension Act* bars recovery from the Crown in tort where a pension or other compensation is awarded out of the Consolidated Revenue Fund on the same factual basis as gives rise to the claim. Writing for the Court, Justice Iacobucci stated at paragraphs 28-29:

> In my view, 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. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made.
>
> This breadth is necessary to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated. That is, a suit only claiming for pain and suffering, or for loss of enjoyment of life, could not be entertained in light of a pension falling within the purview of s. 9 merely because the claimed head of damages did not match the apparent head of damages compensated for in that pension. All damages arising out of the incident which entitles the person to a pension will be subsumed under s. 9, so long as that pension or compensation is given "in respect of", or on the same basis as, the identical death, injury, damage or loss.

[195] In the case at bar, the Federal Court held that it was premature to assess the applicability of section 9 of the *Pension Act* because Mr. Gray had not applied for a pension and it was

unclear whether the portion of the pension awarded to Mr. Greenwood for PTSD was awarded for the same occurrences as he alleged constituted harassment.

[196] I see no palpable and overriding error in this determination. Contrary to what the Crown asserts, the Federal Court did not have "uncontroverted evidence … that the plaintiffs' claims were not viable" (at paragraph 88 of the Crown's Memorandum of Fact and Law). The evidence regarding Mr. Greenwood's situation was sparse and, to the extent it spoke to the proximate cause of his PTSD, emphasized the impact on him of a colleague's death that he witnessed when the two were working on an undercover operation. Mr. Gray has not been awarded a pension for psychological injuries, and no stay application was brought by the Crown under section 111 of the *Pension Act.* It was therefore far from clear that the representative plaintiffs possessed pension entitlements based on the same facts as they alleged gave rise to liability in their claim. The Federal Court moreover left open the possibility that the Crown could raise these issues as defences.

[197] In the circumstances, I see no basis for interfering with approval of Messrs. Gray and Greenwood as representative plaintiffs' on the basis of palpable and overriding error.

H. *Did the Federal Court make a palpable and overriding error of fact or of mixed fact and law in finding some basis in fact that a class proceeding is the preferable procedure?*

[198] I turn now to the final issue raised by the Crown, namely, that the Federal Court made a palpable and overriding error in determining that a class action was the preferable procedure.

[199] For many of the same reasons as were canvassed above in respect of the jurisdictional issue, it was open to the Federal Court to have found that this final criterion for certification was met in the case at bar in respect of the smaller class and shorter class period that I have determined is appropriate.

[200] To establish that a class procedure is preferable to other procedures available for the resolution of class members' claims, a representative plaintiff must lead evidence to establish a basis in fact that a class proceeding would be a fair, efficient and manageable means of advancing the claim that is preferable to alternate means of redress available to class members. In weighing this criterion, the motions judge is required to consider the tripartite goals of a class proceeding, namely, access to justice, judicial economy and behaviour modification: *Fischer*, at paras. 22-23; *Hollick*, at paras. 28-31; *Rumley*, at paras. 36-39 *Wenham*, at para. 77; *Brake*, at paras. 85-87. I agree with the Crown that this analysis must be undertaken in respect of the preferability of a class proceeding as a vehicle to litigate – as opposed to settling – class members' claims.

[201] In the case at bar, the Federal Court undertook the requisite analysis. In short, in light of the evidence before it as to the inadequacies of the internal means of redress open to RCMP Members and Reservists, coupled with the lack of an alternate procedure for collective pursuit of their claims prior to the advent of unionization and coverage under a collective agreement, it was open to the Federal Court to have concluded that a class proceeding was the preferable procedure in respect of the smaller class and shorter class period outlined above.

V. Proposed Disposition

[202] In light of the foregoing, I would grant this appeal in part, set aside the certification order of the Federal Court and remit it to that Court to delete the fourth common question and amend the class definition in paragraph 2 to read: "All current or former RCMP Members (i.e. Regular, Civilian and Special Constable Members) and Reservists who worked for the RCMP between January 1, 1995 and the date a collective agreement becomes or became applicable to a bargaining unit to which they belong".

[203] The Federal Court should also make additional amendments to its certification order to ensure it complies with the mandatory requirement of Rule 334.17 of the *Federal Courts Rules* and should require the representative plaintiffs to amend their litigation plan and Certification Notice so they conform to the class definition and class period fixed by this Court.

[204] In accordance with Rule 334.39 of the *Federal Courts Rules*, I would make no order as to costs in this appeal.

"Mary J.L. Gleason"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	WEBB J.A. NEAR J.A.
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APPEARANCES:

Christine Mohr Derek Allen Andrew Law Jacob Pollice Marilyn Venney	FOR THE APPELLANT
Won J. Kim Megan B. McPhee Aris Gyamfi Rachael Sider	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada	FOR THE APPELLANT
Kim Spencer McPhee Barristers P.C. Toronto, Ontario	FOR THE RESPONDENTS