Federal Court of Appeal | Cour d'appel fédérale

Date: 20240220

Dockets: A-16-23
A-15-23

Citation: 2024 FCA 33

CORAM: **WEBB J.A.**
RENNIE J.A.
BIRINGER J.A.

Docket: A-16-23

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MARGORIE HUDSON

Respondent

and

GEOFFREY GREENWOOD and TODD GRAY

Interveners

Docket: A-15-23

AND BETWEEN:

HIS MAJESTY THE KING

Appellant

and

HARVEY ADAM PIERROT

Respondent

Heard at Toronto, Ontario, on October 11, 2023.

Judgment delivered at Ottawa, Ontario, on February 20, 2024.

REASONS FOR JUDGMENT BY: BIRINGER J.A.

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

Federal Court of Appeal | Cour d'appel fédérale

Date: 20240220

Dockets: A-16-23
A-15-23

Citation: 2024 FCA 33

CORAM: **WEBB J.A.**
RENNIE J.A.
BIRINGER J.A.

Docket:A-16-23

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MARGORIE HUDSON

Respondent

and

GEOFFREY GREENWOOD and TODD GRAY

Interveners

Docket: A-15-23

AND BETWEEN:

HIS MAJESTY THE KING

Appellant

and

HARVEY ADAM PIERROT

Respondent

REASONS FOR JUDGMENT

BIRINGER J.A.

I. OVERVIEW

[1] These reasons address the appeals of two decisions of the Federal Court (*per* Zinn J.) dismissing the appellant's motions for permanent stays of proceedings: a decision reported at 2023 FC 35 [*Hudson* Reasons] dismissing the appellant's motion for a permanent stay of the proposed class proceeding in *Hudson v. Canada* and a decision reported at 2023 FC 36 [*Pierrot* Reasons] dismissing the appellant's motion for a permanent stay of the proposed class proceeding in *Pierrot v. Canada*. All references to "Reasons" in this decision are to the *Hudson* Reasons, unless otherwise indicated.

[2] The appellant brought the motions on the basis that both *Hudson* and *Pierrot* are duplicative of already certified class proceedings, *Greenwood v. Canada* [*Greenwood*] and *Association des membres de la police montée du Québec v. Canada* [*AMPMQ*]. All four proceedings involve allegations of workplace harassment and discrimination by RCMP management and employees, and claim damages.

[3] The motion judge dismissed the *Hudson* motion, having determined that the focus of the proceedings in *Hudson* differed from those in *Greenwood* and *AMPMQ*. In *Pierrot*, the motion judge dismissed the motion for the reasons given in *Hudson* but ordered a temporary stay pending a final determination in *Hudson*: *Pierrot* Reasons at paras. 6-8.

[4] The *Greenwood* plaintiffs intervened in the appeal of the *Hudson* motion decision to request that the appeal be allowed on the basis that *Hudson* is duplicative of *Greenwood*.

[5] For the reasons that follow, I would dismiss the appeals.

II. THE PARTIES AND THE PROCEEDINGS

[6] As a central issue in these appeals is the scope of the class proceedings in *Greenwood*, *AMPMQ*, *Hudson*, and *Pierrot*, I briefly describe each of them.

Greenwood

[7] The *Greenwood* action was commenced in 2018. In January 2020, the Federal Court certified *Greenwood* as a class proceeding: 2020 FC 119. The Crown appealed to this Court, which upheld the certification but modified the class definition and the class period: 2021 FCA 186. Leave to appeal to the Supreme Court of Canada was refused: 2022 CanLII 19060 (S.C.C.). The modified certification order is reported at 2022 FC 1317 [*Greenwood* Certification Order]. A further amendment to the certification order, concerning the family class (2023 FC 397), was recently appealed to this Court, which allowed the appeal and remitted the matter to the certification judge: 2024 FCA 22.

[8] *Greenwood* involves a claim in systemic negligence, including allegations that the RCMP failed to provide its employees "with a work environment free from bullying, intimidation, and harassment": *Greenwood* Certification Order at paras. 4-6.

[9] The class includes: "All current or former RCMP Members (ie. 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": *Greenwood* Certification Order at para. 2.

[10] *Greenwood* excludes claims covered by *Merlo v. Her Majesty the Queen* [*Merlo*], *Ross et al v. Her Majesty the Queen*, and *Tiller v. Her Majesty the Queen* [*Tiller*], class proceedings that were settled. Claims covered by *AMPMQ* are also excluded.

AMPMQ

[11] The *AMPMQ* action was commenced in 2016. In August 2018, the Superior Court of Quebec certified (or, to use the language of the Quebec *Code of Civil Procedure*, C.Q.L.R. c. C-25.01, "authorized") *AMPMQ* as a class proceeding in *Delisle et al. c. Sa Majesté la Reine*, 2018 QCCS 3855 [*AMPMQ* QCCS Decision]. The Quebec Court of Appeal upheld the certification: 2018 QCCA 1993.

[12] *AMPMQ* involves allegations that the RCMP failed to provide a workplace free from "abus de pouvoir" (defined to include physical harassment, psychological harassment, retaliation, discrimination and all other forms of abuse of power), particularly in relation to French speakers and individuals who exercised their freedom of association and right to unionize: *AMPMQ* QCCS Decision at paras. 234-235.

[13] The main class includes all members and civilian members of the RCMP that were victims of "abus de pouvoir" by a member of the RCMP Staff (as defined) and on the condition of fulfilling one of the following requirements: "having suffered the injury in Québec; having suffered Injury resulting from a Fault committed by a Staff member then situated in Québec; having to perform their duties for the RCMP in Québec, at the time when the Injury was committed; or having their domicile or their residence in Québec when they suffered the Injury": *AMPMQ* QCCS Decision at para. 234.

[14] The *AMPMQ* class has two subclasses: (1) members of the main group who suffered the injury by reason of belonging to the language group of French speakers; and (2) members of the

main group who suffered the injury by reason of their activities related to freedom of association and the right to unionize.

[15] The class also excludes class members in *Merlo*: *AMPMQ* QCCS Decision at para. 234.

Hudson

[16] Ms. Hudson was an RCMP member from 1979 to 2009. She commenced the *Hudson* action in the Federal Court, in July 2020. Ms. Hudson claims that she and other potential class members were subject to racism and racist acts by the RCMP, including demeaning comments, unequal access to benefits, and unequal opportunities for career progression. She says that she and other potential class members suffered career limitations, loss of income, and physical and psychological damage.

[17] Ms. Hudson alleges that the RCMP breached the proposed class members' rights to equality under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 and Quebec *Charter of human rights and freedoms*, C.Q.L.R., c. C-12; was systemically negligent; failed to apply the provisions of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, its regulations, and the Code of Conduct promulgated under the *RCMP Act* in a fair manner; and failed to act honourably and in good faith when dealing with Indigenous class members.

[18] The proposed class consists of racialized individuals who worked for the RCMP between April 17, 1985 and the date of certification. The proposed class excludes any claims class

members have that were resolved in *Merlo*, *Tiller*, *Copland and Roach v. HMTQ*, and *Toss, Roy and Satalic v. HMTQ*. The claim also excludes claims that class members have in *Greenwood* (unless that proceeding is decertified) and in *AMPMQ* (unless that proceeding is de-authorized).

[19] The parties have filed their materials for the certification motion and await a hearing. In August 2022, the appellant served a notice of motion to strike *Hudson* on jurisdictional grounds, which it will seek to have heard at the same time as the certification hearing if unsuccessful in having *Hudson* stayed.

Pierrot

[20] The *Pierrot* action was commenced in the Federal Court, in January 2022. Mr. Pierrot makes similar allegations to those in *Hudson* but is focused on Indigenous RCMP employees: *Pierrot* Reasons at para. 4.

[21] Mr. Pierrot's counsel have agreed to work with Ms. Hudson's counsel. Mr. Pierrot has agreed to hold his action in abeyance if *Hudson* proceeds. Given this agreement between the plaintiffs, the motion judge ordered a stay "pending a final determination in Hudson": *Pierrot* Reasons at para. 8.

No Carriage Motion

[22] When two or more proposed class actions are commenced with respect to the same alleged wrongdoing and counsel are unable to agree on how to proceed, a plaintiff may bring a

carriage motion. In a carriage motion, the court is asked to determine which counsel or group of counsel will have "carriage" of the class action, while the other competing class actions are stayed: *LaLiberte v. Day*, 2020 FCA 119 at para. 1 [*LaLiberte* FCA Decision].

[23] While the *Federal Courts Rules*, SOR/98-106 [*Rules*] do not specifically provide for carriage motions, section 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and paragraph 105(*b*) of the *Rules*, read in light of rule 3, give the Federal Courts authority to stay duplicative class actions: *LaLiberte v. Day*, 2019 FC 766 at para. 36 [*LaLiberte* FC Decision]; *LaLiberte* FCA Decision at para. 10.

[24] According to the interveners, no carriage motion was brought because when the *Hudson* and *Pierrot* actions were commenced, *Greenwood* and *AMPMQ* had been certified. Instead, the appellant brought motions to indefinitely stay *Hudson* and *Pierrot*.

III. THE MOTION DECISIONS

[25] The motion judge confirmed the Federal Court's jurisdiction to grant the relief requested pursuant to section 50 of the *Federal Courts Act* and the Court's plenary jurisdiction to manage its own proceedings: Reasons at para. 9. The burden was on the moving party to demonstrate that granting a stay of *Hudson* would serve the interests of justice: Reasons at para. 11.

[26] The motion judge accepted that if the factual foundation and issues raised in *Hudson* were duplicative of those in *Greenwood* and *AMPMQ*, a stay would likely prevent the costly duplication of judicial and legal resources, lessen the risk of inconsistent decisions, and reduce

any prejudice to the appellant in having to defend against the same allegations in different proceedings: Reasons at para. 13.

[27] In order to determine the extent of overlap, the motion judge considered the "focus" of each proceeding, relying on the certification orders and decisions in *Greenwood* and *AMPMQ* and the pleadings in all of the proceedings.

[28] The motion judge concluded that *Hudson* addressed different factual situations and legal issues than *Greenwood* and *AMPMQ*. The focus of the former was the impact of systemic racism and implicit misconduct, while the focus of *Greenwood* was bullying, intimidation, harassment, and explicit misconduct: Reasons at paras. 17, 19, and 27. The focus of *AMPMQ* was abuse of power based on discrimination resulting in injury because of harassment, psychological harassment, or retaliation: Reasons at para. 18. The motion judge found that there was little mention of racism and no mention of systemic racism in *Greenwood* or *AMPMQ*: Reasons at para. 24.

[29] While acknowledging overlap between the proceedings, the motion judge determined that it would be unfair to Ms. Hudson to break her claim into pieces and require her to litigate them in different actions: Reasons at para. 31. Allowing *Hudson* to proceed was in the interests of justice. The motion was dismissed.

[30] For the reasons issued in the *Hudson* motion, the motion to stay *Pierrot* was also dismissed: *Pierrot* Reasons at para. 6. As counsel for Mr. Pierrot agreed to hold the action in

abeyance pending a final determination in *Hudson*, a temporary stay order was issued on that basis.

IV. ISSUES

[31] The central issue is whether the motion judge, in exercising the discretion under paragraph 50(1)(*b*) of the *Federal Courts Act* and refusing to stay *Hudson* and *Pierrot*, committed an error warranting this Court's intervention.

[32] The appellant and the interveners submit that the motion judge made errors in law and in fact. They say that the motion judge erred in (a) failing to take into account the goals of class proceedings; (b) characterizing the legal claims in the various proceedings; and (c) characterizing the factual foundation of the claims.

V. ANALYSIS

(1) *Legislation: paragraph 50(1)(b) of the Federal Courts Act*

[33] Part 5.1 of the *Rules* does not specifically provide for stays of class proceedings (whether proposed or certified, multi-jurisdictional or in the same jurisdiction). The motion judge's decision was rendered pursuant to paragraph 50(1)(*b*) of the *Federal Courts Act*, which applies to all proceedings. It provides:

50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter …	**50** (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire : […]

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	(b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[34] Support for the application of paragraph 50(1)(*b*) to a stay of class proceedings is found in *LaLiberte* where, in the context of a carriage motion, the Federal Court ordered the stay of proposed class proceedings under the authority of section 50 of the *Federal Courts Act* and paragraph 105(*b*) of the *Rules*: *LaLiberte* FC Decision at para. 85.

(2) *Standard of Review*

[35] The motion judge's decisions were discretionary. The standards of review are correctness for questions of law; palpable and overriding error for questions of fact and questions of mixed fact and law — unless there is an extricable error of law, in which case correctness applies: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 79; *Housen v. Nikolaisen*, 2002 SCC 33 [*Housen*].

(3) *Did the motion judge err by failing to give due weight to the goals of class proceedings?*

[36] The appellant submits that a court must consider the goals of class proceedings in exercising the discretion under paragraph 50(1)(*b*) in the context of class proceedings. The goals of class proceedings are access to justice, judicial economy, and behaviour modification: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 15 [*Hollick*]; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35 at para. 6.

[37] The failure to identify or consider the legal criteria that govern the exercise of discretion may constitute an error of law: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 39, 144 D.L.R. (4th) 1; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43. Here, the appellant appears not to take issue with the motion judge's statement of the test for a stay of proceedings under paragraph 50(1)(*b*) but says that the failure to give due weight to the goals of class proceedings was a palpable and overriding error.

[38] For the reasons that follow, I conclude that the motion judge considered the goals of class proceedings as part of the contextual analysis. It is not for this Court to reweigh the factors considered by the motion judge. There is no reversible error.

[39] A stay ordered under paragraph 50(1)(*b*) is a matter of broad discretion: *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312 at para. 5 [*Mylan*]; *Clayton v. Canada (Attorney General)*, 2018 FCA 1 at para. 24 [*Clayton*].

[40] In *Mylan*, this Court distinguished between situations where a court is asked to enjoin another body from exercising its jurisdiction and those where the court is asked not to exercise its own jurisdiction until later. For the former, the tripartite test established in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 applies. For the latter, the "interest of justice" test governs: *Mylan* at para. 5; *Clayton* at para. 24. Here, as *Hudson* and *Pierrot* were commenced in the Federal Court, the "interest of justice" test applies.

[41] Under the "interest of justice" test, there is no exhaustive list of factors that must be considered. The relevant factors will be determined by the context in which the stay request arises: *Mylan* at para. 5; *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143 at para. 10 [*Coote*]; *Clayton* at para. 26.

[42] This approach is consistent with decisions of other appellate courts concerning the stay of class proceedings. The exercise of discretion should not be curtailed by rigid criteria: *Herold v. Wassermann*, 2022 SKCA 103 at para. 98, citing *Leier v. Shumiatcher (No. 2)*, 1962 CanLII 330 (S.K. C.A.) at para. 2, 39 W.W.R. (N.S.) 446; *Hamm v. Canada (Attorney General)*, 2021 ABCA 329 at para. 11.

[43] While there are no "hard and fast rules" applicable to the "interest of justice" test (*Richards v. Canada*, 2021 FC 231 at para. 10), certain guiding principles are to be taken into account, including the overarching objective of securing the "just, most expeditious and least expensive determination of every proceeding on the merits": *Rules*, rule 3. This reflects the public interest in proceedings moving in an efficient, timely, and fair manner, and avoiding the wasteful use of judicial resources: *Mylan* at para. 5; *Coote* at para. 13; *Clayton* at para. 28.

[44] Although a court need not apply the *RJR-Macdonald* test, it may take into account some of the same considerations: *Clayton* at paras. 26-28; *Viterra Inc. v. Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333)*, 2021 FCA 41 at para. 23. Ultimately, the motion judge must protect against unfair prejudice to either party: *Coote* at para.

13. This necessarily involves a balancing of the prejudice to the moving party if the stay is not granted and prejudice to the opposing party if the action is stayed.

[45] I am satisfied that the motion judge took these principles into account. The motion judge acknowledged many of these authorities and cited others for guidance on the "interest of justice" test: Reasons at para. 10. The principles were applied with due consideration to *Hudson* and *Pierrot* being proposed class actions and *Greenwood* and *AMPMQ* already being certified.

[46] A presumption of prejudice arises where overlap of class proceedings in the same jurisdiction is established — sometimes referred to as "intra-jurisdictional multiplicity" of proceedings. There is no need to separately prove prejudice, although the presumption can be displaced with evidence to the contrary: *Reid v. Google LLC*, 2022 BCSC 158 at para. 140 [*Google* BCSC Decision], aff'd *Kett v. Google LLC*, 2023 BCCA 350 [*Google* BCCA Decision] (this point was not challenged on appeal).

[47] The motion judge correctly identified that the appellant's submissions rested on its view that *Hudson* and *Pierrot* were duplicative of *Greenwood* and *AMPMQ*. Multiple proceedings, whether individual actions or class proceedings, that litigate the same issue are inefficient and expensive, cause delay in the administration of justice, and waste scarce judicial and other resources: *Vaeth v. North American Palladium Ltd.*, 2016 ONSC 5015 at para. 37; *Apotex Inc. v. Bayer Inc.*, 2020 FCA 86 at para. 45. They entail the possibility of inconsistent results and can be prejudicial to a defendant, forced to defend the same allegations on multiple fronts. The need to

avoid a multiplicity of class proceedings must, however, always be balanced with the objective of access to justice: *Jensen v. Samsung Electronics Co., Ltd*., 2019 FC 373 at para. 22.

[48] The motion judge conducted a balancing exercise, reviewing the potential prejudice to each party. More particularly, the motion judge considered judicial economy, acknowledging that a stay could prevent unnecessary costly duplication of judicial and legal resources: Reasons at para. 13. The motion judge also took into account access to justice and potential prejudice to the plaintiffs, noting that a stay would potentially require Ms. Hudson to litigate her claims in a piecemeal fashion: Reasons at paras. 30-31. The motion judge considered the potential prejudice to the defendant in having to potentially defend the same allegations on different fronts: Reasons at para. 13. Contrary to the appellant's submission, the motion judge did consider the class action goals of judicial economy and access to justice.

[49] This was appropriate in the circumstances. It is not for this Court to review the weight given to those class action goals or engage in a rebalancing of the factors considered by the motion judge.

[50] The motion judge made no error in identifying and considering the relevant principles governing the "interest of justice" test.

(4) *Did the motion judge err in characterizing the claims and conducting the duplication analysis?*

[51] Having identified the test for granting a stay, the motion judge proceeded to consider the key issue — whether the proceedings were duplicative.

[52] The essence of the appellant's submissions was that the factual foundation and the issues in *Hudson* and *Pierrot* are duplicative of those in *Greenwood* and *AMPMQ*: Reasons at para. 13. The motion judge analyzed the degree of overlap between the proceedings, relying on the record, including the pleadings in all of the proceedings and the certification orders and decisions in *Greenwood* and *AMPMQ*.

[53] The appellant and the interveners submit that the motion judge committed several errors in the duplication analysis, in the legal and factual characterization of the claims. For the reasons that follow, I disagree.

[54] I pause to briefly address the challenges that underlie the duplication analysis. There are no indications in the *Federal Courts Act* or *Rules* of criteria to be considered in determining the overlap in class proceedings (whether proposed or certified, multi-jurisdictional or in the same jurisdiction). By contrast, section 1.1 of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [*OCPA*] provides:

1.1 A determination under this Act as to whether two or more proceedings involve the same or similar subject matter shall include consideration of whether the proceedings involve the	**1.1** Toute décision rendue en vertu de la présente loi sur la question de savoir si deux instances ou plus concernent le même objet ou un objet similaire tient compte de la question de savoir si les instances concernent

same or similar causes of action and the same or affiliated defendants.	les mêmes causes d'action ou des causes d'action similaires et les mêmes défendeurs ou des défendeurs associés.

[55] Here, the issue is the potential overlap between two proposed class proceedings (*Hudson* and *Pierrot*) and two already certified class proceedings (*Greenwood* and *AMPMQ*). Although *AMPMQ* is a Quebec proceeding, the issue of competing class proceedings in multiple jurisdictions, and the related issue of which claim or forum should be preferred, do not arise. Other considerations apply where a court is asked to stay one class proceeding in favour of a class proceeding in another Canadian jurisdiction: for example, *OCPA*, subsections 5(6) and (7); *Class Proceedings Act*, R.S.B.C. 1996, c. 50, subsections 4(3) and (4).

[56] A recent decision of the British Columbia Court of Appeal addressed a situation, analogous to this case, in which multiple claims against the same defendant making similar allegations were commenced in the same jurisdiction. The Court confirmed the correct test to be whether the proceedings are about "the same dispute or subject matter": *Google* BCCA Decision at para. 61. This approach centres on the overlap in the legal issues / causes of action and damages claimed, and the factual foundations of the proceedings (e.g., whether the claims involve the same or similar events or transactions). Put differently, do the proceedings "traverse the same factual ground, allege the same wrongdoing and claim for the same loss"?: *Google* BCSC Decision at para. 156.

[57] The motion judge's approach was consistent with this guidance — relying on the "focus" of each proceeding to capture both the relevant legal issues / causes of action and the facts supporting the claims.

[58] Additional factors to consider in the duplication analysis may include whether the proceedings have some or all of the same class members, class periods, and the same (or affiliated) defendants. Here, the defendants are the same. The motion judge determined that the proceedings were sufficiently different without considering the potential for overlap in class membership or class periods. The motion judge concluded that these class issues should be left for the certification judge: Reasons at para. 28.

[59] The critical part of the duplication assessment lies in determining how much overlap can be tolerated in allowing multiple actions to proceed, keeping in mind other procedural tools to coordinate the prosecution of claims. A Venn diagram depicting shaded areas of intersection springs to mind.

[60] One can readily accept the proposition that "[t]here cannot be two or more certified class actions in the same jurisdiction representing the same class in relation to the same claim": *Mancinelli v. Barrick Gold Corporation*, 2016 ONCA 571 at para. 11; *Workman Optometry et al. v. Aviva Insurance et al.*, 2021 ONSC 142 at para. 33. However, it will rarely be this straightforward.

[61] The analysis will invariably be highly case-specific, involving a characterization of pleadings and factual determinations. Determining the essential nature of claims is a question of mixed fact and law, reviewable on the highly deferential standard of palpable and overriding error, absent an extricable error of law: *Apotex Inc. v. Canada (Health)*, 2012 FCA 322 at para. 9, citing *Housen*; *Buffalo v. Canada*, 2016 FCA 223 at para. 42; *Canada (Attorney General) v. Scow*, 2022 BCCA 275 at para. 76 [*Scow*]. A motion judge is to be afforded a wide berth in the duplication analysis, given the context-specific nature of the inquiry.

(a) *Alleged error in law: conflating implicit with systemic discrimination*

[62] The appellant and the interveners claim that the motion judge erred in characterizing the claims in *Hudson* and *Greenwood* by incorrectly conflating "implicit" with "systemic" discrimination and relying on a bright line distinction between implicit / systemic discrimination on the one hand and explicit acts of discrimination on the other. They say that this was an error in law warranting this Court's intervention. I disagree.

[63] Read fairly, the motion judge's reasons do not conflate systemic discrimination with implicit discrimination. At paragraph 22, the motion judge concludes that "the factual basis of systemic racism in Hudson is based on implicit misconduct, policies, and procedures that do not require explicit actions in order to be discriminatory." The comment in paragraph 24 that the focus of *Hudson* is "systemic racism, an implicit misconduct" must be understood in light of that earlier finding and should be read as "systemic racism, in this case, an implicit misconduct."

[64] The motion judge determined that *Hudson*, at its core, focuses on systemic racism. The misconduct alleged was not being considered for promotion and receiving lower remuneration and worse training, education and mentorship than non-racialized colleagues. Although there were allegations of explicitly discriminatory conduct directed at Ms. Hudson, the focus was on implicit misconduct — the discriminatory impact resulting from a failure to have or enforce adequate procedures, policies and guidelines to protect against racism: Reasons at paras. 19, 22, 24, and 27. "In *Hudson*, the Plaintiff merely had to exist and have certain immutable characteristics to suffer the alleged discrimination": Reasons at para. 27.

[65] The motion judge determined that this made *Hudson* distinct from *Greenwood*, which focuses on "bullying, intimidation, and harassment", and *AMPMQ*, which focuses on "abuse[s] of power" — particularly in relation to French-speaking employees and those who exercised their freedom of association and right to unionize: Reasons at paras. 17-18. The motion judge concluded that *Greenwood* involved unwanted physical touching, retaliation for complaining and demeaning and belittling comments. "The misconducts complained of in *Greenwood* were because an individual committed an act, such as filing a complaint or report": Reasons at para. 27. The motion judge concluded that there was no indication that systemic racism would be dealt with in *Greenwood*: Reasons at para. 29.

[66] The motion judge used the terms "explicit" and "implicit" to differentiate between the types of misconduct alleged in *Hudson* and *Pierrot* on the one hand and *Greenwood* and *AMPMQ* on the other. This was part of an analysis of the factual foundation — the types of events giving rise to the claims in each proceeding. The terms were not used to underpin the

motion judge's conclusion about the legal basis for the claims. The motion judge determined that the focuses of the claims were different — systemic racism or discrimination in *Hudson* and *Pierrot*, bullying, intimidation and harassment in *Greenwood*, and abuses of power in *AMPMQ*.

[67] There is no error warranting this Court's intervention.

(b) *Alleged error in law: characterizing Greenwood and AMPMQ too narrowly*

[68] The appellant and the interveners acknowledge that the characterization of pleadings is usually a question of mixed fact and law. However, they submit that the motion judge erred in law by characterizing the claims in *Greenwood* and *AMPMQ* more narrowly than in the certification orders and decisions rendered by this Court and the Federal Court in *Greenwood* and by the Superior Court of Quebec in *AMPMQ*. They say that the impugned behaviour of the RCMP in each of *Hudson*, *Pierrot*, *Greenwood*, and *AMPMQ* stems from systemic negligence; the causes of action are the same. I disagree.

[69] First, I do not accept that there is an extricable question of law. It is well-established that certification is not a determination of the merits of claims in a class proceeding: *Hollick* at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 99; *Bowman v. Ontario*, 2022 ONCA 477 at para. 37. Certification simply means that the action is appropriately prosecuted as a class proceeding: *Hollick* at para. 16.

[70] The fact that the certification decisions or orders in *Greenwood* and *AMPMQ* contain descriptions of the claims in those proceedings does not change the nature of the characterization

process undertaken by the motion judge. That remains a determination of mixed fact and law, based on the record.

[71] Second, I do not accept the appellant and interveners' characterization of all four proceedings as being about "systemic negligence" or breaches of "a duty of care to provide a non-injurious environment." This overly broad characterization ignores important differences that the motion judge identified and that find support in the statements of claim and the certification orders and decisions in *Greenwood* and *AMPMQ*.

[72] The motion judge referred to the certification orders in *Greenwood* and *AMPMQ*. The motion judge cited the description of claims in the *Greenwood* certification order and then elaborated, based on a review of the pleadings, why the allegations in *Hudson* and *Pierrot* were not covered by *Greenwood* and *AMPMQ*: Reasons at paras. 3-8 and 16-19. There was ample support for this conclusion.

[73] The *Hudson* amended statement of claim states that the action concerns systemic racism, and under the heading "Systemic Negligence" claims that the defendant owed a duty to the plaintiff and class members to ensure that they could work in an environment free of racism. Each particularized aspect of the duty of care is about racism and measures to protect or mitigate against the harmful effects of racism.

[74] In contrast, the *Greenwood* statement of claim states that the action concerns systemic bullying, intimidation and harassment. The pleading refers to the statutory and institutional

barriers, including the "paramilitary structure" of the RCMP that prevented collective bargaining and other means of obtaining meaningful redress for grievances. The particulars of the bullying, intimidation and harassment include sexually explicit comments; unwanted physical and/or sexual exposure or touching; demeaning or belittling comments made about sexual orientation and to or about First Nations individuals, other non-Caucasian individuals, and those suffering from mental health issues; and retaliation against those who complained or reported bullying, intimidation or harassment.

[75] While not mentioned in the motion judge's reasons, the common issues in the certification orders for *Greenwood* and *AMPMQ* and those proposed in *Hudson* further support the motion judge's determination. In *Greenwood*, the first common issue is: "Did the RCMP … owe a duty of care to take reasonable steps in the operation or management of the Force to provide [class members] with a work environment free from bullying, intimidation and harassment?"

[76] In *AMPMQ*, the first common issue is: "Were the RCMP and its staff obligated to respect the rights of the members under the Charters and to provide a workplace exempt from Abuse of power, including protection on the basis of belonging to the language group of French locutors or of their militancy in favour of freedom of association or the right to unionize?"

[77] In *Hudson*, a proposed common issue is: "Was the … RCMP obligated to respect the Plaintiff and Class Members' rights under [the Charters] and to provide a workplace free from discrimination on the basis of race, national or ethnic origin, colour and religion?"

[78] I find no error in the motion judge's approach to assessing the overlap in claims based on the "focus" of each proceeding, as this included a consideration of both the causes of action and the underlying factual foundation in each of the proceedings. This approach finds support in the class actions context, where the issue has been described as whether proceedings involve the "same dispute or subject matter": *Google* BCCA Decision at paras. 61-62. The approach also finds support in other contexts, where in characterizing claims, courts have determined that what matters is the "essential character", based on realistic appreciation of the practical result sought by the plaintiff: *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250 at para. 50; *Scow* at para. 75; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at para. 49, 24 O.R. (3d) 358; *Roitman v. Canada*, 2006 FCA 266 at para. 16 (all concerning jurisdiction); and *Manuge v. Canada*, 2010 SCC 67 at para. 19 (whether a proceeding should be brought as a judicial review application rather than an action).

[79] The fact that the claims in *Hudson* and *Greenwood* both plead systemic negligence is not an answer to the duplication analysis. Two claims may plead systemic negligence in respect of the same organization, yet nonetheless be legally and factually distinct based on the different duties and standards of care and alleged breaches. As the motion judge concluded, *Greenwood* alleges a duty to provide a workplace free from bullying, intimidation and harassment; *Hudson* and *Pierrot* allege a duty to provide a workplace free from systemic racism.

[80] It was open to the motion judge to conclude that the focus of the claims in *Hudson* and *Pierrot* differed from the focus of the claims in *Greenwood* and *AMPMQ*. There was no error in law in characterizing the claims.

(c) *Alleged error in the factual characterization of the pleadings*

[81] The appellant submits that the motion judge erred in distinguishing the factual basis for *Hudson* (and *Pierrot*) from the factual bases for G*reenwood* and *AMPMQ*. It says that *Hudson* (and *Pierrot*), like *Greenwood* and *AMPMQ*, involves allegations of explicit or overt acts of discrimination based on race. It also says that *Greenwood* and *AMPMQ* encompass workplace discrimination allegations, including systemic acts and omissions based on race. The appellant submits that the motion judge's errors were palpable and overriding.

[82] Under the highly deferential standard of palpable and overriding error, appellate intervention is warranted only where an error is both obvious and determinative of the outcome: *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33 [*Salomon*]; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras. 61-75 [*Mahjoub*]. An appellate court must not reweigh the evidence that was before the motion judge and exercise discretion afresh: *Salomon* at para. 40; *Mahjoub* at paras. 70-79.

[83] In my view, the appellant and the interveners have not identified an error that is obvious and "goes to the very core of the outcome of the case": *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165. The motion judge's reasons, although brief, address the key differences between the factual foundations in *Greenwood*, *AMPMQ*, and *Hudson* and *Pierrot* and are supported by the record.

[84] As discussed earlier in these reasons, the motion judge concluded that the factual foundation in *Greenwood* was explicit misconduct — bullying, intimidation and harassment in

the form of unwanted touching, sexual exposure, belittling and demeaning comments. These misconducts occurred in retaliation for action taken by an individual, such as filing a complaint or report: Reasons at paras. 17 and 27. Although the allegations of harassment in *Greenwood* might include situations of race-based discrimination, the motion judge concluded that this was not the focus of the *Greenwood* proceeding; there was little mention of racism and no mention of systemic racism in *Greenwood*: Reasons at para. 24.

[85] The motion judge acknowledged that *Hudson* included allegations of explicit misconduct but concluded that the factual foundation in *Hudson* was implicit misconduct — the failure to have or enforce adequate policies, procedures and guidelines to minimize the risk of being subjected to racism. The plaintiff suffered the consequences because she had "certain immutable characteristics" that resulted in the discrimination: Reasons at paras. 19 and 27.

[86] The motion judge's determination of the factual foundation of the proceedings and the areas of overlap are owed deference. No palpable and overriding error has been established. There is no basis for this Court to intervene.

(5) ***Conclusion***

[87] There are potential areas of intersection between the proceedings — for example, between the claims in *Hudson / Pierrot* and *Greenwood*, for certain class members and periods, in the area of harassment based on race, and between *Hudson / Pierrot* and *AMPMQ*, in the area of harassment and discrimination based on race towards individuals with a connection to Quebec.

[88] The motion judge recognized that the claims in *Hudson / Pierrot* and those in *Greenwood / AMPMQ* were not completely distinct: Reasons at paras. 16 and 30-31. However, the motion judge concluded that the areas of overlap did not outweigh the differences and declined to exercise the discretion to permanently stay *Hudson* and *Pierrot*. I see no error in that decision.

[89] *Greenwood* and *AMPMQ* have been certified, but *Hudson* and *Pierrot* have not. The identifiable class and common questions remain to be determined in the latter proceedings. The motion judge made a discretionary decision in this context and, appropriately, exercised caution.

[90] The motion judge observed that some of the duplication arguments made by the appellant were better left to the certification judge: Reasons at para. 28. At a certification hearing for *Hudson*, the Court will be required to address the concerns raised by the appellant in these appeals, including whether *Hudson* would involve claims that are the subject of any other proceeding: *Rules*, subsection 334.16(2).

[91] In the context of a certification hearing, with additional information about the identifiable class(es), representative plaintiffs and common questions, the Court will be in a better position to assess the degree of overlap in the proceedings. At that time, the Court could consider whether a stay is warranted, if sought by the appellant, and other procedural tools available to limit potentially adverse consequences arising from the overlap.

[92] As acknowledged at the hearing, there may be alternatives less draconian than a stay, including case management, that preserve a role for all of the plaintiffs, allowing the actions to

advance without duplication. The *Hudson* claim already explicitly excludes any claims class members have in *Greenwood* (unless *Greenwood* is decertified) and in *Delisle* (*AMPMQ*) (unless *Delisle* (*AMPMQ*) is de-authorized), addressing the intersection of the *Hudson* claims with each of the *Greenwood* and *AMPMQ* claims. At or prior to a certification hearing in *Hudson*, these alternatives could be further pursued.

VI. DISPOSITION

[93] For the foregoing reasons, I would dismiss the appeals, with costs.

"Monica Biringer"
J.A.

"I agree.
Webb J.A."

"I agree.
Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-16-23 and A-15-23
DOCKET:	A-16-23
STYLE OF CAUSE:	HIS MAJESTY THE KING v. MARGORIE HUDSON and GEOFFREY GREENWOOD AND TODD GRAY
AND DOCKET:	A-15-23
STYLE OF CAUSE:	HIS MAJESTY THE KING v. HARVEY ADAM PIERROT
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 11, 2023
REASONS FOR JUDGMENT BY:	BIRINGER J.A.
CONCURRED IN BY:	WEBB J.A. RENNIE J.A.
DATED:	FEBRUARY 20, 2024

APPEARANCES:

DOCKET:	A-16-23
Christine Mohr Marilyn Venney	FOR THE APPELLANT
David Klein Careen Hannouche Angela Bespflug Steven Cooper Mary Grzybowska	FOR THE RESPONDENT
Megan B. McPhee Robert A. Donato David C. Endemann	FOR THE INTERVENERS

DOCKET:	A-15-23
Christine Mohr Marilyn Venney	FOR THE APPELLANT
David Klein Careen Hannouche Angela Bespflug Steven Cooper Mary Grzybowska	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DOCKET:	A-16-23
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE APPELLANT
Klein Lawyers LLP Cooper Regel LLP Murphy Battista LLP Vancouver, British Columbia/Montreal, Quebec Sherwood Park, Alberta	FOR THE RESPONDENT
Kim Spencer McPhee Barristers P.C. Toronto, Ontario	FOR THE INTERVENERS
DOCKET:	A-15-23
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE APPELLANT
Klein Lawyers LLP Cooper Regel LLP Murphy Battista LLP Vancouver, British Columbia/Montreal, Quebec Sherwood Park, Alberta	FOR THE RESPONDENT