Federal Court  Cour fédérale

Date: 20230808

Docket: T-1105-20

Citation: 2023 FC 1083

Ottawa, Ontario, August 8, 2023

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

KELLY MCQUADE
DAVID COMBDEN
GRAHAM WALSH

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA, REPRESENTING HIS MAJESTY THE KING IN RIGHT IN CANADA

Defendant

ORDER AND REASONS

I. Overview

[1] Kelly McQuade, David Combden, and Graham Walsh [Plaintiffs] are regular members of the Royal Canadian Mounted Police [RCMP]. They seek certification of a class action for damages and other relief on behalf of the following proposed class [Class]:

> all persons who are or have been regular members (as defined in section 1 of the *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281) and who have been diagnosed with, and/or suffer or have suffered from, an Operational Stress Injury. For certainty, the Class excludes civilian and public service members of the Royal Canadian Mounted Police;

[2] The Plaintiffs have each been diagnosed with an Operational Stress Injury [OSI]. They say that regular members of the RCMP are at significant risk of developing OSIs due to the innate features of their occupational duties. Members of the proposed Class are regularly exposed to life-threatening situations, catastrophic injuries, family violence, and other traumatizing events. There is little separation between work and home, resulting in a state of constant vigilance.

[3] The RCMP offers a range of services to its members that are intended to address the prevention, detection, diagnosis, treatment and accommodation of OSIs. The Plaintiffs define these services [Mental Health Services] as follows:

> […] all mental health care services provided by the RCMP to the Class at all material times, including but not limited to the following: services provided through Occupational Health and Safety Services Offices ("OHSS Offices"); the Health Care Entitlements and Benefits Program; Operational Stress Injury ("OSI") Clinics; periodic health assessments; non-professional mental health support including through the Peer-to-Peer program; and training and education efforts, including the Road to Mental Readiness program […]

[4] The Plaintiffs allege that the RCMP has implemented the Mental Health Services in a negligent manner. They also allege that the Mental Health Services are substantially different from, and inferior to, the health care provided by the RCMP to members who suffer physical injuries in the line of duty. In particular, the Plaintiffs say that the proposed Class faces systemic obstacles and delays in obtaining diagnoses or treatment for OSIs, and returning to meaningful work. The Plaintiffs claim that the RCMP's implementation of the Mental Health Services amounts to discrimination against the proposed Class on the ground of mental disability, contrary to s 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

[5] The Attorney General of Canada [Defendant] opposes certification of the proposed class action, primarily on the ground that the Second Fresh as Amended Statement of Claim [Statement of Claim] discloses no reasonable causes of action. The Defendant maintains that the claims of the proposed Class are barred by s 9 of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 [CLPA].

[6] The Defendant notes that all of the proposed representative Plaintiffs are in receipt of a disability pension, and there is no evidence before the Court that any proposed Class member is ineligible for a pension within the meaning of s 9 of the CLPA. The Statement of Claim defines an OSI as "persistent", and therefore potentially amenable to compensation by way of a disability pension:

> "Operational Stress Injury" or "OSI" means any persistent psychological difficulty that results from operational duties with the RCMP and causes impaired functioning, including but not

> limited to diagnosed medical conditions such as Post-Traumatic Stress Disorder, depression, anxiety, and panic attacks.

[7] In the alternative, the Defendant has brought a motion pursuant to s 50 of the *Federal Courts Act*, RSC 1985, c F-7, to stay this proceeding on the grounds that the claims asserted, the proposed Class, and the relief sought all overlap with two previously certified class actions: *Greenwood v Canada*, 2020 FC 119, aff'd 2021 FCA 186 [*Greenwood*] and *Delisle c R*, 2018 QCCS 3855, aff'd 2018 QCCA 1993 [*Delisle*]. According to the Defendant:

> All three cases involve the same dispute: whether the RCMP failed to provide a healthy and safe workplace free of harassment and discrimination, including discrimination on the basis of mental disability. The cases traverse the same factual ground, allege the same wrongdoing and claim damages against the same defendant in respect of the same losses.

[8] For the reasons that follow, the Statement of Claim discloses a reasonable cause of action in systemic negligence. However, the Statement of Claim pleads insufficient material facts to support a claim for breach of s 15 of the Charter.

[9] In oral submissions, counsel for the Plaintiffs conceded that the systemic negligence claims of Class members who are eligible for a disability pension are barred by s 9 of the CLPA. They nevertheless suggested that these Class members could advance the Charter claim, and participate in any aggregate award of Charter damages that may be awarded by the Court.

[10] The Charter claim advanced in the Statement of Claim is premised on the same facts as the allegation of systemic negligence. It is therefore barred by s 9 of the CLPA for all members

of the Class who are in receipt of disability pension or eligible to receive one. This includes all of the proposed Representative Plaintiffs, and also Staff Sergeant [S/Sgt.] Jennifer Pound, a proposed Class Member who submitted an affidavit in support of the certification motion.

[11] In light of the Plaintiffs' concession that their claim of systemic negligence is barred by s 9 of the CLPA, and the Court's conclusion that their Charter claim is similarly barred, there is no representative plaintiff to advance the interests of the Class. Nor is there evidence before the Court to satisfy the remaining certification criteria enumerated in Rule 334.16(1), namely: (b) there is an identifiable class of two or more persons; (c) the claims of the class members raise common questions of law or fact; and (d) a class proceeding is the preferable procedure.

[12] It is possible that these deficiencies could be rectified with an amended Statement of Claim and a new certification motion. Accordingly, the motion for certification will be dismissed, but with leave to amend.

[13] Given the substantial amendments to the Statement of Claim that are required before the proposed class action may be certified, it is premature to decide the Defendant's motion to stay the proceeding pursuant to s 50(1) of the *Federal Courts Act*.

II. Background

[14] The Plaintiffs assert that between April 17, 1985 and November 1, 2021, there have been 41,069 regular members of the RCMP who have worked at least one day.

[15] The Plaintiffs say that regular members of the RCMP face a unique set of occupational risks. Their work is inherently stressful, complex and dangerous. Regular exposure to traumatic events is associated with a higher risk of developing Post-Traumatic Stress Disorder [PTSD], Major Depressive Disorder, Panic Disorder, Generalized Anxiety Disorder, and Social Anxiety Disorder, as well as difficulties with alcohol and other substances, marital problems, chronic pain, sleep disturbances, and a significantly increased rate of suicide.

[16] A study of mental disorder symptoms among public safety personnel completed in 2018 found that the lifetime PTSD prevalence for the general Canadian population is approximately 9%; however, the prevalence of PTSD in the RCMP was estimated to be 30% (Dr. Nicholas Carleton et al, "Mental Disorder Symptoms among Public Safety Personnel in Canada" (2018) 63:1 The Canadian Journal of Psychiatry 55). According to the study, RCMP members reported symptoms of clinical levels of depression at a rate of 31.7%, anxiety at 23.3%, Social Anxiety Disorder at 18.7%, and Alcohol Use Disorder at 3.9%. In total, 50.2% of the sample studied screened positive for a mental health disorder. The study encompassed both regular and civilian members of the RCMP. The Plaintiffs say these percentages would likely be higher if the study had been limited to regular members, given their front-line policing role.

[17] The Plaintiffs allege that the unique mental health challenges faced by RCMP members, and the stigma associated with mental illness, have been recognized by the RCMP for decades. Statistics released by Veterans Affairs Canada [VAC] in September 2009 identified 1,711 RCMP members with psychiatric conditions, including PTSD, anxiety disorders, panic disorders and

depression. Of those, 1,051 members had been released from employment, while 660 continued to serve.

[18] Historically, RCMP members were given access to only the standard Employee Assistance Program [EAP] available throughout the federal public service. The support provided was short-term and not specifically tailored to the complex needs of RCMP members, including those with OSIs.

[19] In 2010, the RCMP announced a pilot project to help manage symptoms of duty-related mental illness that was modelled after a program implemented by the Canadian Armed Forces. The initiative never became fully operational and was cancelled in 2012. The RCMP continued to offer the existing generic mental health programs.

[20] In 2013, VAC statistics indicated that the number of disability claims by RCMP members afflicted with PTSD had doubled in the previous five years. In 2014, 41.7% of long-term disability claims for members who were no longer with the RCMP resulted from mental-health conditions. The Plaintiffs say those figures capture only a fraction of the total number of regular members suffering from OSIs, as they excluded those who chose not to disclose their OSIs or who did not meet the eligibility threshold for a disability pension.

[21] In May 2014, the RCMP announced a five-year Mental Health Strategy, acknowledging that “it is so important to look after our employees to ensure that they can be contributing, healthy and well balanced members of the organization”, and “more can and should be done to

address the issue of mental health in the workplace." The Plaintiffs say that, in many respects, the Mental Health Strategy was a restatement of existing services: continued access to the EAP complemented by a Peer-to-Peer Program and tri-annual periodic health assessments. The strategy also included the ongoing care provided by the RCMP's Occupational Health and Safety Services [OHSS] Offices, and the existing coverage for external medical practitioners provided under the Health Care Entitlements and Benefits Program.

[22] In 2016, the House of Commons Standing Committee on Public Safety and National Security published a report addressing the prevalence of OSIs and PTSD in public safety officers and first responders. The Standing Committee emphasized the need to recognize the particular and unique work environments of various public safety officers, and the fact that RCMP officers "are deployed at home in an environment of ongoing uncertainty, often for decades." The Standing Committee highlighted the need for data collection and retention with respect to the mental health of regular RCMP officers, and noted the need for further comprehensive research on prevention, education, screening, intervention and treatment, as well as the importance of early diagnosis.

[23] In 2017, the Office of the Auditor General published the findings of an intensive audit of the Mental Health Services and the RCMP Mental Health Strategy for the period January 2012 to December 2016 [Auditor General Report]. The audit's purpose was to assess "whether RCMP members had access to mental health support that met their needs," and examine whether the RCMP's Mental Health Strategy supported the early detection and intervention or continuous

improvement of mental health conditions within the workplace. The audit assessed if the following Mental Health Services were being implemented as intended across divisions:

- Road to Mental Readiness;
- Peer-to-Peer Program;
- Periodic Health Assessments;
- OHSS Offices (intake and assessment, recommendation or referral to external treatment providers, review and approval of treatment plans, fitness-for-duty assessments);
- Health Care Entitlements and Benefits Program (external treatment, including OSI Clinics); and
- Disability case management (medical leave, return to work, and medical discharge).

[24] The Auditor General Report found shortcomings in the RCMP's implementation of the Mental Health Services, concluding as follows:

> We concluded that overall, members of the RCMP did not have access to mental health support that met their needs. The RCMP took the important step of introducing a mental health strategy. However, it failed to make implementation of the selected mental health programs and services a priority, and it did not commit the necessary resources to support them. […]

[25] The Auditor General Report found that the RCMP was not prioritizing mental health care, and the stated goals of early detection and intervention were not supported by effective actions. In particular, some programs and services were only partially implemented, there were backlogs and a lack of the necessary intervention by supervisors, no service standards to guide or assess the timeliness of OHSS services, and inadequate record keeping. Additional failures were found in mental health sick leave policies and inaccessibility and delay in gaining access to the

Mental Health Services. Concerns were noted regarding inadequate oversight, poor communication, and ineffective support for RCMP members who were off-duty and taking sick leave.

[26] The Honourable Ralph Goodale, then Minister of Public Safety and Emergency Preparedness, responded to the Auditor General Report with a statement acknowledging that "RCMP employees and members must have appropriate access to the resources and services they need for their mental health and well-being." He provided an assurance that the RCMP had already taken steps to address the Auditor General's recommendations, and stated that the RCMP was committed to identifying resource requirements for its mental health strategy, strengthening measurement and accountability for mental health, and providing better tools and training to management and employees.

[27] In the winter of 2018, the RCMP provided updates with respect to its progress on implementing the Auditor General's recommendations. The Plaintiffs acknowledge that these were steps in the right direction. However, they maintain that more must be done to address OSIs among RCMP members, and to effectively implement the Mental Health Services in a way that addresses the systematic and structural barriers to obtaining timely mental health care.

[28] The Plaintiffs assert that regular RCMP members continue to face delays and obstacles in gaining access to treatment and support, and also in returning to work. They say this is illustrated by the experiences of the proposed Representative Plaintiffs, and also prospective Class Member S/Sgt. Pound. They maintain that the evidence filed in support of this certification motion

indicates system-wide deficiencies in the implementation of the Mental Health Services, from the prevention of OSIs to supporting Class Members returning to work.

[29] The Plaintiffs say that the RCMP's negligent implementation of the Mental Health Services may be loosely categorized as follows:

- Prevention of OSIs is not taken seriously;
- Supervisors and others in the chain of command do not encourage identification and treatment of OSIs;
- Delays in delivery of services;
- Help-seeking is discouraged; and
- Members off-duty on sick leave for mental health reasons are not supported in their return to work.

[30] The Plaintiffs submit that the deficiencies in the RCMP's implementation of the Mental Health Services amount to systemic negligence and breach of Class Members' rights pursuant to s 15(1) of the Charter.

III. Issues

[31] The issues raised by these motions are (a) whether this proceeding should be certified as a class action, and (b) whether the proceeding should be stayed on the ground that it overlaps with the previously certified class actions in *Greenwood* and *Delisle*.

IV. Motion for Certification

[32] The focus of the analysis at the certification stage is not on the merits of the claims, but whether the claims may appropriately be advanced as a class action. The test for certification of a proposed class action is found in Rule 334.16(1):

> **334.16(1)** Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if
>
> (a) the pleadings disclose a reasonable cause of action;
>
> (b) there is an identifiable class of two or more persons;
>
> (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
>
> (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
>
> (e) there is a representative plaintiff or applicant who
>
> i. would fairly and adequately represent the interests of the class,
>
> ii. has prepared a plan for the proceeding that sets out a workable method of advancing the proceedings on behalf of the class and of notifying class members as to how the proceeding is progressing,
>
> iii. does not have, on the common questions of law or fact, an interest
>
> **334.16(1)** Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies:
>
> (a) les actes de procédure révèlent une cause d'action valable;
>
> (b) il existe un groupe identifiable formé d'au moins deux personnes;
>
> (c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
>
> (d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
>
> (e) il existe un représentant demandeur qui:
>
> i. représenterait de façon équitable et adéquate les intérêts du groupe,
>
> ii. a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du

that is in conflict with the interests of other class members, and	groupe informés de son déroulement,
iv. provides a summary of any agreements respecting fees and disbursements between the representative plaintiff of application and the solicitor of record.	iii. n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
	iv. communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[33] The onus is on the Plaintiffs to establish the evidentiary basis for certification. In particular, the Plaintiffs must show some basis in fact for each of the certification requirements, save for the reasonable cause of action (*Canada (Attorney General) v Jost*, 2020 FCA 212 [*Jost*] at para 28). The evidentiary burden is not onerous. Only a "minimum evidentiary basis" is required (*Condon v Canada*, 2015 FCA 159 at para 10).

[34] It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and the relief sought (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*] at para 16). Pleadings play an important role in providing notice and defining the issues to be tried. The Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action. If the Court were to allow parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues (*Mancuso* at paras 16-17).

[35] A plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant

who, when, where, how and what gave rise to its liability. Plaintiffs cannot file inadequate pleadings and rely on a defendant to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars (*Mancuso* at paras 19-20).

[36] The normal rules of pleading apply with equal force to a proposed class action. The Court must view the pleading as it has been drafted, not as it might be drafted. The launching of a proposed class action is a matter of great seriousness, potentially affecting many class members' rights and the liabilities and interests of defendants. Complying with the Rules is not trifling or optional; it is mandatory and essential (*Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 40).

[37] A plaintiff satisfies the reasonable cause of action requirement unless it is "plain and obvious" that no claim exists (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 [*Hunt*] at 979; *Hollick v Toronto (City)*, 2001 SCC 68 at para 25). The threshold is low, and the Court must read the pleading as generously as possible with a view to accommodating any inadequacies in the allegations (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 [*Atlantic Lottery*] at para 88, citing *Operation Dismantle v The Queen*, [1985] 1 SCR 441 (SCC) at 451; *Canada v John Doe*, 2016 FCA 191 [*John Doe*] at para 51).

[38] Claims that do not contain a "radical defect" should advance to trial. A plaintiff should not be prevented from proceeding because of the length or complexity of the issues, the novelty of a cause of action, or the potential for a strong defence to be mounted (*Atlantic Lottery* at para 89, citing *Hunt* at 980). Further, it is not necessary for a plaintiff to successfully plead all

asserted causes of action. It is sufficient if the pleadings disclose one valid cause of action (*Tippett v Canada*, 2019 FC 869 at para 34, citing *Gay et al v Regional Health Authority 7 and Dr Menon*, 2014 NBCA 10 at para 36).

[39] The facts pleaded are assumed to be true, unless they are manifestly incapable of being proven, and no evidence may be considered (*Atlantic Lottery* at para 87; *John Doe* at para 23). Even so, the plaintiffs must clearly plead facts, not bald assertions or conclusions, to support the elements of each cause of action (*John Doe* at para 23).

[40] The Plaintiffs' Statement of Claim pleads two causes of action: (a) systemic negligence and (b) breach of s 15(1) of the Charter. The Defendant maintains that both causes of action are barred by s 9 of the CLPA for all members of the proposed Class.

A. *Systemic Negligence*

[41] The Plaintiffs allege that the Defendant was systemically negligent in its implementation of the Mental Health Services. They claim the Defendant owed the proposed Class a duty to take reasonable care in the implementation of the Mental Health Services, and the Defendant breached this duty, causing damages, injury and loss to the Class.

[42] Courts have recognized systemic negligence claims in *Canada (Attorney General) v Nasogaluak*, 2023 FCA 61 [*Nasogaluak*], *Davidson v Canada (Attorney General)*, 2015 ONSC 8008 (Ont SCJ)) and *Rumley v British Columbia* (2001 SCC 69 (SCC). Similarly, claims of

systemic harassment within the RCMP were found to meet the cause of action requirement in *Merlo v Canada*, 2017 FC 533 and *Tiller v Canada*, 2019 FC 895 (see *Greenwood* at para 81). Plaintiffs must establish the same elements for all negligence claims, regardless of whether or not they are pursued on a systemic basis (*Greenwood* at para 153).

[43] In *Greenwood*, the Federal Court of Appeal outlined the elements of the tort of negligence as follows (at para 154, citing *Saadati v Moorhead*, 2017 SCC 28 [*Saadati*] at para 13):

> Liability 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.

[44] With respect to the first element, courts determine whether a duty of care exists by applying the two-stage test established in *Anns v Merton London Borough Council*, [1977] 2 All ER 492 (HL), and later refined by the Supreme Court of Canada in *Cooper v Hobart*, 2001 SCC 79 [*Anns/Cooper* test]. While it is generally not necessary to proceed to the second stage of the test for claims that are analogous to an established duty of care, the full two-stage test applies where the alleged duty of care is novel (*Nelson (City) v Marchi*, 2021 SCC 41 [*Marchi*] at paras 17-18). Here, the Plaintiffs admit that the duty of care they advance is novel, and the full *Anns/Cooper* test must be applied.

[45] The first stage of the *Anns/Cooper* test asks if the defendant owed the plaintiff a *prima facie* duty of care. This is established by a relationship of proximity between the plaintiff and the

defendant, such that the defendant's failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. Once a *prima facie* duty of care is established, the second stage of the test asks if there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care (*Marchi* at paras 17-18).

[46] The Plaintiffs argue that the Defendant's negligent implementation of the Mental Health Services caused the Class Members to suffer foreseeable harm. The Statement of Claim pleads that the Defendant had access to empirical evidence of a mental health crisis within the RCMP, knowledge of the risks that were likely to give rise to duty-related OSIs, and Class Members' accounts of exposure to trauma. The Plaintiffs say the Defendant neglected to modify or improve its implementation of the Mental Health Services, resulting in the foreseeable proliferation and exacerbation of OSIs.

[47] The Plaintiffs also claim that there is proximity between the parties. Proximity arises where the parties are in such a close and direct relationship that it would be just and fair to impose a duty of care upon the defendant (*Marchi* at para 17). In *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, the Supreme Court of Canada identified two distinct situations that may establish a relationship of proximity (at paras 43-46):

> Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.
>
> The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes

> may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*D. (B.)*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. […]
>
> The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. […]
>
> Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties.

[48] The Plaintiffs say that proximity arises from the RCMP's responsibility for establishing and maintaining occupational health and safety standards under the *Canada Labour Code*, RSC, 1985, c L-2 [Code]. Section 124 of the Code imposes upon employers the general duty to "ensure that the health and safety at work of every person employed by the employer is protected". While failure to comply with a statutory obligation will not in itself give rise to an actionable tort, it may serve as evidence of negligence (*Kahnapace v Canada (Attorney General)*, 2023 FC 32 at para 128, citing *Apotex Inc v Syntex Pharmaceuticals International Ltd*, 2005 FCA 424 at paras 15-16).

[49] In addition, the Plaintiffs argue that proximity arises from numerous interactions between the Defendant and the Class. The Statement of Claim pleads material facts derived from the personal experiences of the proposed Representative Plaintiffs, each of whom recounts the challenges they faced in obtaining access to the Mental Health Services and returning to meaningful work. The Plaintiffs also plead that the RCMP made representations to the Class,

including an acknowledgment that “more can and should be done to address the issue of mental health in the workplace”.

[50] Assuming the pleaded facts to be true, the Statement of Claim pleads sufficient facts to establish foreseeability and proximity between the Defendant and the proposed Class based on their conduct and interactions. It is neither plain nor obvious that the Plaintiffs cannot satisfy the first stage of the *Anns/Cooper* test at trial.

[51] With respect to the second stage of the *Anns/Cooper* test, the Plaintiffs accept that “core” or “true” policy decisions that involve the weighing of competing economic, social, and political factors and conducting contextualized analyses of information are immune from liability in negligence (citing *Marchi* at paras 44, 50, 51). However, activities that fall outside this protected domain may expose a public authority to liability if they entail “the practical implementation of the formulated policies” or “the performance or carrying out of a policy” (*Brown v British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420 at 441).

[52] Here, the Plaintiffs say the Defendant owed a duty of care to implement the previously adopted Mental Health Services without negligence. As the Supreme Court of Canada held in *Just v British Columbia*, [1989] 2 SCR 1228 at 1243:

> […] if a decision is made to inspect lighthouse facilities the system of inspection must be reasonable and they must be made properly. [citation omitted]. Thus once the policy decision to inspect has been made, the Court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the viability of funds, to determine whether the government agency has met the requisite standard of care.

[53] Similarly, having elected to provide the Mental Health Services, the Plaintiffs say the RCMP assumed an obligation to Class Members to provide them reasonably. The Plaintiffs assert that the manner in which they have advanced their claim of systemic negligence is similar to the one confirmed by the Federal Court of Appeal in *Nasogaluak*.

[54] The Statement of Claim pleads that members of the proposed Class have suffered pecuniary and non-pecuniary damages, injury and loss, and that these harms were caused by the negligent acts and omissions of the Defendant. The Plaintiffs allege that the Defendant knew, or ought to have known, that its negligence would cause the Class Members to suffer damages, including emotional, physical, and psychological harm, such as the exacerbation of OSIs.

[55] Damages for mental injury are recoverable in negligence (*Saadati* at paras 23-24). The mental injury need not rise to the level of a "recognizable psychiatric illness", so long as the disturbance suffered by the claimant is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" that come from daily life.

[56] As the Federal Court of Appeal held in *Greenwood*, "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" (at para 162). In the same vein, the Court should be "circumspect" in finding at this preliminary stage that the Defendant owes no duty of care to the proposed Class to ensure that the Mental Health Services were implemented without negligence (see *Sauer v Canada (Attorney General)*, 2007 ONCA 454). The Plaintiffs' Statement of Claim discloses a reasonable cause of action.

B. *Canadian Charter of Rights and Freedoms, s 15*

[57] Subsection 15(1) of the Charter states:

Equality before and under law and equal protection and benefit of law	**Égalité devant la loi, égalité de bénéfice et protection égale de la loi**
15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15 (1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[58] To prove a *prima facie* violation of s 15(1) of the Charter, a claimant must demonstrate that the impugned law or state action: (a) on its face or in its impact creates a distinction based on an enumerated or analogous ground, and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27). The analysis is fact-driven, highly contextual and comparative.

[59] In *Withler v Canada (Attorney General)*, 2011 SCC 12 [*Withler*], the Supreme Court of Canada rejected the need for a "mirror comparator", and held that claimants need establish only distinctive treatment based on a prohibited ground (at paras 62-63). Here, the Plaintiffs say the comparator group consists of regular members of the RCMP who sustain physical injuries in the

line of duty. The difference in the nature of the injury suffered by the two groups leads to differential treatment.

[60] In *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, a decision that pre-dates *Withler*, the Supreme Court of Canada held that "a claimant relying on a personal characteristic related to the enumerated ground of disability may invite comparison with the treatment of those suffering a different type of disability", for example, by comparing the "differential treatment of those suffering mental disability [with] those suffering physical disability" (at para 54).

[61] According to the Plaintiffs, the Mental Health Services offered by the RCMP may appear neutral, but the impact of their delivery is that members of the proposed class receive substantially different and inferior treatment compared to regular members of the RCMP who suffer from physical injuries. The latter have access to better occupational health services, and do not encounter stigma in obtaining those services, ensuring their injuries are addressed in a timely and effective manner, and facilitating their return to work. Physical disabilities are often obvious, do not require self-identification, and are perceived as "legitimate" rather than a form of "weakness".

[62] The Statement of Claim alleges that "[i]ndividuals with mental disabilities have historically been disadvantaged in Canadian society, limited in employment opportunities, are vulnerable, and stereotyped", and "this pre-existing disadvantage contributes to the impact of the distinction created by the Defendant, and exacerbates the harm and lack of substantive equality

experienced by the Class." Canadian law has long recognized that those with mental disabilities suffer from a pre-existing disadvantage (*Plesner v British Columbia Hydro and Power Authority,* 2009 BCCA 188 at para 130).

[63] The Defendant says that the Statement of Claim pleads no material facts to support the assertion that the Mental Health Services offered to the proposed Class are deficient compared to the health care offered to RCMP members with physical injuries. There are no particulars of the occupational health services offered to members with physical injuries. Nor does the pleading articulate how those occupational health services are better tailored to the needs of members with physical injuries, or how they are superior to the Mental Health Services. The Statement of Claim is bereft of the necessary facts to support an analysis under s 15 of the Charter.

[64] The Defendant also relies on the Supreme Court of British Columbia's decision in *KO v British Columbia (Ministry of Health),* 2022 BCSC 573, where Justice Robin Baird refused to certify a proposed class action alleging that the Ministry of Health failed to adequately address mental illness-related stigma in its administration and operation of the public health care system. The plaintiff alleged that people with mental illnesses received lower quality healthcare than those with physical injuries, contrary to s 15 of the Charter.

[65] Justice Baird found that the plaintiff's pleading failed to disclose a reasonable cause of action (at paras 25-26):

> For the most part, the "Stigmatization Impacts" listed in the pleadings are variations on an allegation that the government under-funds mental health services resulting in inadequate care for K.O. and others. But it is no part of the claim for remedies, nor

> could it be, that the defendant should be compelled to finance and provide medical health services or benefits not already provided by law, or that K.O. should receive redress or compensation for government budgetary decisions: see, in this connection *Cirillo v. Ontario*, 2021 ONCA 353; *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 ("*Tanudjaja C.A.*"), leave to appeal refused [2015] S.C.C.A. No. 39; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78.
>
> It bears emphasis that the plaintiffs are not seeking declaratory or injunctive relief to compel any systemic correction within the healthcare service. Instead, they demand compensation from the provincial treasury for the defendant's alleged failure to fund, devise and implement discretionary public policy. An allegation of underfunding, or failing to create or adequately design social programs, does not make up a cause of action.

[66] The Plaintiffs in this proceeding are not challenging the Defendant's alleged failure to fund, devise and implement discretionary public policy. Rather, the Plaintiffs take issue with the manner in which the Defendant implemented the Mental Health Services the RCMP chose to provide to its members. In this respect, the Charter allegation is broadly consistent with the claim of systemic negligence.

[67] I nevertheless agree with the Defendant that the Statement of Claim is deficient, in that it does not plead material facts respecting the provision of health care services to the comparator group, *i.e.*, regular members of the RCMP who sustained physical injuries in the line of duty.

[68] It is possible that this deficiency could be cured by amendment of the Statement of Claim. However, as presently constituted, the Statement of Claim does not plead sufficient facts to disclose a reasonable cause of action arising from the alleged breach of s 15 of the Charter.

C. *Crown Liability and Proceedings Act, s 9*

[69] Section 9 of the CLPA provides as follows:

No proceedings lie where pension payable	**Incompatibilité entre recours et droit à une pension ou indemnité**
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.

[70] The purpose of s 9 is to prevent double recovery for the same claim. In *Sarvanis v Canada*, 2002 SCC 28 [*Sarvanis*], the Supreme Court of Canada interpreted s 9 of the CLPA as follows (at para 28):

> 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.

[71] In *Sarvanis*, the Supreme Court concluded that s 9 of the CLPA did not bar the plaintiff's tort claim because his disability benefit, awarded under the *Canada Pension Plan* [CPP], had a distinct factual basis (at para 38):

> Simply put, s. 9 of the *Crown Liability and Proceedings Act* establishes Crown immunity where the very event of death, injury, damage or loss that forms the basis of the barred claim is the event that formed the basis of a pension or compensation award. The CPP, a contributory plan not contingent on death, injury, damage or loss, but rather on physical condition and on adequate quantum and duration of contribution, is a significantly different animal.

[72] In *Greenwood*, the Federal Court of Appeal rejected the defendant's argument that the proposed representative plaintiffs were not suitable because their claims were non-viable due to the application of s 9 of the CLPA. The Court held that it was unclear whether the plaintiffs' disability pensions were in respect of the same occurrences as alleged in the claim, and it was therefore premature to decide whether the claims were statute-barred (*Greenwood* at paras 195-196).

[73] In *Marsot v Canada (Minister of National Defence)*, 2002 FCT 226, aff'd, 2003 FCA 145, the plaintiff who was in receipt of a partial pension attributable to a PTSD diagnosis sought damages for alleged harassment. In refusing the defendant's motion for summary judgment, Justice François Lemieux noted several evidentiary gaps respecting the nature of the plaintiff's disability and pension award. Justice Lemieux found the defendant had failed to demonstrate that the plaintiff's disability pension was in respect of the same injury, damage or loss as the basis for the plaintiff's claims.

[74] *Brownhall v Canada (Ministry of National Defence)*, [2007] 159 ACWS (3d) 811 (Ont Div Ct) is to similar effect. The Court declined to strike a statement of claim without an appropriate evidentiary foundation upon which to assess whether the pension in issue was awarded on the same factual basis as the civil claim.

[75] No similar ambiguity arises in the present case. The Plaintiffs concede that the negligence claims of Class members who are eligible for a disability pension are barred by s 9 of the CLPA. However, they suggest that these Class members can nevertheless advance the Charter claim, and participate in any aggregate award of Charter damages that may be awarded by the Court.

[76] The difficulty with the Plaintiffs' position is that the Charter claim advanced on behalf of the Class has the same factual basis as the claim of systemic negligence. Both arise from the same injuries, specifically the infliction and exacerbation of OSIs.

[77] Each of the proposed representative Plaintiffs is in receipt of a pension pursuant to s 32 of the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c R-11 [RCMPSA] and the *Pension Act*, RSC 1985, c P-6. Section 32 of the RCMPSA, which incorporates the *Pension Act*, awards disability pensions to RCMP Members who have a permanent disability connected with their service:

Eligibility for awards under Pension Act	**Admissibilité à une compensation conforme à la Loi sur les pensions**
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	**32** Sous réserve des autres dispositions de la présente partie et des règlements, une compensation

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:	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) 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, has suffered a disability or has died; and	a) visée à la partie VI de l'ancienne loi à tout moment avant le 1er avril 1960, qui, avant 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.

[78] Where the factual basis for the pension and the claim in damages are the same, it does not matter that a plaintiff's claims are broader, or framed through a Charter damages lens. Section 9 of the CLPA applies to the whole fact situation (*Kift v Canada (Attorney General of)*, [2002] OJ No 5448 (OSCJ) at para 9).

[79] As Justice Robert Décary observed in *Prentice v Canada*, 2005 FCA 395 [*Prentice*] at para 24, in order to determine whether a case arises out of an employer-employee relationship, the facts giving rise to the dispute must be considered, and not the "characterization of the

wrong" alleged; otherwise, "innovative pleaders" could "evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action".

[80] Justice René LeBlanc applied *Prentice* in *Lafrenière v Canada (Attorney General)*, 2020 FCA 110 to uphold the dismissal of a Charter claim that had the same factual basis as the appellant's award of a disability pension (at paras 60, 62):

> As the Court noted in *Prentice*, here it is necessary to examine the real nature of the action brought by the appellant and to be wary of the red herrings that may be found in his statement of claim in order to wittingly or unwittingly circumvent the immunity provided for in section 9 of the CLPA. […]
>
> Without deciding that in all circumstances section 9 of the CLPA bars a claim against the Crown based on section 24 of the Charter, for the above reasons, this case cannot be exempted from the effects of section 9 of the CLPA on the basis of the appellant's completely unsupported complaints, based on the Charter.

[81] In *Sherbanowski v Canada*, 2011 ONSC 177, Justice David Brown of the Ontario Superior Court found a plaintiff's claims to be barred by s 9 of the CLPA because they either arose out of, or were directly connected with, a service-related injury or disease (at paras 43-44):

> A complete identity exists between the losses asserted by Mr. Sherbanowski in this action in respect of the Events Claims and the losses for which awards of disability benefits have been granted to Mr. Sherbanowski and for which he has received payment or which are payable to him. The factual basis upon which Mr. Sherbanowski rests his claims for damages in this action is the same factual basis upon which he rested his applications for disability awards under section 45 of the *Compensation Act* […] His Statement of Claim, in essence, reproduces the events Mr. Sherbanowski narrated in the 16-page document attached to his application for PTSD benefits.

> Although Mr. Sherbanowski pleads, in addition to his claims sounding in negligence, causes of action framed in breach of fiduciary duty, breach of contract, misrepresentation and breach of *Charter* rights, they all either arose out of, or are directly connected with, his service in the Forces and they seek compensation for disabilities or injuries resulting from a service-related injury or disease: *Compensation Act*, ss. 2(1) and 45(1). Those additional claims are "claims" within the meaning of section 9 of the *CLPA* because any loss or damage claimed gives entitlement to payment of a pension or compensation: *Dumont v. Her Majesty the Queen*, 2003 FCA 475, para. 73.

[82] In *Lebrasseur v Canada*, 2006 FC 852, aff'd 2007 FCA 330, Justice Anne Mactavish held that a plaintiff's claim was barred by s 9 of CLPA because it had the same factual basis as her pension claim. Justice Mactavish found that "while numerous different causes of actions are pleaded, at its heart, the action remains essentially a claim for damages for the treatment that Ms. Lebrasseur says that she encountered in her workplace" (at para 31).

[83] The Charter claim advanced in the Statement of Claim is premised on the same facts as the allegation of systemic negligence. It is therefore barred by s 9 of the CLPA for all members of the Class who are in receipt of disability pension or eligible to receive one. This includes all of the proposed Representative Plaintiffs, and also S/Sgt. Pound.

[84] The Plaintiffs argue that at least some members of the proposed Class would not be eligible for a disability pension. They note that pensions are paid only for formal, medically diagnosed disabilities or disabling conditions, as informed by the Diagnostic and Statistical Manual of Mental Disorders fifth edition [DSM-V], causing "permanent impairment". Any application for a disability pension must be supported by documentation from a treating physician.

[85] This may well be true. However, in light of the Plaintiffs' concession that their claim of systemic negligence is barred by s 9 of the CLPA, and the Court's conclusion that their Charter claim is similarly barred, there is currently no representative plaintiff to advance the interests of the Class. Nor is there evidence before the Court to establish the remaining criteria of Rule 334.16(1).

[86] As presently constituted, the motion for certification must be dismissed.

V. Leave to Amend

[87] Class proceedings can be complex and dynamic, and it is appropriate for case management judges to be active and flexible. They must always be open to amendments to matters such as class definition, common issues and the litigation plan, while remaining a neutral arbiter of whether the requirements of certification have been met (*Buffalo v Samson Cree Nation*, 2010 FCA 165 at paras 12-13).

[88] It is possible that the Statement of Claim can be amended to propose a new Class definition that excludes members of the RCMP whose claims are barred by s 9 of the CLPA. It will also be necessary to identify one or more representative plaintiffs to advance the interests of the revised Class. A proposed representative plaintiff must be a member of the class in question (*Jost* at paras 103-110).

[89] Further evidence will be required to establish "some basis in fact" for satisfying the remaining certification criteria enumerated in Rule 334.16(1), namely: (b) there is an identifiable class of two or more persons; (c) the claims of the class members raise common questions of law or fact; and (d) a class proceeding is the preferable procedure. In *Salna v Voltage Pictures, LLC*, 2021 FCA 176, the Federal Court of Appeal (*per* Rennie JA) emphasized the importance of evidence regarding the approximate size and shape of the potential class (at para 119):

> It is difficult, on this evidence, to do any meaningful analysis of whether a class proceeding is preferable to individual actions, or a single action with multiple defendants. The preferability analysis will differ depending on the size of the class. To be clear, a court does not need to know the exact number of class members, nor the ultimate boundaries of the class with precision. But there must be some evidence on which a court can conclude that a class proceeding is the preferred approach.

VI. Motion to Stay

[90] Given the substantial amendments to the Statement of Claim that are required before the proposed class action may be certified, it is premature to decide the Defendant's motion to stay the proceeding pursuant to s 50(1) of the *Federal Courts Act*.

VII. Conclusion

[91] The motion to certify the proposed class proceeding is dismissed with leave to amend.

[92] Consistent with Rule 334.39, no costs are awarded.

ORDER

THIS COURT ORDERS that:

1. The motion to certify the proposed class proceeding is dismissed with leave to amend.

2. No costs are awarded.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1105-20
STYLE OF CAUSE:	KELLY MCQUADE, DAVID COMBDEN AND GRAHAM WALSH v THE ATTORNEY GENERAL OF CANADA, REPRESENTING HIS MAJESTY THE KING IN RIGHT IN CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JUNE 20-22, 2023
ORDER AND REASONS:	FOTHERGILL J.
DATED:	AUGUST 8, 2023

APPEARANCES:

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