Federal Court  Cour fédérale

Date: 20240509

Docket: T-791-21

Citation: 2024 FC 655

Ottawa, Ontario, May 9, 2024

PRESENT: The Honourable Mr. Justice Zinn

CLASS PROCEEDING

BETWEEN:

DAN THOMAS

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

Table of Contents

I. Introduction

[1] Dan Thomas asks that his claim against the Canadian Armed Forces [CAF] be certified as a class proceeding and that he be appointed as representative plaintiff pursuant to Rule 334.16 of the *Federal Courts Rules*, SOR/98-106 [the Rules].

[2] Mr. Thomas seeks to represent the class members: former and current members of the CAF who experienced worsening symptoms of their mental health disorders [MHDs] during their service due to stigmatization inflicted by the CAF [Mental Illness Stigmatization]. MHDs are defined in the Plaintiff's Statement of Claim as "conditions, diseases, or symptoms of an emotional or psychological nature which negatively affect the mind, mood, behaviour, and/or cognition, and which persist for a period of sixty days or longer." Mental Illness Stigmatization is described by the Plaintiff in his Notice of Motion as "pejorative attitudes, behaviours, or beliefs concerning CAF Members who suffer from mental health disorders, as reflected by the

internalization of negative attitudes and beliefs by sufferers of mental health disorders, by CAF policies, practices, and rules, as well as by the treatment of class members by other CAF Members, which includes discrimination, ostracization, harassment, and abuse."

[3] Mr. Thomas seeks to certify a class action against the CAF for systemic negligence, breach of statutory and fiduciary obligations, breach of sections 7 and 15 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 [the *Charter*], and the related provisions of the *Civil Code of Québec*, CQLR c CCQ-1991 [*Civil Code*] and the *Charter of Human Rights and Freedoms*, CQLR c C-12 [Québec *Charter*], by failing to take adequate or any steps to mitigate Mental Illness Stigmatization in the CAF.

[4] The Defendant, the Crown on behalf of the CAF, opposes the certification of the proceeding as a class action. It submits that this Court lacks jurisdiction to certify the action because there are available legislative remedies within the CAF and elsewhere. Moreover, in its Memorandum of Fact and Law, it submits that the Plaintiff failed to demonstrate some basis in fact of four of the five elements of the certification test under Rule 334.16 of the Rules.

[5] As is discussed below, at the oral hearing, the Crown sought to amend its Memorandum of Fact and Law [Memorandum] to argue that the Plaintiff failed to meet all five of the elements of the certification test.

[6] The Plaintiff enrolled in the CAF at the age of 17 on September 22, 1977, and served until 1986 in the 3rd Battalion, Princess Patricia's Canadian Light Infantry. He sustained a

serious physical injury while serving in the CAF, after which he was diagnosed with a MHD. He agreed to a "3B Release" (i.e., an immediate removal from CAF due to an illness or injury) in September 1986, following his stated intent to bring forward a grievance.

II. Issues

[7] These Reasons address three issues:

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

B. Should the Defendant be permitted to resile from an admission made in its Memorandum?

C. Has the Plaintiff satisfied the five conditions for certification under Rule 334.16(1) of the Rules?

III. Analysis

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

[8] The parties were permitted to submit supplemental written representations related to the Court's jurisdiction to certify this proposed class proceeding. Indeed, most of the oral hearing was devoted to these submissions.

[9] The Defendant, relying on *Vaughan v Canada*, 2005 SCC 11 [*Vaughan*] at paragraph 57, submits that the Court ought to decline jurisdiction because there are available legislative remedies within the CAF and elsewhere aimed at preventing and resolving CAF workplace

disputes. In light of the rule of law, giving respect to Parliamentary supremacy, the Court should not intervene where the statutory remedies have not been exhausted, as the Defendant submits is the case here: *Sandiford v Canada*, 2007 FC 225 at para 26.

[10] In any event, the Defendant submits that the class members received, or could receive, a pension for the same harms pleaded in this proposed class proceeding which would bar their claims pursuant to section 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [the CLPA].

[11] The Plaintiff acknowledges that the Defendant may later raise these issues as defences to the claims but says that it is premature to determine such issues at certification. Citing this Court in *Greenwood v Canada*, 2020 FC 119 [*Greenwood* FC], affirmed on appeal in 2021 FCA 186 [*Greenwood* FCA], which certified the class proceeding where the Defendant raised similar jurisdictional challenges, the Plaintiff argues that this case presents an even more extensive record to support finding that the internal mechanisms are inadequate alternative remedies for the claims sought in the proceeding and that section 9 of the CLPA does not apply.

[12] The parties' submissions on jurisdiction will be analyzed under the following headings: (1) the internal dispute resolution schemes; and (2) section 9 of the CLPA.

[13] Before delving into the merits of the jurisdictional arguments, I note that the Defendant raised several arguments relating to the admissibility of evidence. While evidence is not admissible in certification proceedings to establish the existence of a reasonable cause of action, it may be admitted and relied on in circumstances like these where the Court must determine

whether it ought to decline jurisdiction in favour of the alternate administrative remedies: *Hudson v Canada*, 2022 FC 694 [*Hudson*] at para 79; *Greenwood* FCA at para 95. Evidence relating to the nature and efficacy of the suggested alternate processes is particularly crucial in the Court's determination of jurisdiction. As the Federal Court of Appeal held in *Greenwood* FCA at paragraph 95, "[a] ruling on this sort of issue cannot be made in a factual vacuum."

[14] The Defendant specifically contests the Plaintiff's reliance on several public reports to argue that the Court should exercise its jurisdiction, namely because the internal dispute-resolution schemes are ineffective and inappropriate to deal with the harms pleaded in the statement of claim and that CAF's processes for administrating disability benefits suffers from systemic flaws and deficiencies. These reports, attached as exhibits to Ms. Lindsay Houston's affidavit [the Houston affidavit], include:

- The September 2001 report of CAF Ombudsperson André Marin;
- The December 2002 report of CAF Ombudsperson André Marin;
- The September 3, 2003 report of the Right Honourable Antonio Lamer;
- The December 2008 report of CAF Ombudsperson Mary McFadyen;
- The May 2010 report of CAF Ombudsperson Pierre Daigle;
- The December 2011 report of the Honourable Patrick LeSage;
- The March 27, 2015 report of the Honourable Marie Deschamps;
- The September 2018 report of Veterans Ombudsperson Guy Parent;
- The September 28, 2020 report of the Parliamentary Budget Officer;
- The December 2020 report of the Standing Committee on Veterans Affairs;
- The April 30, 2021 report of the Honourable Morris J. Fish;

- The May 2022 report of the Auditor General of Canada;
- The May 20, 2022 report of the Honourable Louise Arbour [the Arbour Report];
- The June 2022 report of the Standing Committee on Veterans Affairs; and
- The December 12, 2022 report of the Honourable Anita Anand.

[15] The Plaintiff argues that these reports should be admissible for the truth of their contents since they are "documents in possession" of the Defendant and by virtue of the manner of their preparation as public documents: *British Columbia (Securities Commission) v Branch*, [1995] 2 SCR 3 at para 52; *Grewal v Khalsa Credit Union*, 2011 BCSC 277 at para 7. The Defendant argues that the Plaintiff failed to establish that the public documents exception to the rule against hearsay should apply such to admit the reports for the truth of their contents: *Robb Estate v St. Joseph's Health Care Centre*, [1998] 31 CPC (4th) 99. Instead, the Defendant argues that the reports are admissible only to the extent that they place the facts pled into context: *Bigeagle v Canada*, 2021 FC 504 at paras 36–46, aff'd 2023 FCA 128 at para 44.

[16] I agree with the Plaintiff and will admit and rely on the evidence contained within the Houston affidavit, in addition to the other evidence tendered by the parties, in determining whether the Court should decline to exercise its jurisdiction in this matter. Similar reports were admitted and considered for the truth of their contents in evaluating the jurisdictional issue in *Greenwood* FC, affirmed in *Greenwood* FCA.

(1) The internal dispute resolution schemes

[17] The Defendant submits that the Court should decline to exercise its jurisdiction to certify this proposed class action proceeding due to the availability of internal dispute resolution schemes and compensation by CAF that may adequately address the class members' claims. It points to several policies, orders, instructions, and directives that demonstrate CAF's anti-harassment stance. In great detail, it explains that CAF has multiple avenues for providing redress to compensate for wrongs committed by the CAF, including remedying those who faced harassment or discrimination on the basis of disability.

[18] These avenues include statutory grievance rights under section 29 of the *National Defence Act*, RSC 1985, c N-5 [the NDA], a harassment complaint process set out in the *Defence Administrative Orders and Directives* [DAOD] and *Queens Regulations and Orders for the Canadian Forces* [QR&O], and judicial review of final decisions of administrative decision-makers under section 18 of the *Federal Courts Act*, RSC 1985, c F-7 [Federal Courts Act]. CAF members also can address complaints of discrimination and harassment, as well as retaliation for the making of any such complaints, under the *Canadian Human Rights Act*, RSC 1985, c H-6, through independent review and investigation by the National Defence and Canadian Forces Ombudsman or Directorate of Special Examinations and Inquiries, and through investigation of misconduct under the NDA. Most harassment complaints are resolved informally, with the assistance of CAF's Integrated Conflict and Complaint Management program.

[19] CAF members who are aggrieved by any decision, act, or omission in the administration of the CAF's affairs, and for which no other process for redress is provided under the NDA, are

entitled to submit a grievance: NDA, s 29(1). If a grievance related to harassment is submitted before a formal harassment complaint is made, a Situational Assessment [SA] may be completed by the grievance authority. Where the SA finds that the complaint meet the criteria to proceed through the formal harassment complaint process, an investigation may be conducted by a Responsible Officer [RO], a senior military member or civilian manager outside the grievance authority. There are a range of remedial and disciplinary measures available to correct a respondent's behaviour should the RO find that harassment occurred. If the CAF member is not satisfied with the result of the harassment investigation or the RO's decision on the harassment complaint, or has a complaint regarding the procedure followed in the harassment investigation, he or she may submit a grievance.

[20] A grievance is initially referred to a grievor's commanding officer or their superior who may act as the initial authority [IA] if they are able to provide the redress sought: QR&O, art 7.09. If the grievor is seeking redress which cannot be provided by the IA, or if it relates to the officer to whom it is submitted, the grievance is referred to the next superior officer responsible for the matter, who will act as the IA: QR&O, art 7.14. IA decisions may be reviewed by the Military Grievance External Review Committee [MGERC] and by a Final Authority [FA], who is the Chief of the Defence Staff [CDS] or their delegate. In some cases, including where the grievance relates to "the application or interpretation of Canadian Forces policies relating to […] harassment or racist conduct," the MGERC is required to review them: QR&O, art 7.21. The MGERC is an independent administrative tribunal external to the CAF that reviews individual grievances and provides findings and recommendations to the CDS and the grievor. Though the MGERC's findings and recommendations are not binding, the CDS must provide reasons if it departs from them. The MGERC also provides the CDS with systemic

recommendations, such as measures to increase fairness and transparency in the grievance process.

[21] There are a range of remedies available for successful complainants including *ex gratia* payments of up to $100,000.

[22] The Defendant submits that the schemes described above have not been exhausted. That is, the Plaintiff and the Plaintiff's affiants have not attempted to use the formal or informal harassment complaint process nor the grievance process to address their claims. It emphasizes that the Plaintiff bears the burden of demonstrating to the Court that it should exercise its residual discretion to assume jurisdiction. Such residual jurisdiction is to be used only in exceptional cases: *Lebrasseur v Canada*, 2006 FC 852 [*Lebrasseur* FC] at para 37, aff'd 2007 FCA 330 [Lebrasseur FCA] at paras 18-19; *Moodie v Canada*, 2008 FC 1233 at para 38.

[23] In support of its argument that the Court ought to defer to internal mechanisms where they are available and address the same or similar pleaded harms, especially in the context of claims involving workplace harassment or discrimination, the Defendant cites a myriad of decisions from different courts that rely on *Vaughan*: *Lebrasseur* FCA; *Canada v Prentice*, 2005 FCA 395; *Tindall et al v Royal Canadian Mounted Police et al*, 2018 ONSC 4365; *Marshall v Canada*, 2008 SKQB 113; *Doucette v Canada (Attorney General)*, 2018 FC 697; *Desrosiers v Canada (Attorney General)*, 2004 FC 1601; *Galarneau v Canada (Attorney General)*, 2005 FC 39; *Hudson*; and *Bisaillon v Concordia University*, 2006 SCC 19.

[24] In particular, the Defendant submits that the grievance system under the NDA provides CAF members with the opportunity to seek redress for just about any issue which may arise in service, including allegations of workplace harassment and discrimination on the basis of disability. Indeed, this Court has deferred to this process on many occasions as cited above.

[25] The Defendant further acknowledges that the internal processes are marred with delays but says that these delays were or are being addressed (see the *Directive for CAF Grievance System Enhancement*) and, in any event, mere delay or bare allegations of inadequacies are insufficient to support a finding that the Court should not defer to the internal processes: *Fortin v Canada (Attorney General)*, 2021 FC 1061 at para 43; *Kleckner v Canada (Attorney General)*, 2016 FC 1206 at para 36.

[26] The Plaintiff heavily relies on this Court's decision in *Greenwood* FC in submitting that the Defendant's jurisdictional arguments cannot succeed. In *Greenwood* FC at paragraph 39, the Court found that it could exercise jurisdiction as the internal mechanisms within the Royal Canadian Mounted Police did not "provide a fulsome remedy, or any remedy, for the claims sought to be advanced." The Plaintiff similarly argues that the CAF's internal dispute resolution schemes cannot provide effective redress to the class members in this action. Indeed, the Plaintiff asserts that part of the allegations advanced in the class proceeding relate to the inadequacy of the internal dispute resolution schemes. He submits that it is circular to decline certifying the class proceeding on the basis of seeking a remedy through the Defendant's internal schemes when those very schemes form part of the dispute. Most of the Plaintiff's evidence against the internal processes relate to its delays and resulting backlogs.

[27] Once the Defendant satisfies the Court that there is a legislative scheme to which the Court must defer, the Plaintiff bears the burden of establishing that the Court nevertheless possesses residual jurisdiction that it ought to exercise: *Lebrasseur* FCA at para 19. I accept that there are internal mechanisms within the CAF which cover the harms alleged in the Statement of Claim, insofar as they relate to workplace disputes; the question for me to determine is whether the Plaintiff demonstrated that I should exercise my jurisdiction to intervene.

[28] For the same reasons as in *Greenwood* FC (i.e., the inadequacy of internal recourse mechanisms), I find that the Court may exercise jurisdiction to certify the class action proceeding.

[29] In *Vaughan*, the Supreme Court held that while courts generally should defer to any legislative schemes that exist to deal with employment-related disputes, they nonetheless retain residual jurisdiction that may be exercised where the legislated process does not provide effective redress: *Vaughan* at paras 18–25. Courts only lack this residual jurisdiction in exceptional circumstances where the legislative scheme ousts the Court's jurisdiction completely: *Vaughan* at paras 18–25. No such strong legislative language exists here. I therefore find the Court retains residual jurisdiction to intervene in the case at bar.

[30] I acknowledge the case law the Defendant cites where this Court, and others, in its discretion declined to exercise its residual jurisdiction due to the availability of statutory internal mechanisms to adequately address workplace conflicts. I note that many of these cases were those advanced in *Greenwood* FCA, which the Federal Court of Appeal determined were not binding authority to limit the Court's exercise of residual jurisdiction. While I agree with the

Defendant that the Court should defer to Parliamentary intent where possible, it should nevertheless look beyond the mere availability of such internal recourses in determining whether "the internal mechanisms are incapable of providing effective redress:" *Greenwood* FCA at para 130. The question is not whether the existence of these mechanisms in the abstract should prevent the Court from exercising its jurisdiction; rather, the Court must determine whether in reality these internal mechanisms adequately address the pleaded claims in the pleaded circumstances such that the Court should defer to them. As this Court has held in the context of intervening in employment-related disputes, there must be a gap in labour adjudication that causes a "real deprivation of ultimate remedy:" *Hudson* at para 74, citing *Weber v Ontario Hydro,* [1995] 2 SCR 929 at para 57.

[31] The Defendant argues that this case is unlike *Greenwood* FC due to a lack of evidence demonstrating that the CAF's grievance process is incapable of providing effective redress for what it characterizes as essentially workplace disputes. I disagree. Here, the Plaintiff adduced sufficient evidence contained within the Houston affidavit to provide some basis in fact that the internal dispute resolution schemes that the Defendant points to are ineffective in providing the redress sought under the class proceeding. While much of the evidence the Plaintiff puts forward relates to the system's delays, there is some evidence suggesting that the effectiveness of the internal process is severely limited by the deterrents in using the process, including the class members' grounded fear of repercussion and retaliation and the lack of confidentiality. The Plaintiff's affidavit and those of Mr. Ryan Lewis and Mr. Stephan Poitras further provide direct evidence as to how the CAF grievance process, which they did use or attempted to use, inadequately addressed their alleged harms, and even exacerbated them.

[32] This case is different from those the Defendant cites, where the plaintiffs alleged general harassment and other harms that could properly be addressed by the available internal mechanisms. Here, there are exceptional circumstances warranting the Court's residual discretion to exercise jurisdiction. The alleged lack of independence of the internal process is central to its inadequacy—the CAF cannot rely on internal processes that lack impartiality to provide the same redress sought under the proposed class proceeding. Art 7.14 of the QR&O states that a grievance is made within a Class Member's chain of command unless the complaint is about that person, in which case it is referred to the next person in line. However, the Arbour Report, among others, identified that the final decision on grievances is made by the CDS or their delegate. In other words, while there are efforts to ensure impartiality within CAF's grievance system, there is evidence to suggest that these efforts are not sufficient.

[33] Moreover, in this litigation, the processes themselves form part of the allegations. That is, in the process of attempting to receive remedy for the alleged harms, class members may receive further harm on the same basis that they seek the remedy.

[34] CAF's internal processes are also limited to current CAF members. In contrast, this class proceeding seeks to provide relief for current and former members. This is further support that the internal processes advanced by the Defendant are not an adequate basis for the Court to defer jurisdiction.

(2) Section 9 of the *Crown Liability and Proceedings Act*

[35] CAF members may be entitled to disability benefits for pain and suffering compensation and/or a disability pension administered under the *Veterans Well-being Act*, SC 2005, c 21 [VWA] and *Pension Act*, RSC 1985, c P-6 [PA], respectively. To qualify for these benefits, a current or former CAF member must apply to Veterans Affairs Canada [VAC], have a diagnosed medical condition or disability, and be able to demonstrate a connection between that injury and the individual's service in the CAF. Service-related injuries include those of a psychological nature.

[36] Once an individual is found to be entitled to VAC benefits, the extent of compensation depends on their degree of impairment, i.e., the extent of their injury. An individual may apply for a revaluation of their degree of impairment if their condition worsens. It is not necessary for revaluation purposes that their condition worsens due to their service in the CAF.

[37] In addition, the VAC compensates for up to three injuries or diseases which are consequential to service-related injuries: VWA, s 7; PA, s 21(2.1). For example, pain and suffering compensation may be granted for disabilities which are a consequence of an injury or disease which was previously determined to be service-related.

[38] Decisions on an individual's entitlement to and assessment of VAC benefits are subject to departmental review or appeal to the independent Veterans Review and Appeal Board. These decisions are further subject to judicial review.

[39] Given the availability of disability benefits by VAC, the CAF submits that section 9 of CLPA provides a bar to the Plaintiff's and class members' claims. The section bars claims against the Crown where a pension or other compensation is payable:

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.

[40] In *Sarvanis v Canada*, 2002 SCC 28 [*Sarvanis*] at paragraph 29, the Supreme Court explained: "All damages arising out of the incident which entitles the person to a pension will be subsumed under s. 9, so long as that pension or compensation is given 'in respect of', or on the same basis as, the identical death, injury, damage or loss." In this way, section 9 of the CLPA prevents claimants from receiving "double recovery" for the same factual situation under which the government already made a payment: *Sarvanis* at para 28.

[41] In *Prentice v Canada*, 2005 FCA 395, the Federal Court of Appeal observed at paragraph 24 that "in order to determine whether a case arises out of an employer-employee relationships, 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”.”

[42] The Defendant submits that the claims alleged on behalf of the class members indeed arise from the same factual basis for which compensation has been paid, or is payable, through VAC disability benefits. It argues that the Plaintiff’s and class members’ claims can be reduced to seeking compensation for service-related injuries, compensated by VAC benefits. Indeed, the Plaintiff and its affiants have received these benefits; for example, the Plaintiff is in receipt of compensation and other benefits through VAC for his post-traumatic stress disorder and major depressive disorder.

[43] As outlined above, the Defendant submits that CAF members may receive additional compensation where they are already a recipient of disability benefits and claim their condition has worsened for whatever reason, including workplace discrimination or harassment. The VAC has authority to re-evaluate the degree of impairment, and subsequent amount of compensation, any time following receipt of VAC benefits. To the extent that the Plaintiff raises allegations of compensable harm for which he is not in receipt of VAC benefits, the Defendant submits that he is required to first make an application to VAC for compensation before commencing an action.

[44] The Plaintiff submits that section 9 of the CLPA does not apply as VAC only compensates “service-related disability” and therefore excludes compensation for harassment, abuse, discrimination, bullying, stigmatization and other pleaded harms that do not amount to a service-related disability.

[45] The Plaintiff also submits that there is no evidence that the Plaintiff, nor the class members, have been or could be compensated through the VAC for the same claims put forward by the proposed class proceeding. Mr. Thomas received VAC benefits for his "post traumatic stress disorder and major depressive disorder [that were] attributable to [his] SDA Cyprus service." However, the VAC denied Mr. Thomas benefits for his later claim of aggravation of his MHD caused by harassment he faced within his CAF chain of command, under the reason that he had already received "full disability entitlement" for his earlier claim. Although his MHD originates from his SDA Cyprus service, his secondary claim was to compensate for the separate harm he suffered more than five years later. Other class members such as Mr. Poitras and Mr. Lewis similarly received benefits from the VAC although there is no evidence that links these benefits to the claims pleaded in the proposed class proceeding. Instead, there is evidence to suggest that these benefits were provided to compensate for claims unrelated to the pleaded claims, i.e., the unrelated development of MHDs.

[46] Finally, the Plaintiff submits that the CAF's processes for administrating VAC disability benefits are plagued by systemic flaws and deficiencies. The Plaintiff provides evidence within the Houston affidavit that details the undue delays in processing VAC disability benefit applications.

[47] I find that the relief the Plaintiff seeks on behalf of the class members is beyond what can be and has been provided by the VAC. While the VAC may compensate class members for developing diagnosed MHDs during their service, the VAC does not *independently* compensate for the separately pleaded harms like abuse, harassment, and discrimination. Contrary to the Defendant's characterization, these are not consequential or ancillary damages for an event in

which compensation has been or is being paid under the VWA or PA. These are, instead, harms arising out of a separate factual basis from those compensated for by the VAC.

[48] The Defendant cites a number of cases that it claims stands for the proposition that section 9 of the CLPA bars claims by CAF members for compensation for service-related injuries. For example, in *Lafrenière v Canada (Attorney General)*, 2020 FCA 110, the Federal Court of Appeal held that section 9 of the CLPA applied to bar the plaintiff's claim for damages which was over the same condition and in respect of the same events which gave rise to his VAC pension. Even though the plaintiff's claim related primarily to the harm he faced by the Crown's processing of his complaint, rather than the complaint itself, the Court found that this harm intrinsically related to the factual basis upon which he already received compensation. Further, in *Sherbanowski v Canada (Ministry of National Defence)*, 2011 ONSC 177, the court held that section 9 of the CLPA applied on the evidence that established the plaintiff had been compensated by his VAC pension for the precise issues complained of in the plaintiff's action. The plaintiff in that case received his VAC benefits following the alleged events which gave rise to his civil claim, and which the VAC took into account.

[49] The facts of this matter are different. The evidence provided on behalf of the class members receiving VAC benefits demonstrates that the benefits do not extend to the relief sought under this proceeding. In circumstances where the benefits were provided, they were given for a different alleged harm, and in respect of different events that occurred prior to the events amounting to the pleaded harms (i.e., compensating the development of the MHD and not the resulting harms that were inflicted on class members as a result of their already-developed MHDs). It is not clear nor obvious that the VAC has or could compensate the class members for

the same factual basis underlying the common issues. This is especially true considering that the class includes individuals who have diagnosed MHDs, but did not necessarily develop those MHDs through the course of service. In these circumstances, it is even more clear and obvious that the VAC cannot provide adequate redress for the pleaded harms which claimants suffered as a result of having a MHD.

[50] The delay of the CAF's process in distributing VAC benefits is irrelevant in determining the adequacy of the benefits for the purposes of section 9. This is immaterial, however, since the other evidence demonstrates that the benefits, if provided, would not necessarily address the pleaded claims.

[51] Therefore, section 9 of the CLPA does not apply to absolve Crown liability and prevent the Court from moving forward with the certification motion.

B. *Should the Defendant be permitted to resile from an admission in its Memorandum?*

[52] The Defendant made the following statement at paragraph 32 of its Memorandum:

> On the first branch of the test for certification, the onus rests on a plaintiff to show a reasonable cause of action against the defendant. It is not enough that some other members of the class *may* have a claim. The cause of action in negligence is framed in the plaintiff's factum "as workplace culture which condones ostracization and maltreatment" of persons with Mental Health Disorders. This language is consistent with the negligence claim made in *Greenwood* and which the Federal Court of Appeal upheld as disclosing a reasonable cause of action. Therefore, the defendant acknowledges that a cause of action for the purposes of certification has been sufficiently plead in this case. [emphasis added and footnotes omitted]

[53] The underlined statement above is clearly an admission made in relation to this certification motion. At the commencement of the oral hearing, more than seven months after filing its Memorandum, the Defendant informed the Court that it was no longer conceding that the pleading disclosed a reasonable cause of action:

> There was -- there's just one additional point. In terms of our written submissions, we've advised plaintiff's counsel of this, that in our submissions under reasonable cause of action we had conceded for negligence. That was in error, we're not conceding (inaudible).

[54] The Defendant's advice to the Plaintiff was by way of email dated September 12, 2023, less than one week prior to the hearing, in which the Defendant wrote:

> We would also like to advise that in light of the recent court of appeal decision in *K.O. v. British Columbia (Ministry of Health)*, 2023 BCCA 289, we will be taking the position that the negligence claim does not disclose a reasonable cause of action due to the absence of material facts in the pleadings.

[55] The Plaintiff responded by return email:

> … the Plaintiff does not agree that Canada can simply resile from the formal position expressed to the Plaintiff and the Court in its materials, particularly at this late stage and in light of the obvious prejudice to the Plaintiff.

[56] I agree with the Plaintiff that the Defendant cannot "simply resile" from the formal position it expressed to the Court and the Plaintiff in its Memorandum. In this context. I accept that the Court is to be guided by the jurisprudence in the Federal Courts regarding amendment of pleadings. Prime among these principles is that a formal admission cannot be withdrawn without leave of the Court or with consent: *Apotex Inc v Astrazeneca Canada Inc*, 2012 FC 559, aff'd

2013 FCA 77. Here, there is no consent. The Defendant proceeded as if it had a unilateral right to withdraw its admission. No motion, formal or informal, was made to the Court to withdraw the admission, and thus no affidavit filed to explain the circumstances leading to the proposed withdrawal, or explanation offered as to why it ought to be permitted.

[57] Given the paucity of explanation, the Court questioned counsel as to why it was now seeking to withdraw the admission, and the basis on which the Court ought to grant the request. Various explanations were offered, including the following:

> So the admission that was made was -- wasn't an admission, it was a concession and we did concede that if this case were *Greenwood* then yes, this concession applies. And I think what became clear to us upon review of the Court of Appeal decision in *K.O.* was that this case isn't *Greenwood*, this case is about mental health stigma.
>
> If this were bully and harassment case, then that concession applies, but that's not what this case is.
>
> …
>
> I think our position is obviously that, you know, it's still their case to make, the pleading still need to be properly pled and that's the plaintiff's onus. I under- -- and that is our position.
>
> …
>
> We made a mistake. That's what it comes down to. I think when we reviewed the Court of Appeal decision, which came out recently, it became very clear that a more critical look at the pleadings was necessary.
>
> At first blush -- it's very easy at first blush to say okay, this is a bully and harassment case and *Greenwood* was certified -- and this is, this is where I was going at the beginning where I said if this was *Greenwood* it could have gotten certified. It's not. Because it's very easy at first blush to say, well people are being mistreated in the workplace, it's bullying, it's harassment.
>
> The Court of Appeal Decision -- the language in the Court of Appeal Decision caused us to look more critically at first the

> pleadings and what they actually said, as opposed to just accepting, well this is mistreatment in the workplace, this must be *Greenwood.* And on a critical review, the material facts are not pled. They're not there. It's almost identical. So that is the problem that we recognize now.
>
> …
>
> If I may, just one second.
>
> Reasonable cause of action, we can't keep our concession from reasonable cause of action. And the reason we cannot is in the event that this matter does go to appeal we need to be able to raise those issues there as well. I'm not saying that it is going to go to appeal, but we need to be at least able to say that the argument was made. So that is -- you know, that is a concern that, you know, Crown has. So I appreciate being able to at least make the argument.

[58] Even if I were to accept that the potential prejudice to the Plaintiff can be alleviated by an adjournment, I would not be prepared to grant one in the present circumstances.

[59] The first consideration is the length of time this hearing has been scheduled and the effect an adjournment would have on the Court processes and schedule. By Order of March 20, 2023, the hearing of this motion was scheduled for five days, from September 18, 2023 to September 22, 2023, at the Court in Vancouver, British Columbia.

[60] The second consideration is the fact that the BC Court of Appeal decision in *K.O. v British Columbia (Ministry of Health)*, 2023 BCCA 289 [*K.O.* CA] issued July 17, 2023, some two months prior to the hearing of this motion. While “recently” is not a specific term, the Defendant had more than ample time to review that decision and assess its impact on this litigation, rather than waiting to so do a few days prior to the hearing.

[61] The third and most relevant consideration is that *K.O.* CA did not establish any new principle of law or even reverse the Motion Judge's decision not to certify the proposed class action: *K.O. v British Columbia (Ministry of Health)*, 2022 BCSC 573 [*K.O.* SC]. On April 8, 2022, the Motion Judge refused certification, in part, based on the absence of a reasonable cause of action. At paragraphs 20–22, the following observation is what the Defendant now says is equally true of this matter:

> … I find that the pleadings consist almost entirely of bare allegations unsupported by pleaded material facts and fail to disclose a triable cause of action. There are no specific allegations that K.O. has been harmed by the conduct of anyone for whom the defendant is or might be said to be directly or vicariously responsible. Neither are there material facts to anchor K.O.'s claim that she has suffered "systemic barriers" in accessing healthcare, or that her specific mental illness has not been treated as "medically required", or that inadequate treatment, if any, has flowed from "stigmatization of mental illness in the provincial healthcare system".
>
> There are, likewise, no material facts giving form to the claim that there are marked differences in the therapeutic treatment offered to K.O. and her sister: see, in a similar vein, *K.S. v. British Columbia (Ministry of Children and Family Development)*, 2021 BCSC 1818 at para. 110. There is no factual basis, in particular, to support the premise that K.O. "languishes" while her sister receives "top quality care", or to ground the allegation that mental health stigma has anything to do with it. The assertion that the healthcare system perceives mentally ill patients as less worthy than others is entirely gratuitous: it is nowhere explained, particularised or factually substantiated.
>
> To my eye the present pleadings suffer from this fatal defect throughout. There are no particularised allegations about the manner in which the defendant is supposed to have harmed K.O., directly or indirectly, or denied or caused her to be denied medical services, treatment or benefits to which she is lawfully entitled, or in any way deprived her of life, liberty or security of the person, or denied her equality of healthcare compared to others based on the nature of her illness, or to support her claim that mental health stigma has been a factor in the shortcomings of the healthcare system as she perceives them.

[62] In short, if the Defendant were of the view that the present case is not *Greenwood* FC but *K.O.* SC, it was in a position to know that when it first drafted and filed its Memorandum, and indeed it even cited *K.O.* SC, albeit for a different proposition.

[63] With respect to the Defendant's loosely-articulated argument that, in any event, the Plaintiff continues to bear the burden of satisfying all conditions for certification under Rule 334.16(1) of the Rules, including that the pleadings disclose a reasonable cause of action, this requirement does not relieve the Defendant from withdrawing its admission.

[64] For these reasons, the Court denies the Defendant leave to resile from its admission that the pleadings disclose a reasonable cause of action. In any event, as was conceded by the Defendant, if this case is akin to *Greenwood* FC, rather than *K.O.* SC, then a reasonable cause of action is made out. For the reasons expressed below, I find that this matter is akin to *Greenwood* FC, rather than to *K.O.* SC.

C. *Has the Plaintiff satisfied the five conditions for certification under Rule 334.16(1) of the Rules?*

[65] Certification is the first step in a class action proceeding. At this stage, the Court does not consider the merits of the case but rather assesses whether it is appropriate for the proceeding to be dealt with as a class proceeding.

[66] Rule 334.16(1) of the Rules sets out the criteria for certification:

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

the proceeding is progressing,	informés de son déroulement,
(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and	**(iii)** n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.	**(iv)** communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[67] The plaintiff has the burden of satisfying the elements of the prescribed test under Rule 334.16(1) for the Court to certify the class action proceeding: *Paradis Honey Ltd v Canada*, 2017 FC 199 at para 97 [*Paradis Honey*]. The evidentiary standards for certification requirements are low. The representative plaintiff must only show that it is not plain and obvious that the pleadings do not disclose a reasonable cause of action and that there is "some basis in fact" to satisfy the remaining elements of the test: *Sylvain v Canada (Attorney General)*, 2004 FC 1610 at para 25 [*Sylvain*]. This means that there are "sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage": *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 104 [*Pro-Sys*]. This threshold is lower than the balance of probabilities, though the plaintiff must lead sufficient evidence to satisfy the certification judge that the requirements for certification have been met: *Pro-Sys* at para 101.

[68] The certification requirements of Rule 334.16(1) are similar to their counterparts in Ontario and British Columbia: see *Canada v John Doe*, 2016 FCA 191 at para 22 and *Buffalo v Samson Cree National*, 2010 FCA 165 at para 8. Consequently, the Supreme Court's jurisprudence arising from those provinces dictates how the Federal Court applies its certification criteria: *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 [*Dutton*]; *Hollick v Toronto (City)*, 2001 SCC 68; and *Rumley v British Columbia*, 2001 SCC 69 [*Rumley*].

(1) Do the pleadings disclose a singular reasonable cause of action?

[69] The Plaintiff asserts that his pleadings disclose three reasonable causes of action: systemic negligence, breach of fiduciary duty, and breaches of sections 15(1) and 7 of the *Charter* and substantially similar provisions under article 1457 of the *Civil Code* and sections 1, 4, 10, 10.1, and 16 of the Québec *Charter*.

[70] There is a low threshold in determining whether a plaintiff has disclosed a reasonable cause of action when assessing whether to certify an action. Certification will be denied only if it is "plain and obvious" that no claim exists. This Court in *Sylvain* at paragraph 26 described that there is no reasonable cause of action when "even if the facts alleged in the statement of claim are true, the case has no chance of success" (see also: *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at para 32-33). This is the same test used on motions to strike pleadings: *Le Corre v Canada (Department of Human Resources Development)*, 2004 FC 155 at para 23, aff'd by 2005 FCA 127 [*Le Corre*].

[71] The Court does not assess the merits at the certification stage. Instead, the Court assumes that the facts pleaded in the plaintiff's statement of claim are true or capable of proof, and on that basis, assesses whether it supports a reasonable cause of action: *Condon v Canada*, 2015 FCA 159 at para 13. Importantly, no evidence is admissible on this issue: *Greenwood* FCA at para 91.

(a) *Systemic negligence*

[72] As the Supreme Court observed in *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at paragraph 3: "A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach."

[73] To be systemic, the "negligence [must] not [be] specific to any one victim but rather to the class of victims as a group:" *Rumley v British Columbia*, 2001 SCC 69 at para 34.

[74] Rule 174 provides that a party must plead the material facts on which a conclusion of law is based:

Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.	Tout acte de procédure contient un exposé concis des faits substantiels sur lesquels la partie se fonde; il ne comprend pas les moyens de preuve à l'appui de ces faits.

[75] At the hearing, the Defendant argued that the only material facts pleaded that relate to the Plaintiff are found in paragraph 4 of the Statement of Claim; namely, that the Plaintiff enrolled

and served in the CAF from 1977 to 1986, that he is an Indigenous person, that he suffered a serious physical injury, that he was also diagnosed with a MHD, that he received wholly inadequate treatment, that he was pressured to agree to a 3B release, and that his diagnosis was met with severe stigmatization which resulted in him being written off by CAF.

[76] The Defendant submits that these are insufficient to support a finding of negligence. It further submits that the "rest of the statement of claim is made up of bald and conclusory statements" and that "what's missing from this is the who, the what, the when, where of the negligence."

[77] While I have ruled that the Defendant may not resile from its admission that the Plaintiff sufficiently plead negligence as a reasonable cause of action, I do not accept its oral submissions in any event. In my view, the Defendant fails to read the Statement of Claim holistically, and fails to distinguish material facts from evidence that will prove the material facts. It bears repeating that evidence is inadmissible on this issue; the material facts must be taken to be true unless they are "manifestly incapable of being proven:" *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19, at para 87.

[78] Though the Defendant is correct in stating that material facts, though assumed to be true, must still be pleaded in support of each cause of action, it has not demonstrated to me that the Plaintiff failed to meet this threshold. Indeed, the Plaintiff pleads each of the requisite elements of negligence. He pleads that the Defendant owes a duty of care to members of the CAF, described as requiring CAF leadership to take reasonable steps in the operation and management

of the CAF to provide a workplace free from bullying, harassment, discrimination, and intimidation directed at members with MHDs. He further pleads that the Defendant breached the duty of care, in part, by permitting or encouraging systematic maltreatment of members suffering from a MHD. Lastly, the Plaintiff pleads that he and other class members have suffered and sustained particularized damages as a result of these breaches.

[79] I find that the material facts pleaded support a reasonable cause of action in systemic negligence. More than "bald assertions of conclusions," the Plaintiff pleaded specific material facts in support of establishing systemic negligence. There is indeed some basis in fact that the Defendant owes the class members a duty of care, that it breached that duty of care, that the class members suffered damage, and that the damage they suffered was caused, in fact and in law, by the Defendant's breach.

[80] Contrary to the Defendant's assertion, this is not *K.O.* SC where the court held that the plaintiff did not plead sufficient material facts to establish a reasonable cause of action. The pleadings in *K.O.* SC centered on the government's alleged failure to adequately enact initiatives aimed at reducing or eradicating mental health stigma. The plaintiff alleged this was a legal duty of the government which established a standard of care. The court rejected this argument.

[81] Here, while the pleadings relate to mental health stigmatization, the Plaintiff is not alleging the harm of mental health stigmatization in itself. Instead, the pleadings center on the bullying, abuse, and harassment which the Plaintiff and class members faced or face as a result

of the culture of mental health stigmatization present in the CAF. This is akin to *Greenwood* FC, wherein at paragraph 5 the Court describes the claim as follows:

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

[82] The Court is satisfied that the Statement of Claim discloses material facts necessary to find that a reasonable cause of action in systemic negligence is alleged. In turn, the Plaintiff's claim under the analogous article of the *Civil Code*, Article 1457, may also be certified.

[83] While the Plaintiff need only advance a single reasonable cause of action for the purposes of certification, for the sake of completeness, I will assess the other pleaded causes of actions.

(b) *Breach of Fiduciary Duty*

[84] The Plaintiff alleges that the acts and omissions of the CAF constituted a breach of its fiduciary duty to the proposed class members to care for and protect their best interests. The Plaintiff says that a fiduciary duty arises out of the relationship between CAF and its members founded in trust, reliance, and dependency.

[85] The Defendant submits that it did not owe the proposed class members a fiduciary duty and notes that there is a high threshold for finding the Crown owes an individual or group a fiduciary duty due to its overarching duty to act in the public interest.

[86] The Supreme Court in *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at paragraph 27 [*Elder Advocates*] held that a successful action in breach of fiduciary duty requires a plaintiff to satisfy that: (a) the fiduciary has scope for the exercise of some discretion or power; (b) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (c) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[87] It was recognized at paragraph 44 of *Elder Advocates* that courts have been reluctant to find a fiduciary duty owed by the Crown and it generally requires an explicit undertaking by the Crown to put the interests of the proposed class members above the general public:

> Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178.

[88] There is nothing in this case to suggest that CAF expressly or impliedly undertook to act in the best interests of the class members above the general public. There is no wording in the

VWA or PA, nor from the CAF's or VAC's mandate to suggest an implicit undertaking on the Crown to prioritize the interests of the class members above all others. The Plaintiff's reliance on the vulnerability of the class members is not sufficient to support an implicit undertaking.

[89] For these reasons I find that the Plaintiff's cause of action for breach of fiduciary duty has no reasonable prospect of success in this case.

(c) *Breach of the Charter, Civil Code, and the Québec Charter*

[90] The Plaintiff pleads that CAF's acts and omissions breached the *Charter* rights of class members in a way that is not "prescribed by law" and cannot be justified under section 1 of the *Charter*. Specifically, the Plaintiff pleads that the CAF contravened sections 7 and 15(1) of the *Charter*, by alleging that the CAF deprived class members' security of the person by materially increasing the risk that they will experience discrimination, harassment, and abuse while serving in the CAF and that the CAF perpetuated disadvantage and stereotyping and denied class members equal treatment and protection of the law based on their MHDs.

[91] The Defendant submits that the *Charter* and related claims are duplicative as they are founded on the same factual basis for the Plaintiff's other claims in tort; that is, the alleged systemic discrimination, stigmatization, harassment, and abuse of class members by the CAF. The Defendant points to a decision of the Court of Appeal for British Columbia, *Johnson v British Columbia (Attorney General)*, 2022 BCCA 82 [*Johnson*], where the court found that the appellants' *Charter* claims were coterminous with their tort claims since they did not advance any tort claim that could fail while the *Charter* claims succeed.

[92] Section 7 of the *Charter* guarantees the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[93] Section 15(1) of the *Charter* guarantees that "[e]very 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."

[94] I agree with the Plaintiff that while the factual basis for his *Charter* claims and tort claims are the same, they involve different allegations and it is not plain and obvious that they are concurrent or coterminous. This is not *Johnson* wherein the Court found at paragraph 77 that the appellants alleged *identical* harms or consequences from concurrent claims which were particularized in precisely the same way. Further, unlike in *Johnson*, here it is possible that the Plaintiff's tort claims may fail while the *Charter* claims succeed as they rely on different elements. *Johnson* even cites to an Ontario Superior Court case, *Reddock v Canada (Attorney General)*, 2019 ONSC 5053, which the Plaintiff relies on, to show that there are circumstances where claims based on the *Charter* and in tort may be allowed to proceed despite involving the same core factual basis. Such is the case where the claims are premised on distinct legal theories.

[95] Notwithstanding the above analysis, I find that it is plain and obvious that the pleadings disclose no reasonable cause of action for breach of section 7 of the *Charter*, or related provisions of the Québec *Charter*, namely sections 1 and 4. Section 7 protects individuals from

state interference with their physical or psychological integrity, including any state action that causes physical or serious psychological suffering: *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 64. It is meant to protect an individual's autonomy and dignity, and encompasses control over one's personal integrity, free from state interference. The Plaintiff's arguments in this regard focus on the breach of the class members' security interests, alleging that the conduct of the CAF leadership, by permitting and condoning an environment which encourages systemic discrimination, stigmatization, harassment, and abuse against the class members, materially increased their risk of experiencing such harms. I am not satisfied that the Plaintiff pleaded the required material facts to establish a reasonable cause of action in the breach of section 7. In particular, I note that positive obligations are not required by section 7: *Gosselin v Québec (Attorney General)*, 2002 SCC 84, at paras 81-82. Accordingly, the absence or inadequacy of policies to protect the section 7 rights of the class members cannot serve as the basis for a cause of action under the breach of section 7.

[96] However, the Plaintiff's Statement of Claim successfully disclosed a reasonable cause of action pursuant to section 15(1) of the *Charter*, and the related provisions of the Québec *Charter*, namely sections 10, 10.1, and 16. The Supreme Court in *Fraser v Canada (Attorney General)*, 2020 SCC 28, explained at paragraph 27 that section 15(1) is *prima facie* breached where the impugned law or state action a) on its face or in its impact, creates a distinction based on enumerated or analogous grounds, and b) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. The Plaintiff argues that the class members have been denied the right to equal protection and benefit of the law without discrimination based on mental disability, which is an enumerated ground within section 15(1). This was through the CAF's imposition of "built-in headwinds" and its failure to

accommodate their MHDs. I find that it is not plain nor obvious that the pleadings disclose no reasonable cause of action in a breach of section 15(1) of the *Charter*, or its related provisions under Québec law.

[97] As a result of these findings, the common questions of fact and law must be restricted to those relating to the alleged causes of action in systemic negligence and breach of section 15(1) of the *Charter*, and the analogous sections under the *Civil Code* and Québec's *Charter*.

(2) Is there an identifiable class of two or more persons?

[98] The Plaintiff must establish "some basis in fact" that there is an identifiable class of two or more persons. Class proceedings require an identifiable class in order to identify persons who are entitled to notice for certification, entitled to potential relief, and bound by the judgment: *Dutton* at para 38 and *Paradis Honey* at para 22. The identification of the class must have objective criteria, not depend on the outcome of the litigation, and bear a rational connection to the common issues: *Hollick* at para 17.

[99] There is a low threshold at the certification stage. Although the class must be sufficiently narrow, class members need not be identically situated: *Pro-Sys* at para 108.

[100] The Plaintiff proposed the following Class Definition in his Memorandum:

> All current or former CAF Members who experienced Mental Illness Stigmatization during their CAF Service, up to and including the date this matter is certified as a class proceeding under the *Federal Courts Rules*.

[101] The Defendant submits that a class definition is certifiable only if the plaintiff has established some basis in fact that "(1) the class can be defined by some objective criteria, (2) the class can be defined without reference to the merits of the action; and (3) there is a rational connection between the common issues and the proposed class definition."

[102] The Defendant says that the proposed class definition is not based on non-objective criteria because Mental Illness Stigmatization is not objective, that the definition is merits-based because it is "defined as those who have suffered mental health stigmatization 'e.g., those who have suffered injury'" and the class definition is overly broad. The Defendant also contested the proposed definition's lack of temporal limits as found in the CLPA and the Federal Courts Act. It argues that the class definition should be restricted to incidents occurring within the six years prior to the date of certification, as based on the federal limitation period.

[103] In partial response, the Plaintiff, at the hearing, proposed an amended class description:

> All current or former CAF Members who have been diagnosed with a mental health disorder, and allege they were subjected to non-sexual and non-racial discrimination, bullying, stigmatization, harassment, and/or abuse during their CAF Service, between 1953 and the date this matter is certified as a class proceeding under the *Federal Courts Rules*.

[104] In my view, and for the following reasons, this revised class definition continues to suffer from being overbroad, particularly in failing to restrict the class period.

[105] The revised class definition nearly meets the low threshold for an identifiable class: it consists of objective criteria and does not depend on the outcome of the litigation. In respect to

its reference to class members who "allege they were subjected to non-sexual and non-racial discrimination, bullying, stigmatization, harassment, and/or abuse during their CAF service," while this does relate to the merits of the litigation, it is not dependent on the outcome *per se*. Instead, I agree with the Plaintiff's oral submissions that this Court has certified class definitions that reference the merits of the litigation wherein the class members can self-identify if they meet the criteria. One such example is *Heyder v Canada (Attorney General)*, 2019 FC 1477 at paragraphs 31-32 where the class definition includes "all current or former CAF members who experienced Sexual Misconduct." Sexual misconduct is broadly defined and different individuals may have different interpretations of whether they experienced it, as analogous to the case here. Here, there is a factual underpinning to support the existence of claims for these class members; all the affiants have diagnosed MHDs and allege the harms named in the class definition.

[106] However, I agree with the Defendant that the proposed class period, running from 1953 to the date this matter is certified, is overbroad. In *Greenwood* FCA, the Federal Court of Appeal overturned some of the chamber judge's findings to restrict the class period and narrow the class membership. At paragraph 133, the Court of Appeal held it was a palpable and overriding error for the chambers judge to extend her exercise of residual jurisdiction beyond the period for which there is evidence. The evidence before me is incapable of supporting a class period commencing prior to 1986, the earliest possible date that the Plaintiff experienced the harms alleged in his pleadings (i.e., harassment and abuse). The reports all post-date 1986 by several years, the earliest one having been published in 2001. Given the lack of evidence regarding problems with harassment prior to 1986, from both the documentary evidence and

direct evidence of Mr. Thomas, Mr. Poitras, and Mr. Lewis, I cannot find that the CAF's policies were ineffective prior to 1986. The class period accordingly must be amended to commence at 1986. This time period also resolves the issues raised by the certified causes of action for breaches of the *Charter*. The *Charter* came into effect April 17, 1982 with section 15 not coming into force until April 17, 1985. A time period commencing 1986 ensures that there are no class members with claims arising before the *Charter*.

(3) Do the claims raise common questions of law or fact?

[107] Under Rule 334.16(1)(c), a plaintiff is required to show some basis in fact for the existence of common issues to the class members which constitute a "substantial ingredient" of each of their claims. This requirement advances judicial economy, a purpose of class action proceedings, through avoiding the duplication of fact-finding or legal analysis: *Rumley* at para 29.

[108] The Plaintiff submits that these causes of action raise the following common questions of fact or law:

> i. To what extent does Mental Illness Stigmatization exist in the CAF?
>
> ii. Does Mental Illness Stigmatization arise out of a pervasive or dominant culture in the CAF?
>
> iii. Did the CAF leadership know, or should they have known, about Mental Illness Stigmatization? If so, when?
>
> iv. Does Mental Illness Stigmatization cause harm? If so, do any factors or indicia tend to show that this stigmatization exists at a systemic level?

v. What steps, if any, did the CAF take to eliminate or mitigate Mental Illness Stigmatization? Were those steps effective? For instance:

1. What guidance, training, processes, mechanisms, systems and/or procedures did the CAF have in place in relation to eliminating or mitigating Mental Illness Stigmatization?

2. What safeguards, oversight, reporting, monitoring, quality assurance, and/or supervisory mechanisms did CAF have in place in relation to eliminating or mitigating Mental Illness Stigmatization?

3. Were the actions taken or systems implemented by CAF regarding Mental Illness Stigmatization consistent with and sufficient to protect Class members from harm? If not, how and why?

vi. Did the CAF's acts or omissions regarding Mental Illness Stigmatization breach:

1. Class members' rights under s. 7 of the Charter by depriving them of the right to life, liberty, or the security of their persons in a manner contrary to the principles of fundamental justice?

2. Class members' rights under s. 15 of the Charter by discriminating against them on the basis of mental disability?

3. A common law duty of care owed to Class members?

4. A fiduciary duty owed to Class members?

5. Statutory duties owed to Class members?

vii. Did the CAF engage in wilful, reckless, or bad faith conduct regarding Mental Illness Stigmatization, such that an award of aggregate or punitive damages is justified? If so,

1. Can this be assessed in the aggregate, and in what amount?

2. How shall any of it be distributed among members of the Class?

viii. If the Class members are entitled to damages other than or in addition to aggravated or punitive damages, can these damages or a portion thereof be determined on an aggregate basis? If so, in

> what amount, and how shall it be distributed among Class members?
>
> ix. What procedures should apply to the determination of any individual questions which remain after determination of the Common Issues?

[109] The Defendant argues that individual claims are a better mechanism for resolving the class members' claims. It states that the pleadings do not disclose common issues of fact nor law.

[110] I find that the pleadings disclose some basis in fact that there are common questions of fact and law. In *Pro-Sys* at paragraph 108, the Supreme Court restated the test as follows:

> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated vis-à-vis the opposing party.
>
> (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[111] An identical answer is not necessary for all the members of the class, as long as the answer to the question does not give rise to conflicting interests among them: *Vivendi Canada*

Inc v Dell'Aniello, 2014 SCC 1 at paragraph 46 [*Dell'Aniello*]. The common questions requirement constitutes a notably low bar: *Dell'Aniello* at para 72.

[112] The Plaintiff met this low bar. The question of the Defendant's liability is common to each class member, arising out of being a current or former CAS member who is or was subjected to CAS' policies. The resolution of most of the common questions are necessary to the resolution of each class member's claim, and each of them will benefit from the successful prosecution of the action, all while avoiding duplication of fact-finding and legal analysis.

(4) Is a class proceeding the preferable procedure?

[113] The Plaintiff must demonstrate to the Court that a class proceeding is the preferred procedure for the just and efficient resolution of the common questions of law or fact. This principle is based on three bases underpinning class proceedings: (1) judicial economy, (2) access to justice, and (3) behavioural modification: see *Hollick* at para 15; *Rae v Canada (National Revenue),* 2015 FC 707 at para 62. Plaintiffs are not required to prove that a class action will achieve all of these, only that it is better than the alternative: *AIC Limited v Fischer*, 2013 SCC 69 at para 23 [*Fischer*].

[114] Rule 334.16(2) further gives the following non-exhaustive list of factors that must be considered in determining whether the class proceeding is the preferable procedure:

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;	**a)** la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

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

[115] In *Fischer*, the Supreme Court set out principles in this regard, which are summarized by this Court in *Paradis Honey* at paragraph 96:

> 1) The starting point is the relevant statutory provision. The preferability requirement is broad enough to take into account all available means of resolving the class members' claims including avenues of redress other than court actions.
>
> 2) The court must look at the common issues in the context of the action as a whole, and when comparing possible alternatives with the proposed class proceeding, it is important to adopt a practical cost-benefit approach, and to consider the impact of a class proceeding on class members, the defendants, and the court.
>
> 3) The preferability analysis considers the extent to which the proposed class action serves the goals of class proceedings. The three principle goals of class actions are (1) judicial economy, (2) behaviour modification, and (3) access to justice. This is a comparative exercise, and the ultimate question is whether other

> available means of resolving the claim are preferable, not if a class action would fully achieve those goals.

[116] Here, the Plaintiff pleads that the class action is preferable because the common issues predominate over individual issues, given that every claim must answer whether the CAF should have had a different systemic approach to addressing mental health stigmatization and if it failed in its duty of care. The Plaintiff submits that CAF's internal mechanisms are inadequate in answering these questions.

[117] The Plaintiff also submits that there are access to justice barriers in bringing individual claims, citing its and its affiants' evidence that their experience navigating the CAF internal processes thus far have taken a toll.

[118] The Defendant counters that common issues cannot predominate as questions of mental health stigma and related harm are necessarily individual inquiries. The Defendant submits that the Court cannot assess the adequacy of anti-stigma policy at large. Instead, the Defendant points towards its internal processes that it claims can more appropriately handle the pleaded claims on a case-by-case basis. Even if common issues could be adjudicated, the Defendant claims that individual trials would necessarily have to follow that would be a poor use of judicial resources.

[119] The Defendant further submits that a class proceeding is not preferable because the internal CAF processes and individual complaints to the Canadian Human Rights Commission present much more appropriate alternatives.

[120] Courts have held that class actions are the preferred procedure for advancing claims which are brought against institutions and which focus on systemic wrongs: see *Seed v Ontario*, 2012 ONSC 2681 at para 149. As the cause of action alleged is *systemic* negligence, the common questions of fact and law will predominate. As in *Greenwood* FC at para 73, the question of whether the CAF should have responded differently to address mental health stigmatization is "general in nature and ties together all of the class members, as the failed policy applied to them all." Even though there are individual issues, the relative importance of the common question to the claim predominates.

[121] The vulnerability of the Plaintiff and the class members also weighs in favour of the class proceeding, as a significant number of class members would likely have an interest in pursuing their claims collectively. In *Paradis Honey* at paragraph 117, Justice Manson was doubtful that every class member would be able to effectively bring an individual action should the action not move forward as a class proceeding. Similarly, the class members here would likely face difficulties in pursuing individual actions considering the cost of such actions, and fear of reprisals some might have, especially if the class members are currently employed by the CAF.

[122] The claims in this proceeding are not the subject of any other proceedings. This is the only CAF mental health discrimination class action in Canada. Rule 334.16(2)(c) therefore favours proceeding as a class action.

[123] As discussed above regarding the issue of jurisdiction, the other means of resolving the claims proposed by the Defendant (i.e., the legislative remedies and internal processes within the CAF) are less efficient than the proposed class proceeding. The access to compensation is

limited to individuals with a prior service-related disability; there is no redress for individuals who had a prior-to-service or unrelated MHD that was aggravated by mental health stigmatization inflicted by the CAF. In any event, most of the evidence put forward by the Plaintiff, and conceded by the Defendant, indicates an enormous backlog of complaints within the internal process. Given the large potential number of class members, it is unlikely that the internal mechanisms, even if adequate in other ways, would be an efficient mechanism for addressing the claims.

[124] While the Defendant may be correct that individual trials may nonetheless have to occur, this does not distract from how the class proceeding is a preferable procedure for answering the common questions posed by the Plaintiff. The question of the Defendant's liability would have to be answered in every claim and it is more appropriate to answer it within a class proceeding than at each individual trial.

(5) Is the Plaintiff an appropriate representative plaintiff?

[125] Finally, the Court must address whether the Plaintiff is an appropriate representative plaintiff for the class. Under subsection 334.16(1)(e) of the Rules, an appropriate plaintiff is one who would (1) fairly and adequately represent the interests of the class, (2) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing, (3) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other

class members, and (4) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

[126] When assessing the adequacy of the proposed representative, "the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally):" *Dutton* para 41. The Supreme Court also noted that the proposed representative need not be the best possible representative, but the court should be satisfied that it will prosecute the interest of the class in a vigorous and capable way.

[127] Mr. Thomas pleads that he is an appropriate plaintiff for the purposes of Rule 334.16(1) because he was a member of CAF that suffered from a MHD and experienced, while a member, mental health stigmatization that worsened his MHD. There is no evidence that he has a conflict of interest with the other proposed class members and he has produced a litigation plan.

[128] The Defendant submits that Mr. Thomas is an inappropriate representative plaintiff because his allegations of mental health stigmatization occur post-release and so he may not be considered a class member. The Defendant also submits that the Plaintiff's litigation plan is inadequate.

[129] I find that Mr. Thomas is an appropriate representative plaintiff for the proposed class action proceeding. His experience of mental health stigmatization occurred prior to his release

from CAF, and so he may adequately represent the interests of the class. There is no evidence that he has an irreconcilable interest that would be in conflict with the other class members.

[130] The litigation plan produced by the Plaintiff is reasonable and practical. At this stage, the purpose is not to provide a concrete plan with all the procedural elements spelled out in detail, but rather to assist the motion judge in determining whether the goals of certification will be served: *Buffalo v Samson First Nation*, 2008 FC 1308 at para 152; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 103. The Plaintiff has met this bar.

IV. Conclusion

[131] The Court has jurisdiction to hear this motion. The availability of VAC is an inadequate alternative to the possible relief provided under this proceeding.

[132] The Court may certify the class action under negligence, breach of section 15(1) of the *Charter*, and the related provisions under the *Civil Code* and Québec *Charter*. The Plaintiff has successfully pleaded the requisite elements under Rule 334.16 of the Rules. It has demonstrated the requisite elements of negligence, to which the Defendant concedes, and provided a sufficient basis in fact for the existence of an identifiable class, common issues, the preferability of a class action proceeding over other procedures, and that the Plaintiff is an appropriate representative plaintiff.

[133] In keeping with Rule 334.39, no costs will be awarded.

[134] The Plaintiff is at liberty to file an Amended Statement of Claim reflecting the findings herein.

ORDER IN T-791-21

THIS COURT ORDERS that

1. The motion to certify this proceeding as a class action is granted.

2. The Class is defined as follows:

> All current or former CAF Members who have been diagnosed with a mental health disorder, and allege they were subjected to non-sexual and non-racial discrimination, bullying, stigmatization, harassment, and/or abuse during their CAF Service, between 1986 and the date this matter is certified as a class proceeding under the *Federal Courts Rules*.

3. Dan Thomas is appointed Representative Plaintiff.

4. The claim made on behalf of the Class is systemic negligence by the CAF in breaching its duty of care to members of the CAF, (1) by failing to provide services, assistance, and compensation to those who suffered from MHDs as a result of or arising from their service, and (2) by permitting or encouraging systematic maltreatment of members suffering from a MHD, resulting in damages to the Class. The related claim under Article 1457 of the *Civil Code* is also certified.

5. The further claim made on behalf of the Class is breach of section 15(1) of the *Charter*, and the related provisions of the Québec *Charter*, namely sections 10, 10.1, and 16, by the CAF for failing to accommodate the Class' MHDs and imposing "headwinds" that disproportionately affected the Class on the basis of mental disability.

6. The relief claimed by the Class is damages, including punitive damages, at common law.

7. The common questions of fact and law are:

    1. To what extent does Mental Illness Stigmatization exist in the CAF?

    2. Does Mental Illness Stigmatization arise out of a pervasive or dominant culture in the CAF?

    3. Did the CAF leadership know, or should they have known, about Mental Illness Stigmatization? If so, when?

    4. Does Mental Illness Stigmatization cause harm? If so, do any factors or indicia tend to show that this stigmatization exists at a systemic level?

    5. What steps, if any, did the CAF take to eliminate or mitigate Mental Illness Stigmatization? Were those steps effective? For instance:

        1. What guidance, training, processes, mechanisms, systems and/or procedures did the CAF have in place in relation to eliminating or mitigating Mental Illness Stigmatization?

        2. What safeguards, oversight, reporting, monitoring, quality assurance, and/or supervisory mechanisms did CAF have in place in relation to eliminating or mitigating Mental Illness Stigmatization?

        3. Were the actions taken or systems implemented by CAF regarding Mental Illness Stigmatization consistent with and sufficient to protect Class members from harm? If not, how and why?

    6. Did the CAF's acts or omissions regarding Mental Illness Stigmatization breach a common law or statutory duty of care owed to Class members and/or Class members' rights under s. 15 of the Charter by discriminating against them on the basis of mental disability?

    7. Did the CAF engage in wilful, reckless, or bad faith conduct regarding Mental Illness Stigmatization, such that an award of aggregate or punitive damages is justified? If so,

        1. Can this be assessed in the aggregate, and in what amount?

        2. How shall any of it be distributed among members of the Class?

    8. If the Class members are entitled to damages other than or in addition to aggravated or punitive damages, can these damages or a portion thereof be determined on an aggregate basis? If so, in what amount, and how shall it be distributed among Class members?

9. What procedures should apply to the determination of any individual questions which remain after determination of the Common Issues?

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

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

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

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-791-21
STYLE OF CAUSE:	DAN THOMAS v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 18-21, 2023
ORDER AND REASONS:	ZINN J.
DATED:	MAY 9, 2024

APPEARANCES:

Rajinder Sahota Patrick Dudding Michaela Merryfield	FOR THE PLAINTIFF
Kathryn Hucal Jacob Pollice Sonia Singh	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Acheson Sweeney Foley Sahota LLP Barristers and Solicitors Victoria, British Columbia	FOR THE PLAINTIFF
Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT