

Federal Court



Cour fédérale

Date: 20240731

Docket: T-138-19

Citation: 2024 FC 1219

Ottawa, Ontario, July 31, 2024

PRESENT: Madam Justice McDonald

CLASS PROCEEDING

BETWEEN:

SYLVIE CORRIVEAU

Plaintiff

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

[1] On this post-certification Motion, the Defendant (Canada) seeks particulars, additional documents, and discovery of class members. The underlying class proceeding claims against the Royal Canadian Mounted Police (RCMP) for “systemic negligence of its servants in failing to

provide the plaintiff, and other Class Members, with an Applicant's Examination free of sexual assault and battery, and inappropriate and unnecessary procedures" during the medical examinations.

[2] In their Statement of Defence, Canada admits they are vicariously liable for the actions of two doctors, Drs. MacDougall and Campbell, "for assault and battery, including sexual assault and battery" during medical examinations. But Canada denies any direct liability to class members, denies systemic negligence, and denies that it failed to investigate or that it covered up complaints about the conduct of doctors during medical examinations.

[3] The class proceeding was certified on consent in March 2021 (*Corriveau v Canada*, 2021 FC 267). At this stage of the litigation, the parties have exchanged pleadings, affidavits of documents, and held oral examinations for discovery. The next step is the scheduling of the common issues trial on the following certified common questions:

Negligence

- 1) Did the RCMP, through its agents, servants and employees owe a duty or duties of care to the plaintiff and other Class Members to take reasonable steps to provide an Applicant's Examination free of inappropriate and/or unnecessary procedures, assault and battery, including sexual assault and sexual battery?
- 2) If yes, what was the applicable standard or standards of care? Was there a breach of this duty or duties by the RCMP through its agents, servants and employees?
- 3) If yes, is the Crown vicariously liable for the failure of its agents, servants and employees at the RCMP to take reasonable steps to provide an Applicant's Examination free of inappropriate and/or unnecessary procedures,

assault and battery, including sexual assault and sexual battery?

Designated Physicians

- 4) Do the RCMP's servants, agents or employees include Designated Physicians?

Damages

- 5) Can the Court make an aggregate assessment of any damages as part of the common issues trial? If so, to whom and in what amount?
- 6) Does the RCMP's conduct through its servants, agents or employees justify an award of aggravated, exemplary, and/or punitive damages? If so, to whom and in what amount?

[4] Canada argues that to properly defend itself on the common issues trial, they require additional disclosure and information.

[5] The Plaintiff opposes this Motion. She argues that Canada mischaracterizes the common issues trial and is focused on individual claims rather than the systemic nature of the claim advanced against the RCMP.

I. Canada's Motion

[6] In their Motion, Canada seeks Orders for:

- A. further and better particulars (*Federal Court Rules*, SOR/98-106, Rule 181(2));
- B. an updated affidavit of documents (Rule 227(b)); and
- C. examination for discovery of additional class members (Rule 334.22).

II. Analysis

A. *Further and better particulars*

[7] The particulars sought are detailed in the Canada's Notice of Motion at paragraph 1 as follows:

- a. the actions or procedures constituting "inappropriate and unnecessary" or "improper and invasive" procedures, including if and how these allegations are distinct from actions alleged to constitute sexual assault, assault, or battery;
- b. the identities and conduct of all RCMP Employees and their positions/titled within the RCMP who are alleged to have supported, covered up, or condoned tortious conduct, or interfered with or mishandled complaints and investigations into such conduct;
- c. the events, complaints or communications, known to class members, alleged to have constituted, contributed to, or crystalized the Defendant's alleged knowledge of tortious conduct, as it pertains to the Plaintiff's allegation that the Defendant acted knowingly, deliberately, or in bad faith;
- d. the education, training, policies, guidelines, procedures, and standards the Plaintiff alleges Canada either failed to establish, update, assess, or enforce; and,
- e. the actions supporting an award for punitive damages, including:
 - i. clarification as to whether the Plaintiff alleges abuse of power, bad faith, misfeasance of public office; and,
 - ii. the particulars of the allegation that the RCMP acted knowingly and with intention.

[8] “Particulars” are intended to allow the requesting party to know the nature of the case to meet, to prevent surprise at trial, and to facilitate the hearing (*Gulf Canada Limited v The Tug Mary Mackin and Sea-West Holdings Ltd*, [1984] 1 FC 884). There is a fine line between particulars to understand the case and particulars to ascertain how a party plans to prove their case. The former are permitted but the latter are not. Particulars in the nature of evidence as to how an issue will be proven are not permitted (*McMillan v Canada* (Minister of Citizenship and Immigration), [1999] FCJ No 164; *Peerless Limited v Aspen Custom Trailers Inc*, 2008 FC 957 at para 10).

[9] Prior to addressing the specific particulars sought, I will summarize some of the evidence relied upon by Canada in support of its Motion.

[10] Canada relies upon the Affidavit of Jeffrey Ball, who is the Director of the Open Governance and Data Government Directorate of the RCMP. The following paragraphs of Mr. Ball’s Affidavit outlines the challenges faced by the RCMP in locating potentially relevant documents:

3. The RCMP retains a medical file for each individual regular member, civilian member, and special Constable member. These medical files include medical records and information specific to that individual, including the details and outcomes of that individual’s Applicant’s Examination.

...

6. The RCMP stores any record of an individual’s medical examinations, including records of Applicant’s Examinations, on that individual’s medical file. The RCMP stores individual medical files at the divisional level, based on where the individual in

question works or last worked. There is no central repository of all Applicant's Examination records for applicants.

...

8. Absent identifying information or further particulars with respect to the identities of Class Members, I believe the Defendant cannot perform a complete search for relevant material and information with respect to Applicant's Examinations without reviewing every individual applicant's, cadet's, and member's file.

9. The RCMP retains records pertaining to complaints made against and disciplinary action taken with respect to a member or public service employee. The RCMP stores these records on an individual file of the person who was the subject of that complaint or discipline.

[11] Dr. Peter Clifford was questioned on discovery on behalf of the RCMP. I have reviewed the transcript of his examination. He testified that the hiring of designated physicians was done at the RCMP division level and that, at a minimum, designated physicians would have to be a member in good standing of the College of Physicians and Surgeons in their province. He denied that the RCMP had any monitoring or oversight of these physicians, stating that the physicians would be expected to conduct themselves in accordance with the standards set by their respective colleges. He testified that, to his knowledge, the RCMP did not have any policy in place to address complaints made as a result of the conduct of a designated physician during a medical examination.

[12] Against this backdrop and within the context of the common issues, I will address the particulars sought by Canada.

[13] In paragraph 1(a), Canada seeks particulars on the non-sexual “inappropriate and unnecessary” or “improper and invasive” procedures. As noted by Canada, sexual assault is an intentional tort that does not have duty of care considerations, unlike other tortious conduct (*VLM v Dominey Estate*, 2023 ABCA 261 at para 26). Canada argues that it is entitled to facts to support the claims advanced for non-sexual tortious conduct. In this regard, I note that common issues (1) and (3) (outlined above) make direct reference to “inappropriate and unnecessary” procedures, thus the “inappropriate and unnecessary” conduct of RCMP physicians will be a live issue at the common issues trial. I also note, even though this is brought as a systemic negligence claim, the Court will be called upon to determine if the non-sexual conduct that is alleged to have been inappropriate and unnecessary is tortious. This may involve considerations of a different duty and a different standard of care. I, therefore, agree that particulars in support of these allegations is appropriate. Accordingly, the Plaintiff will be ordered to provide the particulars as requested in paragraph 1(a).

[14] The particulars sought in paragraphs 1(b) and (c) relate to details of complaints made to the RCMP, presumably in relation to “inappropriate and unnecessary” or “improper and invasive” medical procedures. On this point, I note Mr. Ball’s evidence that any complaints would be kept on the file of the person complained about, meaning a search for information on a complaint would require the name of that individual. That said, Canada already has details and information on some complaints. Paragraphs 46-49 of the Statement of Claim detail the complaints made to the Member Employee Assistance Program by three women in or around 1990. Further, during examinations for discovery of Ms. Sylvie Corriveau and Dr. Clifford, the names of several RCMP employees who were involved in complaints were provided. At this

stage and recognizing that the common issues trial will not focus on identification of individual tortfeasors (*Francis v Ontario*, 2021 ONCA 197 at paras 143-144), I am not persuaded that further particulars are necessary on these issues.

[15] The particulars sought in paragraph 1(d) relate to the failure of the RCMP to follow “standards” with respect to the conduct of medical examinations. Dr. Clifford’s evidence is that the RCMP did not have a policy in place regarding the conduct of designated physicians. Thus, I fail to see how the Plaintiff would be able to provide particulars on “education, training, policies, guidelines, procedures, and standards the Plaintiff alleges Canada either failed to establish, update, assess, or enforce.” If this information exists, it would be within the knowledge and control of the RCMP.

[16] Mr. Ball states that without the names of individual plaintiffs (class members), the RCMP will not be able to perform a “complete search” for relevant material and information on the medical examinations that took place. Considering Dr. Clifford’s evidence that the RCMP had no policies in place and did not have oversight of the designated physicians, I fail to see what additional information could be obtained from the personnel files of individual class members other than the identity of the physician who conducted the medical examination. On the identity of designated physicians, I note that, to date, Canada has been provided with the following details:

- the names of 26 designated physicians against whom allegations of inappropriate medical examinations are made. The information also includes the date(s) and location (city/town and province) where examinations took place.

- a list of 150 class members (not personally identified) their gender, and their position/rank within the RCMP, who allege inappropriate conduct by designated physicians. Also provided are dates and location (city/town and province) where the examinations took place.

[17] With respect to the relevant medical standards, I note that Canada has the names of 26 doctors, the location of the medical examinations, and the dates when the examinations took place. This information identifies the relevant RCMP divisions as well as the relevant provincial regulatory bodies. Even though medical standards of care may have changed over the class period, this will undoubtedly be an issue that is addressed through expert evidence and not through the evidence of individual class members.

[18] To be clear, the common issues trial will not focus on the individual claims of class members. As a systemic negligence claim, the focus at the common issues trial will be on how the RCMP administered, or failed to administer, the medical examination process. Any individual issues of injury and causation will only arise for determination if and after liability for systemic negligence is established (*Rumley v British Columbia*, 2001 SCC 69 [*Rumley*] at para 36).

[19] The final request for particulars in paragraph 1(e) relates to the claim for punitive damages. This is raised in common issue (6). The Court will be called upon to determine if the conduct of the RCMP justifies an award of aggravated, exemplary and/or punitive damages. The Supreme Court of Canada has said that “the facts said to justify punitive damages should be

pleaded with some particularity” (*Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 87). Here, the Statement of Claim does not plead facts with particularity on this issue, rather, it makes conclusory statements. In the circumstances, I agree that further particulars are warranted in support of the claim for punitive damages. Therefore, I will order the Plaintiff to provide the particulars sought in 1(e).

B. *An updated Affidavit of Documents*

[20] The request for an updated Affidavit of Documents is largely alternative (although not argued that way) and aimed at securing the same information as that requested in the particulars addressed above.

[21] It is not disputed that the parties have an ongoing obligation to disclose relevant documents and Rule 226(1) provides that, if after documents have been produced, a party becomes aware of relevant additional documents, then a supplementary affidavit is to be provided.

[22] In the class proceeding context, as noted in *Paradis Honey Ltd v Canada (Agriculture and Agri-Food)*, 2018 FC 814 [*Paradis Honey*] at paragraph 23:

...the appropriate approach at the post-certification stage of a class proceeding is to follow the general rule that discovery of documents will be tied to the common issues and to depart from this approach is the exception.

[23] As further noted in *Paradis Honey*, a party seeking further documentary production has the burden to offer persuasive evidence that documents are available but have not been listed and produced (at para 24).

[24] In requesting documents, Canada must establish that the documents are relevant to the common issues, and that there is persuasive evidence that the documents are available. In their written submissions, Canada makes general requests for documents as follows:

13. The Representative Plaintiff should also be ordered to produce documents and facts received from the class members she represents. Further, or in the alternative, the Plaintiff should also be ordered to identify and produce additional class members for examination, to allow meaningful discovery of issues including:

- a. alleged tortious conduct by Dr. Campbell and other doctors;
- b. alleged conduct at times when or in places where Ms. Corriveau has no knowledge;
- c. complaints made to the RCMP or other organizations;
- d. the RCMP's response to complaints or investigations; and,
- e. alleged sexual assault, assault, battery, or inappropriate and unnecessary conduct pertaining to class members who are men.

[25] Canada alleges that the representative Plaintiff answered questions at discovery indicating that she possesses or could readily obtain additional information or documents. I have reviewed the transcript of the discovery of Ms. Corriveau and note that she does acknowledge having communications with class members. However, she explains that she directed class

members to contact class counsel. I did not read her evidence to be that she is in possession of relevant documents from class members. In any event, class counsel takes the position that any such communications between them and class members is subject to solicitor-client privileged. Despite this, Canada argues that these communications should be disclosed.

[26] On claims of solicitor-client privilege in class proceedings, the following from Justice Strathy in *Ramdath v George Brown College of Applied Arts and Technology*, 2012 ONSC 2747 is instructive:

[33] Solicitor and client privilege applies to communications made in confidence between a client and a solicitor for the purpose of giving or receiving legal advice: *General Accident Assurance Co. v. Chrusz* (1999), 1999 CanLII 7320 (ON CA), 45 O.R. (3d) 321 (C.A.) at para. 89. In a class action, once the action has been certified, class counsel becomes counsel to the class and communications between class counsel and class members are privileged: *Ward-Price v. Mariners Haven Inc.*, 2004 CanLII 13951 (ON SC), [2004] O.J. No. 2308 (S.C.J.).

[34] Litigation privilege applies to documents or communications produced or made with the dominant purpose of being used to obtain legal advice or to conduct or to aid in the conduct of litigation. Litigation privilege applies only in the context of litigation and is intended to enable parties to investigate and prepare a case for trial without fear of disclosure: *Supercom of California v. Sovereign General Insurance Co.*, 1998 CanLII 14645 (ON SC), [1998] O.J. No. 711 (Gen. Div.); *General Accident Assurance Co. v. Chrusz*, above.

[35] Common interest privilege is an extension of litigation privilege. It applies to communications between parties who have a common interest in litigation and it enables them to communicate, or exchange information, for the dominant purpose of informing each other of the facts and issues in the litigation: *Supercom of California v. Sovereign General Insurance Co.*, above.

[27] Notwithstanding their position that the documents should be disclosed, Canada has not established any basis for this Court to conclude that the communications from class members to class counsel are not in fact solicitor-client privilege communications. Without some indication that the communications are not protected, I will not entertain this argument further.

[28] More broadly, however, on the request for further documents, I note again that Canada has been provided with the names of 26 medical doctors who are alleged to have performed improper examinations. Dates and locations of those examinations in relation to 150 class members has been provided. In my view, this information responds to the documents or facts requested in (a) and (b) above. The documents and facts to respond to (c) and (d) on “complaints or investigations” are addressed in my disposition of the request for particulars on the same topic and I need not address it further in relation to the request for an updated Affidavit of Documents.

[29] On the documents requested in response to (e), I am ordering that the Plaintiff provide particulars on the actions or procedures constituting “inappropriate and unnecessary” or “improper and invasive” procedures, and particulars on the punitive damages claim as requested in paragraphs 1(a) and (e) of the Notice of Motion. In my view, these particulars are responsive to the request for documents of the same nature.

[30] Overall, the evidence of Canada does not satisfy me that they have established the existence of relevant documents within the Plaintiff’s control that have not been disclosed or that are not subject to solicitor-client privilege. Canada relies upon *Berry v Pulley*, [2008] OJ No 4109 [*Berry*] to argue that the Plaintiff cannot refuse to obtain relevant information from the

other class members. However, *Berry* is of no of assistance to Canada as I am not satisfied that Canada has met its burden to first demonstrate with persuasive evidence that documents relevant to the common issues exist and second that all documents have not otherwise been provided.

[31] I am not granting the request for an updated Affidavit of Documents.

C. *Examination for discovery of additional class members*

[32] As alternative relief, Canada requests an Order for examination for discovery of additional class members. As noted in *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paragraph 60, discovery of additional class members should only be allowed if it is reasonably necessary.

[33] At this stage, Canada has not established that it is reasonably necessary to examine additional class members. I am mindful of the caution expressed in *Rumley* (at para 39) in relation to the considerations around the vulnerability of class members. That is a relevant consideration in this case where the allegations of misconduct against the RCMP physicians involve intimate and personal details.

[34] I will not grant the request for examination for discovery of additional class members.

III. Conclusion

[35] This Motion is granted in part. I am ordering that the Plaintiff provides particulars on the following:

- the actions or procedures constituting “inappropriate and unnecessary” or “improper and invasive” procedures, including if and how these allegations are distinct from actions alleged to constitute sexual assault, assault, or battery.
- the actions supporting an award for punitive damages, including:
 - i. clarification as to whether the Plaintiff alleges abuse of power, bad faith, misfeasance of public office; and,
 - ii. the particulars of the allegation that the RCMP acted knowingly and with intention,

[36] I am denying the other requests for particulars and denying the requests for further and better Affidavit of Documents and for examination for discovery of class members.

[37] No costs are awarded.

ORDER IN T-138-19

THIS COURT ORDERS that:

1. The Defendant's Motion for particulars is granted in part and the Plaintiff shall, within 30 days of the date of this Order provide particulars on:
 - a. the actions or procedures constituting "inappropriate and unnecessary" or "improper and invasive" procedures, including if and how these allegations are distinct from actions alleged to constitute sexual assault, assault, or battery;
 - e. the actions supporting an award for punitive damages, including:
 - i. clarification as to whether the Plaintiff alleges abuse of power, bad faith, misfeasance of public office; and,
 - ii. the particulars of the allegation that the RCMP acted knowingly and with intention.
2. The Defendant's request for other particulars is dismissed;
3. The Defendant's Motion for an updated Affidavit of Documents and further discovery is dismissed; and
4. No costs are awarded.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

: T-138-19

STYLE OF CAUSE: CORRIVEAU V HIS MAJESTY THE KING

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 11, 2024

ORDER AND REASONS : MCDONALD J.

DATED: JULY 31, 2024

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