Federal Court  Cour fédérale

Date: 20250313

Docket: T-1458-20

Citation: 2025 FC 476

Ottawa, Ontario, March 13, 2025

PRESENT: Madam Justice Gagné

PROPOSED CLASS PROCEEDING

BETWEEN:

NICHOLAS MARCUS THOMPSON, JENNIFER PHILLIPS, MICHELLE HERBERT, KATHY SAMUEL, WAGNA CELIDON, DUANE GUY GUERRA, STUART PHILP, DANIEL MALCOM, ALAIN BABINEAU, BERNADETH BETCHI, CAROL SIP, MONICA AGARD and MARCIA BANFIELD SMITH

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

and

AMNESTY INTERNATIONAL CANADA

Intervener

ORDER AND REASONS

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I. Overview

[1] The Plaintiffs in this proposed class action are current and former employees of 11 different federal government departments, agencies or other organizations (and/or their predecessors). They seek to represent a proposed class comprising all Black individuals who at any time from 1970 to this day, applied for work or worked for the federal government as part of the public service, and were denied hiring or promotional opportunities by virtue of their race. In Schedule "A" to the Further Fresh as Amended Statement of Claim [Claim], the public service is defined to include 98 different federal government organizations listed under Schedules I, IV and V of the *Financial Administration Act*, RSC 1985, c F-11 [FAA], as well as the Canadian Armed Forces [CAF]. The Claim asserts that the Defendant is liable to the Plaintiffs and proposed class members for employing a "widespread practice of Black employee exclusion" with respect to hiring and promotion within all the 99 federal entities.

[2] The Court held a 13-day hearing during which five preliminary motions were argued, in addition to the Plaintiffs' Motion for Certification. In *Thompson v Canada*, 2024 FC 1752, the Court disposed of the first three motions, which circumscribed the contents of the evidentiary record.

[3] These are the Court's reasons pertaining to the three remaining motions:

1. A Motion by His Majesty the King [Canada] for an order staying the Plaintiffs' claim for overlapping with other class actions or proposed class actions;
2. A Motion by Canada to strike the Plaintiffs' claim for want of jurisdiction, and for disclosing no reasonable cause of action; and
3. The Plaintiffs' Motion for Certification.

II. The Parties and Their Evidence

[4] The Plaintiffs are 14 current or former public servants who work or have worked for 11 different federal government departments, agencies or other organizations, namely:

Canada Border Services Agency [CBSA];
Canada Revenue Agency [CRA];
Canadian Human Rights Commission [CHRC];
Correctional Services Canada [CSC];
Department of National Defence [DND];
Department of Justice [DOJ];
Employment and Social Development Canada [ESDC];
Immigration and Refugee Board [IRB];
Public Prosecution Service of Canada [PPSC];
Royal Canadian Mounted Police [RCMP]; and
CAF.

[5] In addition to their own affidavits, the Plaintiffs filed the affidavits of two former proposed representative plaintiffs and six expert witnesses:

- Dr. Wendy Cukier, Professor of Entrepreneurship and Strategy and the Director of the Diversity Institute at the Ted Rogers School of Management, Toronto Metropolitan University (formerly known as Ryerson University). She was asked to opine on systemic discrimination and to review the statistical evidence and other data provided by counsel;
- Steve Prince (actuary) and Stephanie Greenwald (forensic accounting), partners at RSM Canada. They were asked to construct a reasonable model to calculate damages arising from lost income and pension income;
- Adele Furrie, a Statistician/Survey Methodologist was retained to assist in the collection and analysis of Canada's data in relation to Canadian Black public servants; and
- Uraina Clark, a PhD in Psychology and Research Psychologist with a specialization in neuropsychology, neuroimaging and stress. She was asked to opine on the impact of exposure to discrimination on mental health disorders, including depression, anxiety, and posttraumatic stress disorder.

[6] The Defendant, Canada, represents the federal public service, meaning those components of the federal government over which the Treasury Board [TB] exercises some responsibility under the FAA. It is further subdivided between the core public administration [CPA], which includes the RCMP, and separate agencies.

[7] The CPA includes the 82 departments and agencies listed under Schedules I and IV of the FAA. Of the 99 organizations listed in Schedule “A” to the Claim, 73 are within the CPA. As of March 31, 2021, there were 245,739 active employees in the CPA distributed amongst hundreds of work sites across Canada and around the world. The TB is the employer for those organizations that comprise the CPA, and human resources management responsibility is divided amongst different central agencies: the Treasury Board Secretariat [TBS], the Public Service Commission of Canada [PSC] and the Privy Council Office.

[8] The 25 separate agencies included in the Claim are listed under Schedule V of the FAA [Separate Agencies]. The Separate Agencies are not part of the CPA. They vary in size, structure, mandate, workforce, and leadership. For example, the CRA is the largest Separate Agency and one of the largest employers within the federal public service. In 2022, it consisted of a workforce of over 58,000 employees, 13,000 based in Ottawa and the remaining 45,000 located across Canada in various offices and tax centres.

[9] Each Separate Agency has its own independent status as an employer, and direct authority over its own staffing processes, as defined in its enabling legislation.

[10] For instance, under the *Canada Revenue Agency Act*, SC 1999, c 17, the CRA is responsible for its own human resources management, which includes the power to determine its own staffing needs and to appoint employees accordingly and the obligation to develop its own staffing program that contemplates the appointment of, and recourse for, employees. Pursuant to

its responsibilities and obligations, the CRA has established staffing procedures that determine mandatory guidelines for hiring managers within the agency.

[11] The Court notes that although the Claim refers to Schedules I, IV and V of the FAA, the list of federal entities provided at Schedule "A" of the Claim no longer accurately reflects the FAA at the time of writing. This is because Schedules I, IV and V of the FAA are regularly amended to reflect changes in public service institutions, such as name changes as well as the creation or collapse of new or redundant entities. Although these Order and Reasons are based on the Claim as filed by the Plaintiffs, the Court acknowledges that, if it were certified, this class proceeding would include class members of all federal entities as they appear in the Schedules I, IV and V of the FAA.

[12] The CAF is not included in any statutory definition of the federal public service; it is an entirely separate statutory entity, constituted under the *National Defence Act*, RCS 1985, c N-5, whose members have a unique relationship to the Crown. In March 2022, the CAF had approximately 113,000 members, broken down as 65,021 Regular Force, 29,907 Primary Reserve, 6,700 Supplementary Reserve, 5,230 Canadian Rangers, and 6,482 Cadet Organizations Administration and Training Service members supporting the cadet organizations. These components are organized into a variety of commands, formations, units, etc.

[13] The CAF has its own independent system of regulations, orders, and directives, governing personnel management and, in particular, maintains its own unique processes and procedures for the purposes of enrolling and/or promoting its members.

[14] Canada has filed 37 affidavits, comprised of 35 fact witnesses from various CPA entities and Separate Agencies and two expert witnesses.

[15] 22 of the fact witnesses are public servants employed in the management of the 11 departments, agencies or organizations that employ or have employed the Plaintiffs. They are mainly involved in human resources, recruiting and staffing policies, labour relations, employment equity programs, classification, performance reviews, etc.

[16] Nine of the fact witnesses oversee policies, staffing compliance, quality assurance, employment equity programs, etc., at the TBS and the PSC. They provide guidance to the staffing authorities across the CPA and Separate Agencies and report on their activities.

[17] Two fact witnesses work at Statistics Canada and are responsible for human resources, occupational health and safety, data collection, certification and dissemination of the census on ethno-cultural variables.

[18] The last fact witness is a Policy Manager at Veteran Affairs Canada responsible for providing policy advice and guidance on its disability benefits available to current and former CAF and RCMP members.

[19] Canada’s two expert witnesses are:

- Dr. John H. Johnson, an economist specializing in economic and statistical analysis of labour and employment issues. He was asked to reply to the opinions of the RSM experts, Adele Furrie, and Dr. Wendy Cukier;
- Dr. Michael A. Campion, Professor of management at Perdue University, specializing in industrial and organizational psychology. He was asked to opine on the factors that determine the science of personnel selection; on how those factors apply to the federal public service, and; on whether there is a common selection system, procedure, and practice that was used across all organizations composing the federal public service.

III. The Intervener

(1) Amnesty International Canada

[20] Amnesty International Canadian Section (English Speaking) [Amnesty International Canada] is a not-for-profit corporation registered in Canada. It is one of the Canadian branches of the worldwide Amnesty International organization, which seeks to advance and promote human rights at both the international and national levels. They monitor and report on human rights violations and abuses, participate in international and regional human rights meetings, intervene in domestic, international and regional legal proceedings, and prepare briefs for and participate in national legislative processes and hearings.

[21] Amnesty International Canada was granted leave to intervene in this case to provide the Court insights into Canada's obligations under international human rights law regarding the right

to non-discrimination (*Thompson v Canada*, 2024 FC 215). They made submissions both in writing and orally that pertain to Canada's Motion to Strike and the Plaintiffs' Motion for Certification.

[22] On Canada's Motion to Strike, they present relevant international law pertaining to the viability of the Plaintiffs' cause of action under the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*].

[23] On the Plaintiffs' Motion for Certification, they propose that Canada's international law obligation has an impact on the common issues and preferable procedure criteria to certify the class proceeding.

IV. Preliminary Remarks

[24] Anti-Black discrimination and racism are unacceptable, and they should never find their way in any workplace environment or, for that matter, anywhere in Canadian society. Courts have recognized the existence and pervasiveness, both historically and presently, of racism in this country (*R v Morris*, 2021 ONCA 680 at para 1; *R v Le*, 2019 SCC 34 at paras 89-90, 97; *R v Theriault*, 2021 ONCA 517, leave to SCC refused, 39768 (December 16, 2021) at para 212).

[25] The issue on this motion is not whether, or to what extent, racism and discriminatory conduct occurred in the federal public service. The issue is whether the Claim advanced by the Plaintiffs can continue as a class proceeding, and whether the Court has jurisdiction over the

matter. In other words, this is not an assessment of the merits of the Plaintiffs' Claim but strictly a procedural issue: does this case fit into the class action box?

V. Motion to Stay Overlapping Portions of the Claim

[26] In its first motion covered by these reasons, Canada moves for an order:

a) Staying claims asserted in this action in respect of persons who serve or served in the RCMP, on the basis that they overlap with claims advanced in the certified/authorized class actions of *Greenwood and Gray v His Majesty the King* (T-1201-18, A-42-20) and *AMPMQ v His Majesty the King* (500-06-000820-163), as well as in the proposed class action in *McMillan v His Majesty the King* (T-1509-21); or, in the alternative, with claims advanced in the class action in *Hudson v His Majesty the King* (T-723-20), if it has not been stayed;

b) Staying claims asserted in this action in respect of persons who serve or served in the CAF, on the basis that they overlap with claims advanced in the class action of *AB v His Majesty the King* (T-2158-16);

c) Staying claims asserted in this action in respect of persons who work or worked for the DND and/or the Staff of the Non-Public Funds, Canadian Forces [SNPF], on the basis that they overlap with claims advanced in the proposed class action of *Lightbody v His Majesty the King* (T-1650-21); and

d) Staying claims asserted in this action in respect of persons who work or worked for the CSC, on the basis that they overlap with claims advanced in the proposed class action of *Sanderson and Constant v His Majesty the King* (T-89-21).

[27] Canada asserts that these cases involve the same underlying dispute or subject matter – namely, whether Canada failed to provide a workplace free from harassment and discrimination, including in respect of opportunities for career advancement and promotions. According to Canada, these cases involve the same general factual ground, allege the same fundamental wrongdoing, and claim damages in respect of the same losses as this case.

[28] There is no doubt that the objectives of class actions—access to justice, judicial economy and behaviour modification—are undermined when overlapping class actions are brought in respect of the same group, alleging the same harms, seeking the same relief.

[29] Allowing overlapping class actions to move forward is likely to cause costly duplication of judicial and legal resources, increase the risk of inconsistent decisions, and cause prejudice to a defendant in having to defend against the same allegations in different proceedings.

[30] This Court's jurisdiction to grant the relief requested is founded in section 50 of the *Federal Courts Act*, RSC 1985, c F-7, and the Court's plenary jurisdiction to manage and regulate its own proceedings (*Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143). Canada thus relies on paragraph 50(1)(b) of the *Federal Courts Act*, which provides that the Court "may, in its discretion, stay proceedings in any cause or matter … [where] it is in the interests of justice that the proceeding be stayed."

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

(Attorney General), 2018 FCA 1 at para 24), the exercise of which should not be curtailed by rigid criteria (*Herold v Wassermann*, 2022 SKCA 103 at para 98, citing *Leier v Shumiatcher (No 2)*, 1962 CanLII 330 (SK CA) at para 2; *Hamm v Canada (Attorney General)*, 2021 ABCA 329 at para 11).

[32] In assessing the extent of overlap, the Court must consider the "focus" of each proceeding, relying on the certification orders and decisions, where the class proceeding has been certified, and on the Plaintiffs' pleading where it has not (*Canada v Hudson*, 2024 FCA 33 at para 27, aff'g 2023 FC 35 [*Hudson FCA*]).

[33] As stated by the Federal Court of Appeal in *Hudson FCA*, the fact that the *Federal Courts Act* or *Federal Courts Rules*, SOR/98-106, are silent on the criteria to be considered in determining the overlap in class proceedings (whether proposed or certified, multi-jurisdictional or in the same jurisdiction) adds to the challenges faced in the duplication analysis. However, the Court found some guidance in section 1.1 of Ontario's *Class Proceedings Act, 1992*, SO 1992, c 6, and in the recent decision from the British Columbia Court of Appeal in *Kett v Google LLC*, 2023 BCCA 350. In that case, the Court confirmed that the focus of the analysis should be put on the overlap in the legal issues/causes of action and damages claimed, as well as the factual foundations of the proceedings (e.g., whether the claims involve the same or similar events or transactions).

[34] In addition, the Court in *Hudson FCA* suggests, "the duplication analysis may include whether the proceedings have some or all of the same class members, class periods, and the same (or affiliated) defendants" (at para 58). The Court adds the important following note:

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

[35] Finally, the need to avoid a multiplicity of class proceedings must always be balanced with the objective of access to justice.

[36] Canada argues that all the so-called overlapping cases share the same factual basis, meaning the plaintiffs are either employees or members of government organizations who claim they were subjected to workplace harassment and discrimination, including based on race, which wrongfully limited their advancement prospects.

[37] Except for the claims in Greenwood and AMPMQ, I agree.

[38] I will first characterize the case before me and then turn to each one of the other cases put forward by Canada.

A. *The Thompson Claim*

[39] In their Claim, the Plaintiffs seek to have their claims advanced as a class proceeding on behalf of the following group:

> 19. The Class in the within action includes all Black individuals who at any time during Class Period from 1970 to present at any time applied for work or worked for Canada as part of the Public service as defined in Schedule "A" and who were denied hiring or promotional opportunities by virtue of their race.
>
> The Class also includes all individuals who, by reason of relationship with a Class Member are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990 c F.3, and equivalent or comparable legislation in other provinces and territories ("Family Members").
>
> Other than with respect to the claims for relief of all kinds arising from the wrongful failure to hire and promote Black class members and all related losses from such conduct covered by the causes of action in the Thompson action impacting the hiring and promotion of Black class members, this class definition otherwise excludes all class members relative to the remedies sought by the actions in Greenwood, Hudson, [AB], Lightbody, and Sanderson. It is acknowledged that no action other than Thompson seeks Charter remedies related to the wrongful failure to hire and promote Black class members or to discrimination in the application of public service pension plans and Employment Equity practices relative to all Black class members covered by this Thompson class definition.

[40] Canada does not assert that there is overlapping for those individuals who applied for but did not get employment within the federal public service; that leaves those who were or have been public servants but were denied promotion and advancement.

[41] Schedule "A" of the Plaintiffs' Claim lists most entities that existed at the time of filing that compose, broadly speaking, the federal public service, that is:

> **Schedule I** of the FAA: the 22 departments of the federal government.
>
> **Schedule IV** of the FAA: the 51 agencies of the federal government, which, along with the 22 departments of Schedule I, compose the core public administration (**CPA**).

> **Schedule V** of the FAA: the 25 Separate Agencies not part of the CPA.
>
> The **CAF**, including the (a) regular force, the reserve force, and the special force, (b) the sea, land and air elements referred to, respectively, as the Royal Canadian Navy, the Canadian Army, and the Royal Canadian Air Force, and (c) all officers, non-commissioned members and cadets of the elements referred to in subsection 17(1).

[42] The Plaintiffs' Claim is first characterized by the fact the class definition is strictly limited to Black individuals. Throughout the different case management conferences, as well as in their written and oral submissions, the Plaintiffs have emphasized the importance of that limitation. Black people have a unique history, they face unique and distinct kinds of discrimination, and they have had markedly different experiences than the other visible minority subgroups. In other words, the Plaintiffs strongly reject and challenge what they call the visible minority paradigm, as being an inappropriate and unconstitutional way of gauging underrepresentation and barriers experienced by Black people in the federal public service.

[43] The Plaintiffs' Claim is also characterized by the alleged systemic discrimination and barriers faced by Black individuals in the staffing policies across the entire public service. This case is the only one that targets the entire federal public service. It aims to demonstrate that the decentralized staffing practice adopted by the Government has resulted in systemic discrimination toward Black individuals; therefore, the Plaintiffs argue that it is imperative to examine the whole governmental approach in order to maintain the purpose and essence of this Claim.

[44] Finally, and as touched upon above, the Plaintiffs do not claim damages for the discrimination and/or harassment suffered in their workplace but rather seek to be compensated for the loss suffered as a result of being denied employment or promotions by virtue of their race. The damages sought include those in relation to career limitations, loss of salary, losses due to early retirement, and losses due to impacts on pension amounts, as well as damages pursuant to subsection 24(1) of the *Canadian Charter*. Throughout the hearing, the Plaintiffs have thus put great emphasis on the difference between employment terms and conditions, which are not at stake in this case, and staffing policies, which is the "focus" of this claim.

B. *Claims Against the RCMP (Hudson, Greenwood, AMPMQ, McMillan)*

(1) Hudson

[45] Hudson is a broad class of all racialized individuals, and it includes anyone who is or was a member of the RCMP. The class is defined as follows:

> The Class (to be defined by the Court) is intended to include all racialized individuals who, at any time during the Class Period, worked for or with the RCMP ("Class Members") including, without limitation, Regular Members, Civilian Members, Special Constables, Cadets, Pre-Cadets, Auxiliary Constables, Special Constable Members, Reservists, Public Service Employees ("PSEs") appointed to the RCMP pursuant to the *Public Service Employment Act*, R.S.C., 1985, c. P-32 as amended S.C. 2003, c. 22, ss.12 and 13 including Temporary Civilian Employees who, prior to 2014 were appointed under the now-repealed subsection 10(2) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 ("*RCMP Act*"), municipal employees, regional District Employees, non-profit employees, volunteers, Commissionaires, Supernumerary Special Constables, consultants, contractors, students, members of integrated policing units, and persons from outside agencies and police forces who were supervised or managed by the RCMP or who worked in an RCMP controlled workplace. The Class Period is to be set by the Court. This action

> excludes claims that arose on or after April 1, 2005 and are subject to sections 208 and 236 of the *Federal Public Sector Labour Relations Act*.
>
> The Class also includes all individuals who, by reason of a relationship with a Class Member, are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990 c F.3, and equivalent or comparable legislation in other provinces and territories ("Family Members").

[46] Ms. Hudson alleges that she was never considered for promotion, received lower remuneration, worse training, education and mentorship than her non-racialized colleagues. She alleges that visible minorities are underrepresented in the RCMP who has been hostile toward recruits from visible communities. The claim raises systemic negligence and systemic discrimination on the part of the RCMP, as well as *Canadian Charter* and *Charter of Human Rights and Freedoms*, CQLR c C-12 [*Quebec Charter*] causes of action. As a result, class members have suffered career limitations, pension losses, and early retirement losses, just as in the case at bar.

[47] Black individuals being included in the broader class of racialized individuals or visible minorities, class members in this case are also members of the Hudson case. In fact, Mr. Alain Babineau, one of the Plaintiffs' representatives in the present case, has signed an affidavit as a class member in the Hudson case. In my view, the extent of the overlapping between the present case and the Hudson case is important and the claims of the RCMP class members in the present case are duplicative of the class members' claims already asserted in Hudson.

[48] Now in deciding whether the present case must bow to the Hudson case, I need to consider the Preclusion Order issued by Justice Ann Marie McDonald, on September 11, 2020, in the Hudson case, which reads as follows:

> No other proposed class proceeding may be commenced in the Federal Court in respect of the facts pleaded in this proceeding, without leave of this Court.

[49] The present class proceeding was filed on December 2, 2020, without the Plaintiffs seeking leave of the Court for those class members who are or were members of the RCMP and who allege having been denied a promotion by virtue of their race. The present class proceeding will therefore be stayed with respect to those class members.

(2) Greenwood and AMPMQ

[50] In my view, with respect to these two cases, Canada is taking the same position as it took in the Hudson case, which has been rejected by this Court and by the Federal Court of Appeal in *Hudson FCA*. Canada states that this Court and the Federal Court of Appeal left the door open to reconsider the issue at certification stage. I did and I reached the same conclusion as Justice Russel Zinn did in *Hudson v Canada*, 2023 FC 35: the focus in the present case and that in Greenwood and AMPMQ are too different to trigger potential conflicting decisions.

[51] Apparently, this Court has already implicitly taken a similar view when the Hudson case was allowed to proceed. In both Greenwood and Hudson, Justice Ann Marie McDonald issued preclusion orders. In January 2019 for Greenwood (as part of the certification order) and in September 2020 for Hudson (as part of an interlocutory order). Allowing Hudson to proceed

without leave of the Court in spite of the preclusion order in Greenwood is an upstream implicit assessment of the overlapping issues and a determination that the Hudson case is not "in respect of the facts pleaded in [the Greenwood case]". As acknowledged by counsel for Canada at the hearing, "what the Court is doing is the same, whether it's a stay or you're seeking to exclude overlap by limiting the case, or you're trying to enforce the preclusion order."

[52] That said in Greenwood, the class is defined as:

> All current or former RCMP Members (i.e. Regular, Civilian, and Special Constable Members) and Reservists who worked for the RCMP between January 1, 1995 and the date a collective agreement becomes or became applicable to a bargaining unit to which they belong ("Primary Class").
>
> and
>
> All individuals who are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990, c F.3, and equivalent or comparable legislation in other provinces and territories ("Family Class").
>
> This Class Proceeding excludes claims that are covered under *Merlo v Her Majesty the Queen*, Federal Court File No. T-1685-16, *Ross et al v Her Majesty the Queen*, Federal Court File No. T-370-17, and [AMPMQ].

[53] The class is not limited to visible minorities, let alone Black individuals, and although the Plaintiffs' representative state that they were limited in their benefits and career advancement, this was contingent on whether class members complained about mistreatment or bullying suffered from their superiors. We are talking here about bullying, intimidation and harassment of individuals working with or for the RCMP, including unwanted physical exposure and/or touching, retaliation for complaining, and demeaning and belittling comments made to class members. It focuses on the negative impacts of harassment, intimidation, and bullying.

[54] In AMPMQ, a Quebec only class, the focus is on abuse of power and discrimination based on French language and on activities related to freedom of association and the right to unionize. Canada points to Plaintiff Alain Babineau, who is both Black and a French-speaking RCMP member. That might very well be but in my view, the Venn diagram depicting shaded areas Biringer JA refers to at paragraph 59 of *Hudson FCA* is closer here to a new moon than a full moon. In any event, the present class proceeding will be stayed as far as RCMP members are concerned, because of the overlapping with the Hudson case.

[55] In my view, the overlapping with Greenwood and AMPMQ, if any, is so minimal that decisions of the Court there will have no significant or real impact here and vice versa.

(3) McMillan

[56] At the time of the hearing, the motion to certify McMillan as a class action had been dismissed without leave to amend, as the proposed representative plaintiff's claim had expired (*McMillan v Canada*, 2023 FC 1752 [*McMillan FC*]). It has since been granted a new life by the Federal Court of Appeal, which granted leave to amend the statement of claim to allow the proposed class to appoint a new representative plaintiff (*McMillan v Canada*, 2024 FCA 199).

[57] The proposed class in *McMillan FC* was as follows:

> [86] The Plaintiff proposes a class period of 1974 onward. The Plaintiff also proposes the following class:
>
> > **A. Primary Class Members:** all persons who worked within RCMP workplaces during the Class Period in any of the following categories: temporary civilian employees; supernumerary special constables, auxiliary constables; cadets, pre-cadets,

> students; contractors and consultants; Commissionaires; employees of other governments including municipal and regional governments; seconded officers and employees; persons from outside agencies and police forces including members of integrated policing units and task forces; volunteers and non-profit organization employees; individuals working or attending courses on RCMP premises; and, individuals who are persons as defined in s. 206(1)(a)-(h) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22 ["*FPSLRA*"]; and
>
> **B. Family Members:** All individuals who, by reason of a relationship with a Primary Class Member, are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990 c F.3, and equivalent or comparable legislation in other provinces and territories.

[87] The Plaintiff excludes from the proposed proceeding claims that:

> A. arose on or after April 1, 2005, and that were subject to sections 208 and 236 of the *FPSLRA*;
>
> B. arose while the individual served in the RCMP as a Regular Member, Civilian Member, Special Constable Member or Reservist; and
>
> C. were resolved in *Merlo et al v Her Majesty the Queen*, Federal Court File T-1685-16, *Tiller et al v His Majesty the King*, Federal Court File T-1673-17, or *Ross et al v His Majesty the King*, Federal Court File T-370-17.

[58] In his judgment, Justice Michael Manson struck, by process of elimination, all portions of pleadings over which the Court has no jurisdiction and all claims that did not plainly and obviously disclose a reasonable cause of action, and amended the class as follows:

> [88] I have already constrained the claims to allegations between 2003 and March 31, 2005. I also determined that my exercise of jurisdiction must be limited to TCEs in the Kelowna OCC. The

> proposed primary class cannot exceed those limits. By extension, the family class must be excluded entirely, as set out above. Therefore, by process of elimination, the proposed class and class period must be amended to the following (the "amended class"):
>
> > All persons who worked at the Kelowna operational communications centre between January 1, 2003 and March 31, 2005 as temporary civilian employees.
>
> And since the first two exclusions are redundant, the only claims that must be explicitly excluded from the amended class are those that were resolved in *Merlo et al v Her Majesty the Queen*, Federal Court File T-1685-16, *Tiller et al v His Majesty the King*, Federal Court File T-1673-17, or *Ross et al v His Majesty the King*, Federal Court File T-370-17. (*McMillan FC*, aff'd in part 2024 FCA 199)

[59] The remaining portions of the claim allege that the amended class members, that is, temporary civilian employees who worked during a period of a little more than two years at the Kelowna operational communications centre, suffered systemic bullying, intimidation and harassment in the workplace. They plead a cause of action in negligence.

[60] The amended class in the McMillan case is so specific that I find there is virtually no overlap with the Thompson case.

C. *Claims Against the CAF (AB)*

[61] The AB class action was launched in 2016 and has since been settled by the parties. This Court heard a Motion for Certification and Settlement Approval on July 16, 2024, and judgment approving the settlement was issued on February 13, 2025. The Final Settlement Agreement defines the class as follows:

> 4.01 Class Definition

> The Parties agree that the Class will be defined as follows:
>
> All persons who are or have been enrolled as CAF Members at any time from April 17, 1985, and for any duration up to and including the Approval Date, and who assert that they have been subjected to Racial Discrimination and/or Racial Harassment.

[62] The term Racial Discrimination is defined as follows:

> 'Racial Discrimination' means any unfair treatment, adverse differentiation, or bias occurring in connection with military service and involving military members (CAF or foreign), DND employees, staff of the Non Public Funds, or CAF/DND contractors and that is based on an individual's race, ethnicity colour and/or indigeneity.

[63] Canada argues that the failure to promote CAF members or advance their career by virtue of them being Black is covered by the AB settlement. I agree.

[64] The Monetary Assessment Scheme of the Final Settlement Agreement first provides for a Common Experience Payment that recognizes systemic racism in the CAF and provides payment without requiring class members to tell a story. In addition, class members can provide their own narrative experience of racism that considers factors such as the impacts of discrimination on career development, opportunity, and advancement. The Final Settlement Agreement also provides for measures that will be put in place by Canada to address systemic discrimination within the CAF.

[65] In addition to overlapping in a material way, the unique relation that CAF members have with the Crown also favours staying the present proceeding for the members of the CAF.

[66] The CAF is not included in the statutory definition of the federal public service; it has its own independent system of regulations, order, and directives, governing personnel management and, in particular, maintains its own unique process and procedures for the purposes of enrolling and/or promoting its members. In my view, this favours solving the overlapping issue in favour of the AB case or in favour of the entity specificity rather than race specificity.

[67] Finally, since this Court in the AB approved the Final Settlement Agreement, those members of the Thompson case that are members of the CAF are now bound by the full and final release found therein.

D. *Claims Against the DND/SNPF and the CAF (Lightbody)*

[68] The Lightbody case was filed in October 2021 and was heard by the Court in April 2024, judgment reserved. The class definition is captured in paragraphs 2, 4 and 5 of the Statement of Claim which reads as follows:

> 2. This action concerns systemic racism by the Department of National Defence ("DND") and Canadian Armed Forces ("CAF") (together the "Defence Team") on the basis of race, ethnic or national origin, colour or religion, directed at racialized persons who work, or worked, for or with the DND or the Staff of Non-Public Funds, Canadian Forces (the "SNPF"). The DND and CAF are an organization where military members report to civilians and vice-versa, and where the civilian and military entities essentially operate as one.
>
> …
>
> 4. The Class (to be defined by the Court) is intended to include all racialized individuals who are, or were, employees of the DND, including all public services employees appointed under the *Public Service Employment Act* and all employees of the Staff of Non-Public Funds, Canadian Forces ("Class Members").

> 5. The Class also includes all individuals who, by reason of a relationship with a Class Member, are entitled to assert a claim pursuant to the *Family Law Act*, R.S.O. 1990 c. F.3, or equivalent or comparable legislation in other provinces and territories ("Family Members").

[69] As part of the discrimination they suffered in their workplace, Plaintiffs state that non-racialized employees were promoted ahead of racialized individuals. They recount events where even though they were more qualified for a promotion, non-racialized colleagues outstripped them. Remedies sought include claims for past and prospective losses of income. Just as in the present case, the focus of the claim in Lightbody is systemic negligence for systemic discrimination in the workplace resulting in, amongst other consequences, the creation of artificial barriers to promotion and advancement for racialized employees. In my view, there is sufficient overlapping between the members of the class in Thompson and the class in Lightbody to justify not imposing upon the Defendant to face both cases.

[70] As is the case for the Thompson class members that are members of the RCMP and CAF, the claim of those who are employed by the DND will also be stayed.

E. *Claims Against the CSC (Sanderson)*

[71] The claim in Sanderson was filed in 2021 and is not yet certified. The plaintiffs in that case seek to have their claim certified for the following class:

> 3. The Class (to be defined by the Court) is intended to include all racialized individuals who are or were staff members under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, Part I, sections 1 and 5, including persons designated as peace officers under section 10, all persons covered by the *Application to Canadian Penitentiary Service Regulations*, C.R.C. c. 1333,

> including members of the CSC under the *Public Service Employment Act*, S.C. 2003, c. 22 and all other racialized individuals who worked for or with the CSC ("Class Members").
>
> 4. The Class also includes all individuals who, by reason of a relationship with a Class Member, are entitled to assert a claim pursuant to the *Family Law Act*, R.S.O. 1990 c. F.3, or equivalent or comparable legislation in other provinces and territories ("Family Members").

[72] The claim alleges that the CSC was systemically negligent and breached the *Canadian Charter* in respect of, amongst other allegations, visible minorities being underrepresented in the public service, and non-racialized employees receiving better education, mentorship, and promotions. The remedies sought by the Plaintiffs include damages due to early retirement, pension losses, and damages relating to the effect of discrimination toward class members' income and compensation. Here again, there is sufficient overlap between the Thompson case and the Sanderson case with regards to loss of career progression opportunities and related compensation and pension losses.

[73] As is the case for the Thompson class members that are members of the RCMP, the CAF and the DND, the claim of those who are employed by CSC will also be stayed.

F. *Conclusion on the Motion to Stay Overlapping Portions of the Claim*

[74] The Court finds sufficient overlapping with the cases of Hudson, AB, Lightbody and Sanderson that it is in the interest of justice to stay the claims of those Plaintiffs and class members that are or were employed or members of the RCMP, the CAF, the DND/SNPF and CSC.

VI. Motion to Strike (Jurisdiction)

[75] In the first part of this motion, the Court must determine (a) whether it has jurisdiction over the claim, and (b) if not, whether the Court should exercise its discretion to nevertheless take jurisdiction over the matter.

A. *The Parties' Position*

[76] Canada asserts that the Court does not have jurisdiction over this claim because the Plaintiffs and similarly situated proposed class members are or were federal public servants, and as such, they have or had grievance rights pursuant to the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [*Labour Relations Act*] and/or its predecessor.

[77] Specifically, Canada argues it is plain and obvious that this Claim should be struck on the basis that the Court lacks jurisdiction over the claims of the 13 proposed Representative Plaintiffs and the proposed class members. There are three categories of employees and the reasons for the Court's lack of jurisdiction differ for each.

[78] For all the claims that arose after 2005, Canada asserts they are barred by section 236 of the *Labour Relations Act*, which came into force in 2005 and provides that the grievance rights afforded to federal public servants are in lieu of any right of action that an employee may have in relation to a grievable issue.

[79] For the claims of unionized employees who are not subject to section 236, the law is clear that they have no right of action in respect of any matters for which redress may be sought under a collective agreement (*Weber v Ontario Hydro*, [1995] 2 SCR 929 [*Weber*]; *Canada v Greenwood*, 2021 FCA 186 at paras 115, 129, 131, 135-139 [*Greenwood FCA*]).

[80] Finally, the third category encompasses the claims of non-unionized employees with no grievance rights under the *Labour Relations Act*, or whose allegations predate 2005. While their claims are not expressly barred by section 236 or the principles enunciated in *Weber*, they all had access to statutory recourse mechanisms, and following the decision of the Supreme Court of Canada in *Vaughan v Canada*, 2005 SCC 11 [*Vaughan*], deference is owed toward those mechanisms. This category includes casual employees, students, term employees with terms of less than three months, members of the RCMP prior to the date on which they became subject to a collective agreement (August 6, 2021, for RCMP members), and members of the CAF.

[81] The Plaintiffs, on the other hand, respond that the statutory bar in section 236 of the *Labour Relations Act* does not apply to their Claim. That bar is restricted to grievances and complaints brought by an employee to address a dispute relating to his or her terms and conditions of employment, whereas this case is strictly about staffing.

[82] The Plaintiffs add that subsection 208(2) of the *Labour Relations Act* rather represents a statutory bar to grievances for staffing related issues, as Parliament has established alternative administrative procedures for redress through the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 [*Employment Act*] and related laws in respect of separate agencies.

[83] The Plaintiffs add that staffing matters are not subject to collective bargaining. In fact, the Defendant has repeatedly objected to staffing matters proceeding by way of grievance. This action which seeks to address staffing and promotion issues is thus distinguishable from this Court's rulings in *Greenwood FCA* and in *Hudson FCA* which addressed core labour relations matters in circumstances where the statutory bar in subsection 208(2) did not prevent grievances from proceeding. In both of those cases, the issue was the application of policies against harassment and discrimination intended to prevent the creation of a toxic work environment. This is very different from the case at bar, according to the Plaintiffs.

B. *Issues on the Motion to Strike (Jurisdiction)*

[84] The issues raised by this motion are:

1) Whether the Court has jurisdiction over the Plaintiffs' claims in light of section 236 of the *Labour Relations Act*; and

2) Whether the Court should decline to exercise its discretion to take jurisdiction over the claims of those to whom section 236 does not apply.

[85] A motion to strike for want of jurisdiction or for failure to disclose a reasonable cause of action may be brought under Rule 221(1)(a) of the *Federal Courts Rules*. The test is whether it is plain and obvious that the claim will fail (*Apotex Inc v Ambrose*, 2017 FC 487 at para 39; *Fraser Point Holdings Ltd v Vision Marine Technologies Inc*, 2023 FC 738 at para 30). On a motion to strike, the material facts in a Statement of Claim must be assumed to be true. Although Rule 221(2) provides that no evidence can be adduced on a motion for an order under paragraph (1)(a), where its jurisdiction is at stake, the Court must be satisfied that there are

jurisdictional facts or allegations of such facts supporting an attribution of jurisdiction. Evidence is therefore admissible where a Court is asked to decline jurisdiction in favour of an alternate dispute resolution process; evidence on the nature and efficacy of the suggested alternate process is necessary to allow the Court to determine whether it ought to decline jurisdiction (*Greenwood FCA* at para 95).

C. *Jurisdiction Over Labour Dispute*

[86] On the question of jurisdiction, the Supreme Court has held that where Parliament has created schemes for dealing with labour disputes, such as grievance or complaint processes, courts should generally defer to those processes (*Weber* at para 58; *Vaughan* at para 39; *Greenwood FCA* at para 129).

[87] However, courts retain a residual discretion to deal with employment disputes where internal grievance mechanisms are incapable of providing effective redress, or in exceptional circumstances (*Ebadi v Canada*, 2024 FCA 39 at para 47, leave to appeal to SCC refused, 41260 (17 October 2024); *Greenwood FCA* at para 130; *Adelberg v Canada*, 2024 FCA 106 at para 58; *Bron v Canada (Attorney General)*, 2010 ONCA 71 at paras 27-30).

[88] Canada's international law obligations can assist the Court in determining if it should exercise its residual discretion to assert jurisdiction over this matter. As a State party to the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into 27 January 1980), Canada "may not invoke the provisions of its internal law as justification for

its failure to perform a treaty" (art 27). Canada must provide an effective remedy for breaches of human rights.

[89] The question of jurisdiction is to be determined according to whether the essential character of the dispute, that is its factual context, arises out of the collective agreement or the employer-employee relationship (*Weber* at para 54; *Vaughan* at para 11; see also *Chase v Canada*, 2004 FC 273 at para 38). Framing a claim as a *Canadian Charter* breach, for example, does not preclude the application of the bar. A grievor cannot "avoid legislatively prescribed processes and procedures through artful drafting where the issue raised engage matters subject to those prescribed processes" (*Murphy v Canada (Attorney General)*, 2023 FC 57 at para 98, citing *Burlacu v Canada (Attorney General)*, 2022 FC 1177 at para 10).

[90] As stated earlier, current or former employees of 11 different federal government departments, agencies or other organizations (and/or their predecessors) bring this Claim. They seek to represent all Black individuals who at any time "applied for work or worked for Canada as part of the Public service," from 1970 to this day, and "who were denied hiring or promotional opportunities by virtue of their race." "Public service" is defined to include 98 different federal government organizations listed in the FAA as well as the CAF. The Claim asserts that Canada is liable to the Plaintiffs and proposed class members for employing a "widespread practice of Black employee exclusion" with respect to hiring and promotion within all of the 99 entities that are implicated in the Claim.

D. *Statutory Framework*

[91] Throughout the proposed class period, different legislative frameworks have governed matters of employment and staffing for different Plaintiffs and proposed class members, depending on the entity which employed them (or to which they applied).

[92] Federal public servants were granted collective bargaining rights in 1967 and the *Labour Relations Act* has governed labour relations in the federal public service (i.e., the CPA and Separate Agencies) since 2005. This act and its associated regulations deal comprehensively with the collective bargaining process for unionized employees and define the grievance process for both unionized and non-unionized public servants.

[93] The vast majority of public servants within the CPA and Separate Agencies are unionized; 85% of all active employees and 96.5% of active employees excluding casual workers, students and employees with terms of less than three months are represented by a bargaining agent and covered by one of 28 collective agreements applicable to CPA employees. The employees of 15 of the 22 Separate Agencies are represented by one or more bargaining agents who negotiated 54 distinct collective agreements. 91.8% of all employment tenures in the Separate Agencies are unionized. With only a few exceptions, all collective agreements contain articles prohibiting race-based workplace discrimination and harassment.

[94] A number of positions are also excluded from unionization if they are considered managerial or confidential. Positions can only be excluded from a bargaining unit on this ground by order of the *Federal Public Sector Labour Relations and Employment Board* [Board] based on criteria defined by the *Labour Relations Act*.

[95] RCMP members were previously excluded from collective bargaining, but this is no longer the case. Following the decision of the Supreme Court in *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, the *Labour Relations Act* was amended to provide a labour relations framework specific to the RCMP. Those amendments came into force in June 2017. Regular Members, Special Constable Members and Reservists finalized a collective agreement, with the National Police Federation as their bargaining agent, effective August 6, 2021. It covers all members appointed to a rank in the RCMP below the rank of Inspector and Reservists. Article 16 of the collective agreement prohibits discrimination on numerous grounds, including those of race, creed, colour, and national or ethnic origin.

[96] The *Labour Relations Act* affords employees in the public service a statutory right to grieve the interpretation or application of a provision of a statute, regulation, collective agreement or other direction or instrument that deals with terms and conditions of employment. The right to file a grievance is given to both unionized and non-unionized employees. The *Labour Relations Act* makes it an unfair labour practice for the employer and managers to retaliate against any employee for exercising their right to file a grievance.

[97] There are three types of grievances under the *Labour Relations Act*:

> (a) An individual grievance may be brought under section 208 of the *Labour Relations Act* by any employee who is aggrieved by: (i) the interpretation or application to them of a provision of a statute, regulation, or direction that deals with terms and conditions of employment (ii) the interpretation or application to them of a provision of a collective agreement, or an arbitral award; or (iii) any occurrence or matter affecting the employee's terms and conditions of employment.

(b) A group grievance may be brought under section 215 of the *Labour Relations Act* by a bargaining agent on behalf of a group of employees who feel commonly aggrieved by the interpretation or application of a provision of a collective agreement or arbitral award.

(c) A policy grievance may be brought under section 220 of the *Labour Relations Act* by a bargaining agent or the employer in respect of the interpretation or application of a collective agreement or arbitral award as it relates to the bargaining unit.

[98] For individual and group grievances, the grievance process generally provides for three levels of review and decision. At the first three levels, decision makers have wide discretion to provide redress; they can interpret the *Canadian Charter*, award damages, and/or refer a matter for disciplinary investigations. If the Board determines that a grievance is founded, it has broad powers to make any order that it considers appropriate in the circumstances. This includes the power to award compensation for losses suffered, reinstatement with back pay, rescission of a disciplinary action, as well as exemplary and punitive damages (*Klos v Canada (Attorney General)*, 2021 FCA 238 at para 9; *Canada (Attorney General) v Lyons*, 2024 FCA 26 at para 5).

[99] Policy grievances have one level and are dealt with directly by the employer. If a grievance is not resolved to the satisfaction of the employee or the bargaining agent, the final decision can be judicially reviewed, or referred to the Board for independent adjudication, if the Board has jurisdiction over the matter.

[100] The Board is an independent quasi-judicial statutory tribunal established by the *Federal Public Sector Labour Relations and Employment Board Act*, SC 2013, c 40, s 365. Under that statute, the Board has broad procedural powers enabling it to adjudicate matters before it. The

Board is also empowered under paragraph 226(2)(a) of the *Labour Relations Act* to interpret and apply the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], in relation to any matter referred for adjudication, and grant compensatory and exemplary damages. The CHRA is in fact closely related to the mandate conferred to the Board under the *Labour Relations Act* (*Stringer v Canada (Attorney General)*, 2013 FC 735 at para 55).

[101] If the Board determines that a grievance is founded, it has broad powers to make any order that it considers appropriate in the circumstances (subsection 228(2) of the *Labour Relations Act*). This includes the power to award damages for lost career opportunities and psychological harm, and the power to order systemic remedies. In *Stringer v Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)*, 2014 PSLRB 5, the Board ordered systemic remedies in connection with a grievance alleging a breach by the DND of the "no discrimination" clause of a collective agreement, including that the employer develop a training and sensitization program for all managers and employees of the DND on the duty to accommodate employees with disability.

[102] Public servants whose employment is governed by the *Employment Act* may also challenge the fairness of specific staffing selection processes by filing complaints under the *Employment Act*. Since 2005, all complaints filed under the *Employment Act* are also considered and disposed of by the Board.

[103] Section 77 of the *Employment Act* provides that a person who falls within the "area of recourse" for an internal appointment process (meaning that they applied or could have applied

or been considered for the position), and who believes that they were not appointed by reason of an "abuse of authority", is entitled to file a staffing complaint with the Board. "Abuse of authority" is defined in the *Employment Act* to include bad faith and personal favouritism and has been interpreted to include serious errors and omissions. It does not require intent (*Huard v Deputy Head (Office of Infrastructure of Canada)*, 2023 FPSLREB 9 at paras 78-80). A complainant may allege that there has been an abuse of authority based on any of the prohibited grounds of discrimination set out in the CHRA (*Abi-Mansour v President of the Public Service Commission*, 2016 PSLREB 53 at para 71; *Boivin v President of the Canada Border Services Agency*, 2017 PSLREB 8 at para 57). The Board may interpret and apply the *Canadian Charter* when addressing a staffing complaint under the *Employment Act* and it is empowered to revoke an appointment or not make an appointment, and to take other corrective actions considered appropriate.

[104] In addition, section 66 of the *Employment Act* empowers the PSC to investigate any external appointment process—that is, the hiring of persons applying to join the public service—and if "an error, an omission or improper conduct" is found, it may take any corrective action considered appropriate.

[105] As for the 21 Separate Agencies not governed by the *Employment Act*, they are governed by their enabling legislation and may have access to specific staffing-related recourse available within their respective agencies.

[106] For instance, CRA employees have access to a recourse process provided by the Agency's staffing program developed in accordance with its statutory obligations. Employees may raise allegations of arbitrary and discriminatory treatment in specific staffing processes, and an independent third party may review staffing decisions with regards to permanent promotions.

[107] Public servants with the RCMP have the same grievance and complaint rights as all other similarly situated public servants. As for RCMP members, they have access to a separate grievance process under the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10. Throughout the relevant period, RCMP members have been entitled to bring staffing-related grievances, including allegations of discrimination in matters of promotion, and to obtain redress in that regard. Members have also been entitled to seek judicial review of any final level grievance decision in this Court. As noted above, unionized RCMP Regular Members, Special Constable Members and Reservists can now bring grievances under their collective agreements and the *Labour Relations Act*.

[108] Finally, the CAF has its own internal grievance system under the *National Defence Act*. Through the CAF grievance process, CAF members may grieve a wide range of issues, including matters of discrimination in promotion and related issues. A decision being grieved may include legislation or policy which governs conditions of service, even if the authority to amend the instrument or to provide the redress sought by the grievor lies outside the CAF.

E. *Post-2005 Claims*

[109] The peculiarity of this case is that the Plaintiffs are not challenging any specific appointment process, but they are rather seeking systemic remedies for systemic discrimination. In that sense, argues Canada, their Claim is not captured by subsection 208(2) of the *Labour Relations Act* but rather by its section 236, as it falls squarely under the "no discrimination" clause contained in most if not all the collective agreements applicable to the Plaintiffs. Section 236 imposes an absolute bar to a civil action as grievance rights are "… in lieu of any right of action that an employee may have in relation to any act or omission giving rise to the dispute". If the issue is grievable, there is no exception to section 236.

[110] The Plaintiffs, on the other hand, assert that since the focus of their Claim is staffing, not their "terms and conditions of employment", section 236 does not apply, and their grieving right is barred by virtue of subsection 208(2) of the *Labour Relations Act*. That provision reads as follows:

Individual Grievances	**Griefs individuels**
Presentation	**Présentation**
…	[…]
Limitation	**Réserve**
208 (2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*.	**208 (2)** Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la *Loi canadienne sur les droits de la personne*.

[111] First, this exception only applies to individual grievances.

[112] Second for the exception to a general and broad grievance right to apply, there must be a redress—one would hope an effective redress—provided by an Act of Parliament.

[113] Third, an employee could present an individual grievance in respect of an administrative procedure for which a redress is available under the CHRA.

[114] What would be barred from grievance is a complaint to the Board presented under section 77 of the *Employment Act* by a person who did not obtain a position in the context of a specific selection process. The grounds for the complaint must be related to:

> (a) the hiring authority's discretion with respect to the concept of merit and the essential qualifications of the position (subsection 30(2));
>
> (b) the choice to use an advertised or a non-advertised process; or
>
> (c) the complainant's right to be assessed in the official language of their choice, other than assessments necessary for determining language proficiency as required by the appointment process (*Employment Act* subsection 37(1)).

[115] The complaint can be made by an unsuccessful candidate who was eligible for the appointment process if the process was advertised, or by anyone who was eligible for the appointment process if the process was not advertised. The complainant notifies the CHRC of any issue related to the complaint that requires the interpretation of the CHRA, and the CHRC may make submissions to the Board in relation to those issues.

[116] The decisions of the Board, made under the *Labour Relations Act* or under the *Employment Act*, are reviewable by the Federal Court of Appeal under section 28 of the *Federal Courts Act*.

[117] Consequently, if the complaint process offered by the *Employment Act* does not apply to a collective systemic staffing complaint as the one brought by the Plaintiffs, then subsection 208(2) does not apply and grievance is or was available to the Plaintiffs.

[118] In *Ebadi v Canada*, 2024 FCA 39, the Federal Court of Appeal reaffirmed that regardless of the legal labels applied, if a claim arises out of workplace conduct, the matter may be the subject of a grievance; any other approach would fail to give effect to Parliament's intent:

> [36] …To allow large categories of claims—such as any claim involving an intentional tort or Charter breach—to escape the operation of the [*Labour Relations Act*] would undermine Parliament's intent. Many if not all workplace grievances could, through artful pleading, be cast as intentional torts: for example, a manager speaking harshly to an employee could be said to be intentionally inflicting mental harm, or the failure to be promoted an act of discrimination. To exempt these claims from the grievance process could effectively gut the scheme, reducing it to the most mechanical and administrative elements of employment relationships, such as hours of work, overtime, classification and pay.
>
> [My emphasis.]

[119] It follows that all of the Plaintiffs' claims that arose since the enactment of section 236 of the *Labour Relations Act* are outside the jurisdiction of the Court. This includes the claims of the following plaintiffs:

- Nicolas Marcus Thompson, who has been working at CRA since 2015 and is a member of the Union of Taxation Employees – Public service Alliance of Canada (UTE-PSAC);
- Michelle Herbert, who has been working at Service Canada under ESDC since 2014. At paragraph 28 of her affidavit, she refers to "our union" without identifying it;
- Shalane Rooney, who worked for Statistics Canada from 2010 to 2020 and was a member of the Union for National Employees; and
- Bernadeth Betchi, who worked at CRA from 2009 to 2011 as a student and from 2011 to 2018 as a regular employee. In that latter capacity, she was a member of the Canadian Association of Professional Employees (CAPE). She later worked for the CHRC from 2019 to 2020 and for DND (on secondment from the CHRC) from 2021 to 2023 and was a member of the CAPE.

F. *Pre-2005 Claims by Unionized Employees*

[120] In *Weber*, the Supreme Court of Canada stated that a unionized employee should not bring a civil action alleging negligence or *Canadian Charter* violations for a dispute arising expressly or implicitly from a collective agreement (*Greenwood FCA* at para 105). Once courts on inherent jurisdiction have assessed the true nature of a claim and determined that it expressly or inferentially arises out of the collective agreement, they are foreclosed (*Weber* at para 54). As to Mr. Weber's concerns about an arbitrator's aptitude to deal with *Canadian Charter* issues, Justice McLachlin concluded, after a review of relevant case law, that:

> It follows from *Mills* that statutory tribunals created by Parliament or the Legislatures may be courts of competent jurisdiction to grant

> *Charter* remedies, provided they have jurisdiction over the parties and the subject matter of the dispute and are empowered to make the orders sought (at para 66).
>
> …The question in each case is whether the dispute, viewed with the eye to its essential character, arises from the collective agreement. This extends to *Charter* remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed (at para 67).

[121] The evidence before the Court is that most Plaintiffs who would have a pre-2005 claim were unionized:

- Jennifer Phillips worked at CRA from 1990 to 2020 and was also a member of the UTE-PSAC;
- Kathy Samuel worked at DOJ from 2001 to 2006, and has been working with PPSC since 2006. She is a union representative;
- Wagna Celidon worked at CSC from 1991 to 2019 and was a union representative for the Union of Safety and Justice Employees – PSAC;
- Duane Guy Guerra works for DND and has been a member of the CAF since 1999. At DND, he is a member of the Union of National Defence Employees, Local 625;
- Daniel Malcom worked for CRA from 1999 to 2022 and was a member of several bargaining units until he became a manager in 2019;
- Carol Sip worked for DND from 1974 to 1981. It is unknown whether she was then unionized. She worked for CRA/CBSA from 1981 to 1999 and was there a member of the Customs Excise Union – PSAC. She was a union representative;

- Monica Agard worked for the CRA from 1989 to 1991, it is unknown whether she was then unionized. She has been working at the IRB since 1991 and is a member of the PSAC; and
- Marcia Banfield Smith worked at the DOJ from 2002 to 2021 and was a member of the CAPE.

[122] As stated above, the essential characteristic of the present Claim is not about a single appointment process that would take it outside the realm of the collective agreement. It is rather about systemic discrimination against Black employees, across the entire public service that resulted in a failure to hire, a failure to promote and the underrepresentation of Black employees in all departments, Separate Agencies and other organizations.

[123] In my view, the damages claimed by the Plaintiffs for systemic discrimination fall within the "no discrimination" clause contained in most if not all collective agreements applicable to the Plaintiffs.

[124] It follows that the Court has no jurisdiction over the claims of Jennifer Phillips, Kathy Samuel, Wagna Celidon, Duane Guy Guerra, Daniel Malcom, Carol Sip, Monica Agard and Marcia Banfield Smith.

G. *Pre-2005 Claims by Non-Unionized Employees*

[125] In *Vaughan*, the Supreme Court heard the appeal of a public servant seeking to take advantage of early retirement incentive benefits provided by regulations and not by the collective

agreement. They were arguing that the principle enunciated by the Court in *Weber* was inapplicable and the Court should not defer to the labour relations statutory scheme in respect of matters that cannot be taken to an independent adjudicator.

[126] The Supreme Court rejected this argument and stated that even if the matter can be grieved but not arbitrated, Mr. Vaughan ought to have proceeded by way of grievances under the predecessor to the *Labour Relations Act*. The rationale is that the dispute is related to employment benefits in the labour relations context and Mr. Vaughan is not permitted to litigate his claim in the Court by dressing it up as a negligence claim.

[127] The Supreme Court did not intend to create an absolute bar to the courts' jurisdiction over such claims and added that they do have residual discretion to take jurisdiction over the claim if it has been demonstrated that the statutory tribunal cannot grant appropriate remedies. For the Court to exercise its residual discretion, the Plaintiffs must present compelling evidence demonstrating that there are systemic deficiencies in the internal recourse mechanisms available.

[128] However, none of the Plaintiffs' claims falls clearly under that category.

[129] In addition, and as will be discussed in the Certification Section, the Plaintiffs' allegations of systemic negligence are based on the sub-delegation model for staffing in the public service, which was adopted in 2005. According to their own theory of the case, the cause of the systemic discrimination did not exist prior to that date.

[130] Finally and for an obvious reason, for those who were casual employees, students, term employees with terms of less than three months, the issue of promotion and advancement does not arise the same way it arises for those employees who are indeterminate employees or who spend their career in the public service.

H. *RCMP and CAF Members*

[131] The following two Plaintiffs spent most of their career as non-unionized members of the RCMP:

- Stuart Philp worked for CBSA from 1996 to 2002 and does not remember whether he was then a member of a union (although he likely was). He has been a member of the RCMP since 2002 and was non-unionized from 2002 until 2019, when he became a member of the National Police Federation; and
- Alain Babineau worked at the CAF from 1981 to 1984 and was a member of the RCMP from 1989 to 2016. As such, he was never a member of a union, although the RCMP had a Member's Representative Program prior to 2019.

[132] As Justice Binnie stated in *Vaughan*:

> 14. The *Weber* approach was extended beyond collective agreements to a statutory (not collective bargaining) regime in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14. That case involved a statutory regime for police discipline. Bastarache J., for the Court, held at para. 26:
>
> > . . . the rationale for adopting the exclusive jurisdiction model was to ensure that the legislative scheme in issue was not frustrated by the conferral

> of jurisdiction upon an adjudicative body that was not intended by the legislature.
>
> 15. The present appeal carries the debate a step further, and raises the question whether the doctrine of judicial restraint (or deference) preached in the *Weber* line of authorities applies to the statutory labour relations scheme set out in the PSSRA which does not in its relevant aspects provide for independent adjudication. As stated, the dispute here is over a benefit unilaterally conferred by the employer, in respect of which Parliament has vested the final decision in the Deputy Minister or his or her designate without recourse to independent adjudication. If such restraint is not mandatory (as it was in *Weber*), is restraint nevertheless necessary to avoid undermining Parliament's intent as expressed in the labour relations statute?

[133] RCMP (pre-collective agreement) and CAF members have their own grievance rights under both organizations' enabling legislation, which are equivalent if not better then those available to other public service employees.

[134] RCMP members are appointed by the Commissioner of the Royal Canadian Mounted Police as per sections 6 and 7 of the *Royal Canadian Mounted Police Act*.

[135] Stuart Philp and Alain Babineau were both RCMP members for a period that predates the RCMP's first collective agreement.

[136] In his affidavit, Mr. Philp recounts only one event of a promotional cycle that occurred during that period. Here is how the event unfolded:

> 12. In or around 2013-2014, the Officer in Charge of the Toronto West Detachment openly spoke about his preferred candidate for a promotional position, who was non-Black, and that he could not see anyone beating that member. The officer in charge of the Greater Toronto area caught wind of this assertion and changed the

> selection officer to someone out of the region, in essence making the promotional cycle blind. I was promoted in 2015. When I found out, I went to seek out my colleague only to hear the Inspector and a Staff Sergeant bemoaning the RCMP and the promotional process. The Inspector spoke about not being able to select and choose the "best fit" for the promotion. The Staff Sergeant added that he did not know the chosen candidate (me). He mentioned that I did not play on the RCMP hockey team. I was disheartened. Clearly, I was not part of the club. I was viewed as an outsider, both as a Black man and as an officer who wasn't part of the RCMP hockey team.

[137] The bottom line is that Mr. Philp was best suited for the position, and he was appointed to the position. The selection process worked out in Mr. Philp's favour. Aside from this specific staffing event that occurred during the relevant period, Mr. Philp states in general terms that he has "been subject to numerous anti-Black institutional and systemic barriers that have impeded [his] advancement in the public service, including":

> (a) Subjective bias and prejudicial attitudes of superiors and co-workers toward [him];
>
> (b) The lack of recognition of [his] own experience and accomplishments as part of the process of promotion or talent management; and
>
> (c) The lack of Black employees in supervisory and managerial positions who would be in a position to mentor and to develop [his] skills and standing in the ranks, in order to improve [his] chances for advancement."

[138] There are no allegations regarding a complaint process or internal recourses that would not have been available and/or effective.

[139] Mr. Alain Babineau applied to join the RCMP in 1981 but ended up joining the CAF as Military Police from 1981 to 1984. When he reapplied to join the RCMP in 1984, he learned that

the first time around, he was racially profiled as being involved in the drug culture in his small Quebec hometown as a youth, and that a false report impugning his character had been filed. He filed a complaint with the CHRC in 1985 and, through mediation, was later offered a position that he accepted. In 2014, he felt that he had hit the proverbial glass ceiling in trying to achieve the executive level and filed an application with the CHRC for systemic discrimination of the RCMP Officer Candidate Program. In his affidavit, Mr. Babineau describes the process at the CHRC as follows:

> 19. On July 24, 2015 the Commission decided to deal with my complaint because the RCMP was unequipped to address systemic discrimination complaints through its internal processes, stating that "it appears that the respondent's internal harassment complaint process will not be able to address the allegations of adverse differential treatment, denial of employment opportunities and systemic discrimination raised in the present complaint. Therefore, that process cannot be 'reasonably available' to the complainant because it cannot deal with all of the human rights issues in the present complaint."
>
> 20. The issue the Commission addressed during my discrimination complaint was whether the RCMP pursued a discriminatory practice which did not permit members who are Black and African Canadian to succeed in the Officer Candidate Program, which is required to be promoted to the rank of Inspector.
>
> 21. However, the Commission's investigator conducted a regular issue-based investigation which did not delve into the systemic dysfunctionality of the process.
>
> 22. As a result, they found no discrimination, and closed my file.

[140] In cross-examination, however, Mr. Babineau confirmed that he was promoted a few times during his RCMP career; he went from Constable to Corporal to Sergeant to Staff Sergeant to Acting Inspector. He became involved in recruiting when there was an opening in Montréal for a Bona Fide Requirement Position [BFRP], which is where candidates who are visible

minorities are targeted for the position. He got the position in spite of the fact that he did not have experience in human resources. In that program, if visible minorities were successful in the written test, they were automatically selected for an interview, whereas everyone else had to meet a certain passing mark.

[141] In his role of recruiting officer, Mr. Babineau was familiar with the RCMP's internal grievance process and human rights process and at some point, he assisted employees in their grievance, especially those that were racially based.

[142] Mr. Babineau also confirms that his 2014 CHRC complaint was dismissed because he did not satisfy certain competencies that were a requirement for a promotion to the Officer Program.

[143] Finally, as far as the CAF are concerned, their members are enrolled pursuant to the *Queen's Regulations and Orders* and the *Defence Administration Orders and Directives*. They have a unique set of recourses available under subsection 29(1) of the *National Defence Act*. As stated by Justice McDonald in *Fortin v Canada (Attorney General)*, 2021 FC 1061 at paragraph 25:

> [25] The breadth of grievances contemplated by this provision were discussed in *Jones v Canada*, (1994) 87 FTR 190 at paras 9, 10 [*Jones*] and reiterated in *Bernath v Canada*, 2005 FC 1232 at para 35 [*Bernath*] as follows:
>
> > … it's the broadest possible wording [of section 29 of the Act] that accommodates any and every wording, phrasing, expression of injustice, unfairness, discrimination, what-not. It covers everything. It leaves nothing out. It's exhaustively comprehensive […] there is no equivalent provision in any other statute of Canada in terms of the scope of the wrongs, real , alleged, imagined wrongs that a

> person can get redress for anything. That is the difference between the civilian and the military person.

[144] Mr. Babineau acknowledged in cross-examination that he did not stay in the CAF long enough to test any promotion or advancement possibility, as military life was not for him. However, had he had a claim to advance for the time he spent at the CAF, remedies could have been provided within the CAF grievance process. The military context is unique and highly specialized, and the Grievances Committee, who has the ability to make recommendations to the Acting Chief of Defence Staff, would have been better positioned to consider the issues raised in the military context.

I. *Conclusion on the Motion to Strike (Jurisdiction)*

[145] In my respectful view, it is plain and obvious that it is within statutory recourse regimes enacted by Parliament that the Plaintiffs' allegations of racial discrimination must be addressed. These allegations include systemic discrimination in the allocation of appointments, promotions, and career advancement opportunities within hundreds of different federal government workplaces. Federal public service employees, members of the RCMP, and members of the CAF all have access to comprehensive recourse regimes for dealing with employment-related disputes, including disputes regarding alleged workplace discrimination. The remedies available through these recourse mechanisms are extensive and include both individual and systemic remedies, including monetary remedies and other forms of compensation. Accordingly, there is no violation of Canada's international law obligation to provide an effective remedy for human rights violations, as its internal laws provide such remedies.

[146] Specifically, it is plain and obvious that this Claim should be struck on the basis that the Court lacks jurisdiction over the claims of the 13 proposed Representative Plaintiffs and the proposed class as follows:

> (a) Post-2005 Claims: These claims are barred by section 236 of the *Labour Relations Act*, which came into force in 2005 and provides that the grievance rights afforded to federal public servants are in lieu of any right of action that an employee may have in relation to a grievable issue;
>
> (b) Pre-2005 Claims of Unionized Employees: Pursuant to the decision of the Supreme Court of Canada in *Weber*, unionized employees of federal government organizations have no right of action in respect of any matters for which redress may be sought under a collective agreement; and
>
> (c) Pre-2005 Non-Unionized Employees: For this residual category of employees, while their claims are not expressly barred by section 236 or the principles in *Weber*, all had access to statutory recourse mechanisms, and under the decision of the Supreme Court of Canada in *Vaughan* deference is owed toward those mechanisms.

VII. Motion to Strike (Cause of Action)

[147] Considering the Court's position on its lack of jurisdiction to deal with the matter raised by the Claim, it is unnecessary to deal with this second aspect of the motion.

[148] However, in case I am mistaken on Canada's Motion to Strike for want of jurisdiction, I will deal with the Plaintiffs' Motion for Certification. By doing so, I will unavoidably deal with whether the Claim discloses a reasonable cause of action, as Canada's arguments on this aspect of its Motion to Strike and the first branch of the test for certification are the same.

VIII. Motion for Certification

[149] The sole issue to be determined on this motion is whether this action is suitable for certification as a class action proceeding. Rule 334.16(1) of the *Federal Courts Rules* sets out the test to be met for a claim to be brought as a class proceeding:

> (a) The pleadings must disclose a reasonable cause of action;
>
> (b) There must be an identifiable class of two or more persons;
>
> (c) The claims of the class members must raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
>
> (d) A class proceeding must be the preferable procedure for the just and efficient resolution of the common questions of law or fact, and;
>
> (e) There must be a representative plaintiff or applicant who i) would fairly represent the interests of the class, 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 the proceeding is progressing, 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 iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

[150] Whether there is a reasonable cause of action is determined on the face of the pleading, and the balance of the certification criteria need only be demonstrated by "some basis in fact" (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 99-100 [*Pro-Sys Consultants*]).

A. *Rule 334.16(1)(a) - Does the Claim Disclose a Reasonable Cause of Action?*

[151] The task of the Court on a certification motion is not to resolve conflicting facts and evidence or assess the strength of the case. Rather, the task is simply to answer, at a threshold level, whether the proceeding can go forward as a class proceeding (*Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 28 [*Wenham*], citing *Pro-Sys Consultants* at paras 99, 102).

[152] The Plaintiffs' pleadings allege that Canada has an implicit hiring and promotion practice of "Black employee exclusion." This practice is systemic and discriminatory and gives rise to the causes of actions outlined in the pleadings.

[153] In oral arguments, counsel for the Plaintiffs argues that the practice of delegation and sub-delegation of the power to make appointments, which is legislated by the *Employment Act*, is the official policy that makes room for subjectivity in the hiring and promotion process, allowing Black employees to be subject to systemic discrimination across the public service. They submit that this practice is the reason why Black employees are underrepresented in the public service.

[154] The pleadings allege that Black employee exclusion in the public service is:

i) a violation of the Plaintiffs' right to equality under section 15 of the *Canadian Charter* and section 10 of the *Quebec Charter*;

ii) a violation of Canada's commitment to multiculturalism and equal rights for women under ss. 27 and 28 of the *Canadian Charter*;

iii) a tort of negligence under the common law and a fault under the civil law;

iv) a breach of Canada's fiduciary duty toward the Plaintiffs; and

v) a breach of contract.

[155] The *Employment Act* designates the TB as the employer of public service institutions named in Schedule I and IV of the FAA, and it mandates the PSC with the power to make appointments to and from the public service.

[156] The preamble of the *Employment Act* recognizes that hiring and promotion decisions should be delegated to the lowest possible level to allow flexibility in staffing decisions. It thus provides for the delegation of the PSC's powers to Deputy Heads, and for the sub-delegation of those powers to lower levels within public service institutions.

[157] The *Employment Equity Act*, SC 1995, c 44 also allows for the delegation of the TB's and the PSC's employment equity obligation to the individual public service departments and agencies.

[158] Since the facts are to be taken as true at this stage, the question is whether the Plaintiffs have pleaded the material facts in sufficient detail to support the claims and the relief sought. The Court, and the opposite party, cannot be left to speculate as to how the facts support the various causes of action. The normal rules of pleadings apply with equal force to a proposed class action (*Hudson v Canada*, 2022 FC 694 at paras 68-70; *Doan v Canada*, 2023 FC 968 at para 48). The launching of a proposed class action is a matter that the courts take with great seriousness, as it affects many class members' rights, as well as the liabilities and interests of defendants.

[159] The Plaintiffs plead that Canada's application of the *Employment Equity Act* provisions that require the removal of barriers for the hiring and promotion of minority groups is a breach of Black people's right to equality under section 15 of the *Canadian Charter*, because it does not disaggregate the "visible minority" category. They state that the *Employment Equity Act* does not allow Canada to account for and provide specific remedies to the discrimination and systemic barriers unique to the Black experience.

[160] The Plaintiffs plead that Black employees are not hired or promoted proportionally to their demographic weight.

[161] The Plaintiffs further claim that Black employees are adversely impacted by Canada's pension scheme because Black employees make less money over the course of their public service careers by virtue of being kept in lower-paying jobs. They therefore retire with lower pensions and face economic disadvantages because they were not promoted to higher-paying jobs in the public service during their careers.

[162] Although it is not explicitly stated, the pleadings suggest that the comparator group for the section 15 *Canadian Charter* violation analysis is non-Black public service employees and in particular White employees.

[163] However, the Plaintiffs' Claim does not plead material facts regarding the specifics of the common, widespread and pervasive practice of Black employee exclusion that exists and has existed over 50 years in the 99 different CPAs, Separate Agencies and other organizations

targeted by their Claim. The Plaintiffs are silent on how the practice was implemented or which agents of the Government are alleged to be responsible for its implementation.

[164] In fact, the Plaintiffs plead a result, a state of affairs; Black employees are statistically underrepresented in the federal public service, particularly at the senior level. They ask the Court to infer that it has to be as the result of Canada's practices or policies, or the conduct of its agents. In other words, the Plaintiffs refer to certain data in a study of promotion rates to infer that Canada employed practices and erected barriers that have contributed to the denial of opportunities for hiring and promotion.

(1) Breach of Equality Rights Under section 15 of the *Canadian Charter* and Section 10 of the *Quebec Charter*

[165] The Plaintiffs first argue that Canada's wrongful failure to hire and promote Black workers based on racial exclusion is contrary to section 15 of the *Canadian Charter* and section 10 of the *Quebec Charter*. They add that Canada's violation of the Plaintiffs' equality rights is compounded by a failure to respect its commitments to multiculturalism under section 27 and to equal rights for women under section 28 of the *Canadian Charter*.

[166] The Intervener, Amnesty International Canada, further argues that an intersectional lens must be used to consider anti-Black racism as part of a complex system of interrelated forms of oppression, such as sexism, patriarchy, homophobia, xenophobia, ageism and ableism. They also submit that Canada's international commitments to equality rights and to prohibit racial discrimination are a relevant interpretative tool, as the Supreme Court of Canada has affirmed

that the *Canadian Charter* "should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified" (*R v Hape*, 2007 SCC 26 at para 55, citing *Slaight Communications v Davidson*, [1989] 1 SCR 1038 at 1056 and *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 349).

[167] In order to engage the equity *Canadian Charter* rights, there has to be an impugned discriminatory state action. In *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10, the Supreme Court has recently reiterated what constitutes a *prima facie* subsection 15(1) breach:

> [188] Under s. 15(1) of the *Charter*, "[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." In a s. 15(1) *Charter* challenge, a claimant must demonstrate that 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 a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.
>
> [Citation omitted.]

[168] Again, the pleadings do not identify a specific government conduct which creates a distinction based on race, whether in the hiring or promotion practices of public service employees. The oral arguments focus on the sub-delegation model, without more details.

[169] In *La Rose v Canada*, 2020 FC 1008 [*La Rose*], a group of children and youth alleged that the Government of Canada's conduct – and lack of conduct – relating to fighting climate change violated their rights under sections 7 and 15 of the *Canadian Charter*. Justice Michael

Manson found that there was no reasonable cause of action under section 15 because the plaintiffs claimed that climate change had a disproportionate negative impact on youth, but did not identify which law caused the distinction based on an enumerated ground (*La Rose* at para 79). In other words, the plaintiffs in *La Rose* pleaded a disparate result but not its cause.

[170] In *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja*], the applicants alleged that the actions and inactions of the governments of Canada and Ontario with respect to housing violated sections 7 and 15 of the *Canadian Charter*, as they did not adequately prevent or provide remedies for homelessness. The Ontario Court of Appeal found that unlike Supreme Court of Canada jurisprudence that grappled with social policy, the case before it was not justiciable because there was not "a sufficient legal component to anchor the analysis" (*Tanudjaja* at paras 35-36). The Ontario Court of Appeal was particularly concerned that there would be no way to conduct a proper subsequent section 1 analysis, as the government respondents need to be able to justify a concrete law, policy, or action (*Tanudjaja* at para 32).

[171] The Plaintiffs' argument that Canada's misapplication of the *Employment Equity Act* would constitute a section 15 breach is also unsupported by the pleadings.

[172] The Plaintiffs allege that Canada has implemented a systemic practice of "Black employee exclusion" or failed to implement positive measures to address systemic barriers faced by Black employees. Again, no specific practice or policy is identified to substantiate this claim. The Plaintiffs do not explain how the many departments and agencies that constitute the public service have applied the provisions of the *Employment Equity Act* in a discriminatory manner.

[173] The fact that the provisions of the *Employment Equity Act* does not mandate a disaggregation of the "visible minority" employment equity category are not contrary to the right to equality under section 15 of the *Canadian Charter*. The Government's legislative choices with respect to promoting employment equity are not reviewable by the Court. Section 15 of the *Canadian Charter* does not force Canada to implement a specific course of action to remedy discrimination (*R v Sharma*, 2022 SCC 39 [*Sharma*]; *Ferrel v Ontario (Attorney General)*, 1998 CanLII 6274 (ONCA) [*Ferrel*]). As long as Canada's policy choices do not violate section 15, it has discretion on how it wishes to promote employment equity in legislation and related policies (*Ferrel* at p 24).

[174] In *Sharma*, the Supreme Court states that the first step of a section 15 analysis must identify a disproportionate impact caused by government action, "not historic or systemic disadvantage" (*Sharma* at para 71). In paragraph 63, the Court further explains:

> [63] First, s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation (*Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, at para. 37; *Eldridge*, at para. 73; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, at para. 41; *Alliance*, at para. 42). Were it otherwise, courts would be impermissibly pulled into the complex legislative domain of policy and resource allocation, contrary to the separation of powers. …

[175] The Supreme Court further confirms in *Sharma* that there is no positive obligation on the Government to remedy pre-existing social inequalities affecting a protected group.

[176] The Plaintiffs assert that the *Employment Equity Act*'s failure to disaggregate the visible minority category between different visible minority subgroups masks or facilitates the adverse

impacts of discrimination specific to Black. In the act, “designated groups” is defined to be women, aboriginal peoples, persons with disabilities, and members of visible minorities, whereas “visible minority” is defined as persons other than Aboriginal peoples who are non-Caucasian in race or non-white in colour. The Plaintiffs cannot challenge the choice to delineate four designated groups as there is no constitutional obligation to enact the *Employment Equity Act*. Therefore, it cannot be a *Canadian Charter* breach for Canada to enact the act without disaggregating the “visible minority” group.

[177] In *Ferrel*, the Ontario Court of Appeal stated with respect to their provincial *Employment Equity Act*, SO 1993, c 35, that the legislature’s choice with respect to the specific mechanism enacted to address the problem of workplace discrimination was not subject to challenge.

[178] Following this rationale, the Plaintiffs’ section 15 claim cannot be grounded on the legislated policy decision Canada made to target a minority group versus a particular racialized group.

[179] The Plaintiffs rely heavily on the decision of the Supreme Court in *R v Fraser (Attorney General)*, 2020 SCC 28 [*Fraser*], for the proposition that Canada’s pension regime is discriminatory to Black employees. In that case, a group of RCMP employees successfully argued that the pension scheme was discriminatory because there was a distinction between employees who participated in the job-sharing program and employees who did not job share, because it was demonstrated that this distinction had disproportionately affected a group based on an enumerated or analogous ground.

[180] Yet, in the case at bar, the Plaintiffs do not point to any specific provision of the pension regime that can be linked to a disproportionate impact based on the race of employees. Canada's pension scheme for employees is not conceived or applied differently for Black employees, and the income of lower-paid positions in the public service is not linked to an employee's race. Even if it can be demonstrated that Black employees earn on average less than their non-Black colleagues due to discriminatory factors, the Plaintiffs' Claim does not point to a policy or legislation which could be changed to remedy the pension disparity between Black and non-Black public servants.

[181] Further, the Plaintiffs do not point to a remedy available to them that is comparable to the "buy back" remedy in the *Fraser* case. The only remedy that the Plaintiffs can request is additional damages for loss of pension income. To avoid discrimination resulting in a loss of pension income, Black employees should earn on average the same salaries as non-Black employees, which is essentially the same claim pleaded as the alleged discriminatory hiring and promotion practices in the public service. If Black employees are hired and promoted at a similar rate to non-Black employees, then there will be no income disparity and no disproportionate impact on pensions for Black employees. Therefore, it seems like the Plaintiffs' Claim with regards to pension inequity is not a separate cause of action, but rather an additional claim for damages, rooted in the same cause of action as the alleged discriminatory hiring and promotion practices.

[182] An intersectional approach to the facts presented in this case does not reveal further grounds to anchor the section 15 claim. Whereas the Black women Plaintiffs do present

allegations in their affidavits that they were targets of anti-Black sexism and misogyny — like Ms. Carol Sip's account of targeted gendered and racial harassment at the hands of an abusive supervisor — there is no causal link established between the lack of promotional or employment opportunities and the discriminatory abuse they suffered in the exercise of their work. It bears repeating that this case, as presented by the Plaintiffs, is not about racialized discriminatory conduct and harassment, but about discriminatory staffing policies.

[183] Finally, the Plaintiffs point to statistics concerning Black employees but do not present any statistics for comparator groups, or any statistics that demonstrate intersectional disparities for that matter. In *McQuade v Canada (Attorney General)*, 2023 FC 1083, this Court held that the claim lacked sufficient facts regarding comparator groups and thus failed to disclose a reasonable cause of action under section 15 of the *Canadian Charter*.

[184] In *Kahnapace v Canada (Attorney General)*, 2023 FC 32 (reversed in part on other grounds in *Michel v Canada*, 2025 FCA 58) [*Kahnapace*], the Plaintiffs were seeking to have their claim certified as a class action on behalf of a group of indigenous female inmates. They were alleging that CSC's use of an analytical tool to determine security classification of inmates improperly over classified indigenous female offenders into higher security classifications than was warranted, and that this over classification resulted in the deprivation of their residual liberty and ineligibility for discretionary release and parole. Analyzing the first step of a section 15 breach, the Court held the following:

> [153] As noted above, causation is a central element to the first step of any section 15 claim, such that a claimant must establish a link or nexus between the impugned law or state action and the discriminatory impact. However, in this case, the Plaintiffs have

> not pleaded the necessary material facts as to how the CRS or other tools, which are simply one of many factors taken into account as part of the security classification determination, actually over classify Indigenous female offenders, nor how they cause the discrimination that is alleged. I find that the pleading is replete with conclusory statements, rather than the necessary material facts, which is fatal to the section 15 claim. …

[185] As a result, the Plaintiffs have failed to plead a cause of action based on section 15 of the *Canadian Charter*. Since *Canadian Charter* rights are not engaged due to a lack of the required elements to plead a breach of section 15, 27 or 28, there is no international law interpretation that can assist the Court in its analysis of this alleged violation. As for an alleged breach of the *Quebec Charter*, both parties remained silent—as they did for the other Quebec-specific cause of action. There is therefore no specific analysis to be done by the Court. This silence would not necessarily exclude the Quebec putative members, but the lack of specific argument based on the *Civil Code of Quebec* [CcQ] could (we will get back to this problem in the next section).

(2) Negligence/Systemic Negligence

[186] The Plaintiffs plead that Canada owes a duty of care to Black employees, which entails an obligation to promote them based on merit, to break down barriers preventing their full participation, and to not discriminate against them. Canada had a legal obligation to apply lawful policies, practices and procedures to achieve true equality and employment equity. The relationship between the Plaintiffs (and putative class members) and Canada (as their employer) was sufficiently direct and proximate to give rise to Canada's duty of care toward the Plaintiffs, including the duty to maintain a workplace free from discrimination and harassment. Because of

Canada's practice of Black employee exclusion, the Plaintiffs (and putative class members) have suffered foreseeable physical, financial and psychological harm.

[187] Systemic negligence is not specific to any one victim but rather applies to a class of victims as a group. The Plaintiffs rely on the decision of the Supreme Court in *Rumley v British Columbia*, 2001 SCC 69 [*Rumley*] and that of the Federal Court of Appeal in *Greenwood FCA* for the proposition that a cause of action for systemic negligence can be certified, including in respect of workplace cultures in the public service.

[188] In *Rumley*, the plaintiffs sought to have their claim for sexual, physical and emotional abuse suffered by class members while they were students at a residential school for deaf children certified as a class proceeding. However, the issue before the Supreme Court was not whether the pleadings disclosed a reasonable cause of action, but rather whether the criteria of commonality and preferability were met.

[189] In *Greenwood v Canada*, 2020 FC 119, this Court found that the plaintiffs' claims were not mere workplace disputes. They were rather based upon the Crown's vicarious liability for the collective actions of the RCMP's leadership and their systemic negligence for bullying, intimidation and harassment. The plaintiffs were attacking the very processes and systems that the Crown claims could and should provide a remedy. The RCMP leaders were identified as the tortfeasors and their individual acts of bullying, intimidation and harassment, as the systemic negligence.

[190] In the present case, what the Plaintiffs are in fact pleading is institutional liability for Black employee exclusion across the entire public service. In addition, the policy or practice that would have led to the alleged systemic negligence is the sub-delegation model incorporated in the *Employment Act* in 2005. Yet every department, Separate Agency and organization have their own very specific staffing rules and policies, and their own recourse mechanism for any particular appointment process. For a period of over 50 years, the tortfeasors for which Canada would be vicariously liable are unidentified, just as their acts are unknown and potentially have no commonality.

[191] The *Crown Liability and Proceedings Act*, RSC 1985, c C-50 provides that the Crown is vicariously liable for damages caused by the tort of a servant of the Crown (or the damage caused by the fault of a servant of the Crown in the Province of Quebec). The precondition for the Crown's liability is a specific act or omission by the public servant that would give rise to a cause of action against that servant (*Hinse v Canada (Attorney General)*, 2015 SCC 35 at paras 91-92); *Merchant Law Group v Canada Revenue Agency*, 2010 CAF 184 at para 39).

[192] Reading the Claim fairly and generously, it is clear that it is not based on vicarious liability for individual faults committed by Canada's servants or agents, but rather on allegations of diffuse and systemic failure on the part of the institution of Canada itself. It refers to the permeation of systemic discrimination through Canada's institutional structures; to institutional patterns of behaviour that are part of the social and administrative structures of the state and/or the public service; to institutional structures that reflect the inequities that persist in society, and;

more generally to policies followed by Canada which failed to redress these inequities faced by Black individuals due to an institutional framework built on systemic racism and inequality.

[193] It follows that the structure of the Plaintiffs' pleading cannot support a claim in negligence/systemic negligence against Canada.

[194] A word on the cause of action based on article 1457 of the CcQ. Very little was said in the parties' written submissions or during the hearing on what would make a cause of action based on the CCQ. The Plaintiffs barely touch on the subject while addressing their Claim based on the tort of negligence, whereas Canada does not even mention it in its Motion to Strike. The parties refer to no doctrine or jurisprudence that would be specific to the law applicable in the Province of Quebec.

[195] When the Court asked counsel about this, counsel for Canada replied that article 1457 of the CCQ was merely a codification of the common law tort of negligence, whereas counsel for the Plaintiffs stated that it was akin to the common law duty of care. Unfortunately, both assertions fall short of capturing the many differences that exist between both legal regimes applicable in private law matters in this country. So had the Court found that the cause of action in negligence was made out, it would have been hesitant to include the class members from the Province of Quebec, as no arguments were made to support a cause of action based on the CcQ.

(3) Breach of Fiduciary Duty

[196] The Plaintiffs claim that the employer-employee relationship between Canada and the Plaintiffs and putative class members extends beyond normal employment relationships and gives rise to a fiduciary duty. Since Canada holds significant control and discretion over them and constant contact with them, their relationship is characterized by trust, reliance and dependency. The Plaintiffs add that the nature of Canada's obligations to the public in the delivery of public services also gives rise to a unique and special legal and fiduciary obligation to the public. Because of this fiduciary duty, the Plaintiffs and putative class members had a reasonable expectation that Canada would act in their best interest, namely by ensuring respectful, fair and equal treatment and not actively employing harmful exclusionary practices. They assert that Canada breached its fiduciary duty by implementing a practice of Black employee exclusion.

[197] In *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder Advocates*], the Supreme Court of Canada sets out the test for establishing an *ad hoc* fiduciary duty. There must be the existence of a level of vulnerability of the beneficiary to the actions of the fiduciary. There must also be an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary. There must be a defined person or class of persons vulnerable to a fiduciary's control. There must be a legal or substantial practical interest of the beneficiary that stands to be adversely impacted by the alleged fiduciary's exercise of discretion or control.

[198] In *Elder Advocates*, the Supreme Court also held that a claim of fiduciary breach would only be viable where the claim pleads material facts that, if true, would meet the requirements for establishing an *ad hoc* fiduciary relationship. The pleadings must be capable of supporting the

conclusion that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary. They should disclose a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interests at stake (*Elder Advocates* at paras 30-31).

[199] The employer-employee relationship is an inherently commercial relationship in which the interests of the employer and those of the employee will often be in opposition. As such, each party recognizes and accepts that the other is acting in its own self-interest (*Robertson v Manitoba Keewatinowi Okimakanak Inc*, 2011 MBCA 4 at para 76; *Graphic Communications International Union Local 255-C v Unisource Canada Inc*, 1996 ABCA 137 at paras 19-20; *Basyal v Mac's Convenience Stores Inc*, 2018 BCCA 235 at paras 75-76).

[200] In *Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2010 ONCA 657, aff'd 2012 SCC 71, unions and associations representing federal government employees, RCMP members and CAF members argued that the Government had breached fiduciary duties owed to the plaintiffs by amortizing the actuarial surplus that had accrued in government pensions established under various statutes. The Ontario Court of Appeal rejected the assertion that fiduciary duties were owed in the circumstances:

> [95] In the circumstances of these appeals, I do not view it as reasonable for the members of the Plans to have expected the Government to act in their best interests when exercising the Discretion. There is nothing in the language of the Superannuation Acts (or other legislation affecting the Plans and the exercise of the Discretion) that requires the Government to act solely for the benefit, or in the best interests, of the members of the Plans. … Nor did the Government enter into any type of agreement or undertaking to the effect that it would act solely for, or in the best interests of, plan members. Certainly the employment relationship

> between the Government and the plan members does not give rise to such an obligation.

[201] In upholding the Court of Appeal decision, the Supreme Court held that no fiduciary duty was owed to the government employees (plan members) - imposing such a duty would conflict with the Government's duty to act in the best interests of society as a whole (*Professional Institute of the Public service of Canada v Canada (Attorney General)*, 2012 SCC 71 at para 142). That is consistent with the preamble of the *Labour Relations Act*, which sets out as one of the principles recognized by Parliament that "the public service labour-management regime must operate in a context where protection of the public interest is paramount."

[202] The fact that the Plaintiffs and putative class members are or were "subject to constant contact with, supervision by and direction from Canada" and the fact that they perform or "performed Public service obligations and duties as part of their jobs" do not give rise to a fiduciary duty in their favour.

[203] The *Employment Equity Act*, the *Values and Ethics Code of the Public Sector* and other PSC policies do not create a fiduciary duty either. These all enunciate principles that ought to govern staffing in the public service. They do not dictate the Government to act in the best interest of the Plaintiffs and putative class members to the detriment of other groups or society as a whole. In the federal public service context, the duty to represent the interests of employees or groups of employees is incumbent upon the public service bargaining agents; they represent the interests of employees in collective bargaining and participate in the resolution of workplace issues and rights disputes.

[204] For these reasons, I am of the view that the claim for a breach of fiduciary duty is not viable and that there is no cause of action adequately pleaded to allow such a claim to be certified.

(4) Breach of Contract

[205] Apart from some bald allegations that Canada has breached its contractual obligations toward the Plaintiffs, the Claim does not elaborate much on this cause of action. However, I agree with Canada that read as a whole, the wrongs alleged in the Claim take two forms: (1) the failure to hire Black applicants who applied for positions within the 99 CPA, Separate Agencies and other organizations; and (2) the failure of those 99 entities to promote Black employees who were already employed.

[206] The first alleged wrong cannot give rise to a breach of contract, as there is no contractual obligations between a potential employer and a person applying for employment; the latter is simply looking to enter into a contract of employment.

[207] The analysis of the second alleged wrong requires referring back to the categories of employees/memberships the Plaintiffs and putative class members fall under (public servants – RCMP members or CAF members).

[208] Starting with unionized public service employees (who represent the vast majority of the Plaintiffs and putative class members), they do not have an individual breach of contract claim against their employer. As stated by the Federal Court of Appeal in *Greenwood FCA* (relying on

the Supreme Court decision in *Syndicat Catholique des Employés de Magasins de Québec Inc v Paquet Ltée,* [1959] SCR 206):

> [104] … for employees covered by a collective agreement, the parties to the agreement are the employer and union and there is no room for individual contracts of employment. Claims for breach of contract by or against unionized employees therefore cannot be maintained.

[209] This would equally apply to RCMP members, post-unionization.

[210] As for the non-unionized public service employees, while they do have an employment contract with the Crown, matters related to promotions, resignations, and termination are governed by statute and not by their employment contract. As seen above, matters of human resources management are governed by the FAA, whereas the *Employment Act* governs matters of appointments. Also as seen above, any recourse provided to an unsuccessful applicant for a promotion would have to be exercised through the specific regime provided for by the *Employment Act,* not a civil action for breach of contract.

[211] As stated in *Greenwood FCA,* the pre-unionized RCMP members did not have employment contracts, but were statutory office holders and not employees (*Greenwood FCA* at para 156).

[212] Finally, this Court in *Gligbe v Canada*, 2016 FC 467 [*Gligbe*] reviewed existing jurisprudence and confirmed that members of the CAF serve at pleasure, they are not bound to the Crown by an employment contract (*Gligbe* at para 13).

[213] Consequently, in the absence of any individual contract for the majority of the Plaintiffs and putative class members, or in the absence of any specific contractual obligation for the few that have and individual employment contract, the pleadings do not disclose a cause of action for breach of contract.

B. *Rule 334.16(1)(b)) – Is There an Identifiable Class of Persons?*

[214] "An identifiable class of two or more persons" requires objective criteria that do not depend on the outcome of the litigation. A class definition will be appropriate if it could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues (*Hollick v Toronto (City)*, 2001 SCC 68 at para 18 [*Hollick*]; *Wenham* at paras 66-69).

[215] The Plaintiffs assert that the class definition has been tailored to address the specific harms raised by the Claim and their impact on Black public service workers and those who applied to be hired by the federal public service.

[216] The Plaintiffs first state that the chosen start date for the class definition is justified by i) the coming into force of the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, GA Res 2106 (XX), in 1970; ii) the coming into force of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, in 1976; and iii) the enactment of the *Canadian Multiculturalism Act*, RCS 1985, c 24 (4th supp), in 1985.

[217] Yet at the hearing, when required to define the impugned "widespread practice of Black employee exclusion", the Plaintiffs linked it to the 2005 amendments to the *Employment Act* and the sub-delegation model introduced therein that purport to transfer the power to appoint public servants from the PSC to Deputy Heads and even further down the chain of command. That sub-delegation model, they argue, lead to more subjectivity, which in turn lead to discrimination against Black employees.

[218] As a result, the start date to any class definition should at best be set to 2005, rather than 1970. If this Claim were to be certified as a class proceeding, the Court would also need to consider the evidence capable of supporting the commencement of the class period for each one of the Plaintiffs as it cannot extrapolate beyond the date for which there is some basis in fact (*Greenwood FCA* at para 133).

[219] The main issue with the class definition is that it is merit-based; it includes all Black individuals who were denied hiring and promotional opportunities **by virtue of their race**.

[220] In *Cirillo v Ontario*, 2021 ONCA 353, the Ontario Court of Appeal held that a causation criterion is inherently merit-based and that as such, the membership of such a class is not sufficiently identifiable.

[221] In this case, either the Court would need to assess any idiosyncratic hiring or promotion exercise in order to delimit the class, or the class definition would be left to the putative class members' sole assessment of the reasons why they were denied hiring or promotion. In other

words, whether an individual is or is not a class member cannot be determined objectively before his or her individual claim is adjudicated.

[222] I agree with the Defendant that this is fatal to the Plaintiffs' class proceeding.

[223] The same can be said with regards to the Plaintiffs' argument that their class definition could be read as a claim-based rather than as a merit-based. They say it could be read as including "all Black individuals who claim they were denied hiring and promotional opportunities by virtue of their race".

[224] As stated by the Ontario Superior Court of Justice in *Ragoonanan v Imperial Tobacco Canada Ltd*, 2005 CanLII 40373 (ONSC):

> [45] If it were possible to define a class in terms of persons who claim that one, or more, individual issues should be decided in their favour, there would very likely be no members of the class -- and no one bound by the decision -- if the common issues were decided in favour of the defendant. Persons who made no such claim could, in subsequent proceedings, resist a defence of issue estoppel on that ground. In a class action for damages, for breach of contract, for example, a decision at a trial of common issues, that there was no contract, could be ignored by putative class members who had never been called upon to make a claim, and who subsequently commenced proceedings for restitutionary, or equitable remedies that did not depend on proof of damages.
>
> [46] Accordingly, and despite the respect and deference due, and accorded, to judges who have expressed inconsistent views in other jurisdictions, I do not consider that the problem of merits-based definitions can be avoided in this case by replacing causation as a fact with the fact that causation is claimed or asserted -- at some unspecified time -- by a potential class member.

[225] A similar approach was followed by the Alberta Court of King's Bench in *Paron v Alberta (Minister of Environmental Protection)*, 2006 ABQB 375. The plaintiff was seeking to certify a class including all Alberta residents who claimed that their lands were adversely affected by an electrical plant's use of the lake water. Again, the Court stated that class definitions must avoid criteria that are subjective or that depend on the merits of the case.

[226] I am therefore of the opinion that the class definition proposed by the Plaintiffs is not sufficiently objective and that members of the class are not readily ascertainable or identifiable, particularly when considered across the 99 CPAs, Separate Agencies and other organizations and over the 55-year (or 20-year) class period.

[227] The class proceeding is an opt-out regime. As such, the membership of the class must be ascertainable, that is through objective criteria, for class members to receive adequate notice and be able to opt out.

[228] Finally, there is no basis in fact for the derivative Family Members class as there is no representative Plaintiff put forward for the family law class.

C. *Rule 334.16(1)(c) – Does the Claims of the Class Members Raise Common Questions of Law or Fact?*

[229] Rule 334.16(1)(c) requires that "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." This requirement constitutes a low bar (*Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para 72).

[230] The Supreme Court of Canada in *Pro-Sys Consultants* confirmed that a court should take a purposive approach in assessing common issues and that common issues must be read in the context of the claim as a whole. Resolution of a common issue should move the litigation forward and avoid duplication of fact-finding or legal analysis; they need not be determinative of each and every class member's claim. The fact that there may remain substantial individual issues after the resolution of the common issues does not preclude certification.

[231] However, the class members' claims must share a substantial common ingredient to justify a class action; that requires the court to assess the importance of the common issues in relation to individual issues (*Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 39 [*Western Canadian Shopping Centres*]).

[232] The *Federal Courts Rules* require the court to certify a proceeding as a class action notwithstanding the presence of one or more of the following: (i) the relief claimed would require individual damage assessments; (ii) the relief claimed relates to separate contracts; (iii) there are different remedies sought for different class members; and (iv) the identified class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

[233] The Plaintiffs seek to have the following common issues certified (Schedule D to their factum):

> (a) By its operation or management of the federal public service, did the defendant breach a duty of care it owed to the class to protect them from harm?
>
> (b) By its operation or management of the federal public service, did the defendant breach a fiduciary duty owed to the class to protect them from harm?
>
> (c) Did the actions of the defendant breach the right of the class to the equal protection and equal benefits of the law without discrimination based on race, sex, or ethnicity under section 15, 27 and 28 of the Canadian Charter of Rights and Freedoms and sections 10, 10.1 and 16 of the Quebec Charter of Human Rights and Freedoms?
>
> (d) If the answer to the common issues (c) is "yes", were the defendant's actions saved by section 1 of the Canadian Charter of Rights and Freedoms, and if so, to what extent and for what time period?
>
> (e) If the answer to common issue (c) is "yes", and the answer to common issues (d) is "no", what is the appropriate and just remedy under sections 24 and 52 of the Constitution?
>
> (f) Did the conduct of the defendant breach its contractual and extra-contractual obligations to the class members;
>
> (g) Did the conduct of the defendant give rise to the wrongful failure to hire and promote black employees in the public service, and if so, what damages arise from such conduct;
>
> (h) If one or more of the above common issues are answered affirmatively, can the amount of damages payable by the Defendants be determined on an aggregate basis?
>
> (i) Was the conduct of the Defendant high handed or outrageous such that it should be denounced with an award of moral, aggravated or punitive damages? If an aggregate award of general, aggravated, moral or punitive damages is appropriate, what amount of damages is appropriate?
>
> (j) Do the actions of the Defendant justify a mandatory order for a Justice and Equity Promotion Plan for Black Public service Employees related to the hiring and promotion of black

> employees in the Public service of Canada and associated matters, in order to redress the harms caused to class members.
>
> (k) Do the actions of the Defendant and their failure to implement a culturally sensitive program to treat the physical and mental health needs of class members justify an order to establish a fund to support such a program.

[234] Questions a, b, c, d and f concern Canada's liability and deal with whether Canada's actions, conduct, or operation of the federal public service makes out a cause of action. The first problem with these proposed common issues stems from the lack of any evidence regarding 88 of the CPAs, Separate Agencies and organizations listed in the Claim; there is no evidence or some basis in fact to substantiate common issues with respect to those entities, as there is no representative plaintiff with a claim against each of those defendants.

[235] The second problem is that the incidents upon which this action is founded, the individual decisions not to hire and not to promote individuals, do not constitute manifestations of any single or top-down course of conduct across all 99 entities and over the proposed class period. Before getting to the proposed common issues, the Court would need to break its analysis down into thousands of separate inquiries into each of the individual staffing decisions within each of the entities over the class period. The evidence that racial discrimination tainted one staffing decision will not prove anything for any other Plaintiff or putative class member. In the same vein, if an individual class member was discriminated against based on race, he or she is entitled to redress even if the sub-delegation model does not constitute a breach of the Plaintiff's rights.

[236] On the other hand, the class member that was not discriminated against on the basis of race, or who was denied hiring or promotion by virtue of, for example, not meeting a requisite

for the position, is not entitled to redress even if there is a finding that the sub-delegation model constitutes a breach of the Plaintiff's rights.

[237] The preamble of the modern *Employment Act* provides the rationale for the sub-delegation model. Amongst the reasons put forward, there is the need to distance staffing decisions from political influence:

Canada will continue to benefit from a public service that is based on merit and non-partisanship and in which these values are independently safeguarded;	qu'il demeure avantageux pour le Canada de pouvoir compter sur une fonction publique non partisane et axée sur le mérite et que ces valeurs doivent être protégées de façon indépendante;
Canada will also continue to gain from a public service that strives for excellence, that is representative of Canada's diversity and that is able to serve the public with integrity and in their official language of choice;	qu'il demeure aussi avantageux pour le Canada de pouvoir compter sur une fonction publique vouée à l'excellence, représentative de la diversité canadienne et capable de servir la population avec intégrité et dans la langue officielle de son choix;
The public service, whose members are drawn from across the country, reflects a myriad of backgrounds, skills and professions that are a unique resource for Canada;	que la fonction publique, dont les membres proviennent de toutes les régions du pays, réunit des personnes d'horizons, de compétences et de professions très variés et que cela constitue une ressource unique pour le Canada;
Authority to make appointments to and within the public service has been vested in the Public service Commission, which can	que le pouvoir de faire des nominations à la fonction publique et au sein de celle-ci est conféré à la Commission de la fonction publique et que

delegate this authority to deputy heads;	ce pouvoir peut être délégué aux administrateurs généraux;
Those to whom this appointment authority is delegated must exercise it within a framework that ensures that they are accountable for its proper use to the Commission, which is in turn accountable to Parliament; …	que ceux qui sont investis du pouvoir délégué de dotation doivent l'exercer dans un cadre exigeant qu'ils en rendent compte à la Commission, laquelle, à son tour, en rend compte au Parlement; […]

[238] In his affidavit of September 23, 2022, Michael Morin, Director General, Policy and Strategic Directions Directorate, in the Policy and Communications Sector of the PSC, provides some insight into what led to the 2005 amendments to the *Employment Act*:

> 27. In 2000, the Auditor General published a report criticizing the existing framework for human resources management and CPA for being unduly complex, outdated, and ill-suited to an environment that demanded flexibility and adaptability in an increasingly competitive labour market. The Auditor General recommended changes to the staffing system, including giving managers more authority in staffing and making them more accountable for their decisions.

[239] Dr. Michael Campion, Canada's expert in personal selection gives some insight into the basis for the sub-delegation model. He states:

> The topic of decentralization of Human Resources departments and functions such as staffing authority has been widely studied in the research and practice literature. The degree of decentralization is usually not a dichotomy, but instead exists on at least three levels.

[240] He goes on in describing the Centralized, Partly-centralized (centrally assisted) and Decentralized systems. The Partly-centralized system is the one implemented under the

Employment Act and the one that Dr. Campion says is the most common design in governments in Canada and highly similar countries, and most large organizations. It is the one, in his view, that best manages the balance between standardization and flexibility:

> With this design, a centralized staffing unit provides tools and resources to hiring managers, such as tests they might use, interviews, advice, and usually the accompanying policies, as well as record keeping and perhaps recruiting assistance, but the individual work unit or hiring manager decides what system works best for them and they implement that system themselves, including the potential use of outside contractors for assistance. This is often called a 'shared-services' model, which is a blend of centralized and decentralized systems.

[241] Dr. Campion also explains the trend toward this staffing model and the many advantages it offers:

> (a) Hiring systems are tailored to the jobs and the context, thus improving the job-relatedness (validity) of the process and resulting quality of hires. It is not feasible for centralized systems to tailor the hiring process to each unique job in a large organization (or, as in the federal public service, in dozens of different organizations of varying sizes, with different jobs, and with varying mandates and functions).
>
> (b) Hiring decisions are made by those who know the work best. The managers over the job would usually be more familiar with the knowledge and skill requirements than would be the centralized staff.
>
> (c) The hiring manager's own success depends on making quality hiring decisions because the new hires will help determine the effectiveness of the work unit for which the manager is responsible. Thus, the hiring manager should be highly motivated to do the best job possible in hiring new employees. The hiring manager will have to live with any hiring mistakes and not be able to blame the centralized hiring process.
>
> (d) For the same reason, the hiring manager will be highly motivated to help the new hire be successful. They are more likely to be committed to the new employee if they participate in the hiring.

[242] The evidence from Dr. Campion and Canada's fact witnesses (see for example Jonathan Caron for the RCMP, Amy Jarret for CSC and Tabatha Tranquilla for the CHRC) shows that this flexibility offered by the *Employment Act* also allows hiring managers to fill employment equity gaps. The evidence also shows that hiring managers must undergo mandatory anti-bias and anti-racism training (see for example Matthew Lakodaris for ESDC and Lieutenant Colonel Steven Champ for the CAF).

[243] The Plaintiffs are not challenging the *Employment Act per se* but its sub-delegation model and its alleged impact on Black employees' underrepresentation. Yet there is no basis in fact to establish any cause-and-effect relationship between the two.

[244] There is also no basis in fact that the staffing practices were consistently and uniformly applied in any subjective or arbitrary biased, capricious manner across the 99 entities. Under the delegated staffing model, the individual hiring managers have discretion to, amongst other things, develop criteria for any appointment and assessment method. As a result, widely varying practices across the public service exist, from some structured objective processes where there might be hundreds of candidates to highly targeted unstructured processes where specific unique skills were sought.

[245] The thousands of staffing processes at issue in this proposed class proceeding all have their specific factual background. What statutory scheme was it made under? What test was performed? What were the qualifications deemed essential for the position? Who satisfied those qualifications and who did not? Was there a hiring board engaged and if so, what was the

structure of that hiring board? Was the hiring board biased in any way? How many applicants participated in the process, who was the successful applicant and why was he or she successful?

[246] I also agree with the Defendant in its response to the Intervener's submissions that Canada's international law obligations do not change the analysis to decipher a commonality linking the Plaintiffs' claims. Regardless of whether or not international law is a useful interpretative tool for an analysis of domestic human rights, this analysis would have to be conducted individually, just as the analysis of each Plaintiff's claim regarding individual staffing processes would have to be evaluated on a case-by-case basis.

[247] In addition, the specificity of any one of these staffing processes will be influenced by a variety of factors such as geography or special skills: the hiring at an airport in Nunavut have different implications than hiring at the Coast Guard in the Maritimes or hiring scientists at Health Canada. Having gun safety training is a requirement for the RCMP just as being a member of the Bar in one of the provinces or territories is a prerequisite for some positions at the DOJ.

[248] It is noteworthy to mention that the Plaintiffs are not challenging any particular test performed or prerequisite imposed by any one of the CPAs, Separate Agencies or other organizations, nor are they asserting that any specific test or requirement had a build in bias.

[249] The Plaintiffs' entire case is premised on the fact that they did not get a sought-after promotion; it followed they did not get an increase in salary and that this missed increase in

salary did not lead to an enhancement of their pension entitlement. Unfortunately, I am of the opinion that this premise cannot sustain the Plaintiffs' case.

[250] The Plaintiffs rely heavily on the PSC's 2019 Employment Equity Promotion Rate Study [the Study] to demonstrate that Black employees are promoted at a rate of -4.8% when compared to their non-visible minority peers.

[251] The first problem with this is that the Study only looks at promotion rates within the entities governed by the *Employment Act*; it does not cover the entire class.

[252] That said, the Study analyzed promotion data across all departments and agencies that fall under the jurisdiction of the *Employment Act*. It is comprised of 3 parts:

> (a) Comparison of the promotion data of employment equity groups with that of their counterparts between April 1, 2005, and March 31, 2018, for all public servants hired on or after April 1, 1991;
>
> (b) Observation of progress in the promotion rates of employment equity groups by analyzing the promotion rates of new hires across 2 time periods: from April 1, 1991, to March 31, 2005, and from April 1, 2005, to March 31, 2018; and
>
> (c) Representation of employment equity groups as applicants and their proportional share of promotions for internal indeterminate positions during the 2016-17 and 2017-18 fiscal years.

[253] One of the key findings of the Study is that promotion rates data between April 1, 2005, and March 31, 2018, showed that women have a higher promotion rate than men (+4.8%), that there were no discernable differences between visible minorities and non-visible minorities

(+0.6%) and that Indigenous people and persons with disabilities experienced lower promotion rates (-7.5% and -7.9%, respectively).

[254] Ms. Adele Furrie, the Plaintiffs' statistical expert, affirms that once the visible category is disaggregated into subgroups, the data shows that when compared to non-members of the visible minority category:

(a) Black public servants have a promotion rate of -4.80%;

(b) Back public servants have a promotion rate from the level just below the Executive level to the Executive level of -17.80%;

(c) Black public servants are most successful in obtaining promotions in the "Technical" Occupational Category, with a promotion rate of +4.10%, and least successful in obtaining promotions in the "Administrative Support" Occupational Category, with a promotion rate of -7.60%;

(d) Black public servants are promoted at a rate comparable to their demographic weight in the public service (they represent +2.8% of public servants and are promoted at a rate of +2.9%), but are promoted at a lower rate than their rate of applications (they apply for promotions at a rate of +5.1%);

(e) On average, Black public servants are promoted faster than non-members of the visible minority category (3.67 years to first promotion and 3.8 years to second promotion for Black public servants as opposed to 3.76 years to first promotion and 4.27 years to second promotion for non-members of the visible minority category);

(f) Public servants who never received a promotion during the study period of 2005 to 2018 are similarly represented in the Black subgroup and non-members of the visible minority category (35.4% and 34.6%, respectively);

(g) On average, Black public servants have received promotions at a similar pace than non-members of the visible minority category since 1991 (Black public servants received a promotion every 1.08 years while non-members of the visible minority category received a promotion every 1.16 years).

[255] Ms. Angela Henry, who worked for the TBS for close to 20 years and was a Policy Analyst in the Employment Equity Division of the TBS from 1998 to 2003, explains in her affidavit that the subgroup data is compiled from voluntary self-identification. Employees did not have to fill the form and they did not have to self-identify in any subgroup. As such, it is impossible to measure the true response rate or the true representation of the designated group in the workforce, particularly when looking at historical periods. As a result, the figures found in the Study can only be considered as representing the minimum number of Black employees during any specific time period.

[256] Ms. Henry appended a table as Exhibit J to her affidavit, which reflects the distribution of employees within the CPA as of March 31, 2021. Column 3 gives the percentage of Black employees per Department or Separate Agency and what is notable is the lack of commonality between these entities. For example, we see 6.2 percent for ESDC, 2.0 percent for DND, 2.6 percent for CSC and 4.7 percent for PSPC.

[257] Most of the Plaintiffs who have worked for more than one federal organization confirmed in cross-examination that although there were barriers to promotions in one organization, they did not experience those barriers in others; in some cases, there were even disparities amongst different workplaces and geographic locations within a single organization.

[258] Again, there could be many ways to explain these disparities. Ms. Supriya Edwards of Statistics Canada provides an example while replying to one of the Plaintiffs' affidavits. Ms. Shalane Rooney had testified that in the Sturgeon Falls regional office, there was no Black

employees in supervisory positions and only one Black employee in the regional office. Yet the evidence is that interviewers and supervisors were required to work locally and the census for that year indicated that 98.9 percent of the population in that municipality identified as not belonging to a visible minority group.

[259] Mr. Jarod Dobson also of Statistics Canada reported that for the 2021 census the percentage of the Black population in Canada aged 15 and over is 3.49 (3.9 if you are using Ms. Furrie's definition of Black Canadians), and that it increased significantly over time. Mr. Dobson also reports that the median age for the total Canadian population was 40.7 years, whereas it was 29.6 for its Black population. So, the Black population is relatively young as compared to the overall Canadian population. This has an impact on seniority.

[260] In addition, the percentage of available Black candidates unavoidably varies between competitions. For example, when the DOJ is hiring lawyers, the real pool is Black candidates with a law degree who are accredited to practise law in the province of hiring.

[261] Finally, although the Study did not disaggregate the data in subcategories, a follow-up study, covering the period from 2008 to 2021, did so. In this follow-up study, the Black employees' subgroup had a statistically equivalent relative promotion rate as non-members of the visible minority group. Although this was provided to Ms. Adele Furrie, Plaintiffs' statistician expert, she did not see fit to amend her report or file a supplemental report. In cross-examination, Ms. Furrie confirmed that she no longer relied on these statistics. As a result, her general

conclusion that Black employees are underrepresented in the federal public service cannot stand in light of the "some basis in fact" certification motion evidentiary threshold.

[262] The Defendant (not the Plaintiffs) has provided evidence on the different staffing systems applicable to the 11 organizations where the Plaintiffs work or have worked. Although the burden is on the Plaintiffs to provide evidence that there is some basis in fact for all 99 CPAs, Separate Agencies or other organizations, they have provided no such evidence. It follows that there is an absence of any evidence on the staffing systems applicable to 88 of them.

[263] I find that no common issue will meaningfully advance class members' claims and that the individual issues are overwhelmingly more significant than common issues. Only an individual assessment of the relevant circumstances unique to each class member would allow the Court to determine if the cause of action had been established.

[264] Again, that is not to say that discrimination does not exist or that Black employees are not underrepresented in some areas of the public service, but simply that such a conclusion does not apply generally to the entire public service, or that any such underrepresentation is due to the sub-delegation model; in my view, this case does not display sufficient commonality to be authorized to continue as a class action.

D. *Rule 334.16(1)(d) – Is a Class Proceeding the Preferable Procedure?*

[265] Rule 334.16(1)(d) requires that a class action be the preferable procedure for the just and efficient resolution of common questions of law and fact. Rule 334.16(2) provides a non-

exhaustive list of factors that must be considered in determining whether a class proceeding is a preferable procedure (*Canada v John Doe*, 2016 FCA 191 at para 26).

[266] Preferability has two concepts at its core: first, that a class action would provide a fair, efficient and manageable method of advancing the claim; second, that a class action would be preferable to other reasonably available means of resolving the proposed questions. An assessment of preferability requires examination of the importance of the common questions in relation to the claim as a whole; however, the preferability requirement will be met even when there are substantial issues that would remain to be determined on an individual basis (*AIC Limited v Fischer*, 2013 SCC 69 at para 23).

[267] The inquiry into the preferable procedure should be conducted with an eye to the three primary advantages of class proceedings, namely access to justice, judicial economy and behaviour modification (*Western Canadian Shopping Centres*; *Hollick* at para 15; *Paradis Honey Ltd v Canada*, 2017 FC 199 at para 96).

[268] Had I found that the Court had jurisdiction over the Claim, and had I found that the Claim met the four other criteria for a class action to be certified — especially that it raised common issues, I would also have found that a class action is the preferable procedure to advance those common issues. Since I have not and considering that this criterion is so intertwined with the other four criteria— in fact, counsel for the parties revisit much of their previous submissions when dealing with the preferable procedure criterion — there is no need to elaborate further.

E. *Rule 334.16(1)(e) – Are there Adequate Representative Plaintiffs?*

[269] The proposed representative plaintiffs need not be typical of the class, nor the best possible representatives; however, the Court should be satisfied that the proposed representatives will vigorously and capably prosecute the interests of the class (*Canada v John Doe*, 2016 FCA 191 at para 75).

[270] Each of the proposed Representative Plaintiffs are members of the proposed Class, and are current or former employees of 11 different CPAs, Separate Agencies or other organizations. I agree with the Plaintiffs that they have demonstrated that they understand the duties of a representative plaintiff and are committed and willing to act in the best interests of the class. They have provided personal evidence of their experiences with the public service and examples of racial discrimination they suffered, particularly with respect to staffing practices integral to hiring and promotion. They also speak of the injuries that they have suffered as a result.

[271] The Plaintiffs have proposed a Litigation Plan stating it will advance this proceeding and meet their obligations as Representative Plaintiffs, and that it outlines the steps of the litigation and supports that the goals of class proceedings will be served by certification. No proposed Representative Plaintiff has a conflict of interest with other class members with respect to the common issues raised in their Claim.

[272] In addition to their argument that the Court lacks jurisdiction over the personal claims of each of the Plaintiffs, the Defendant mainly takes issue with the Plaintiffs' proposed Litigation Plan. They raise similar arguments as those previously raised: the Plaintiffs do not plead any material facts regarding the alleged discriminatory practice; they fail to say which persons or

entities within the 99 CPAs, Separate Agencies or other organizations (treated as a single monolithic entity by the Plaintiffs) are purported to have implemented such practices, etc.

[273] Both parties have qualified this case as one of the largest class actions of all time. One would have expected a Litigation Plan capable of enabling a certified action to proceed in a manageable and fair manner.

[274] As stated by this Court in *Kahnapace*:

> [227] I acknowledge that, at the certification stage, the litigation plan is not to be overly scrutinized as it is work in progress that may be amended as the litigation proceeds. However, the litigation plan must show that the representative plaintiffs and their counsel have thought the process through and that they grasp its complexities. At a minimum, the litigation plan provided by the proposed representative plaintiff must allow the motions judge to determine whether the representative plaintiff should be entrusted with the responsibility of taking the claim forward on behalf of class members.
>
> [Citations omitted.]
>
> [228] While there is no Rule that details the requirements of an adequate litigation plan, the nature, scope and complexity of the particular litigation will determine how detailed a litigation plan should be and the jurisprudence has established the following non-exhaustive list of matters that should be addressed in the litigation plan:
>
> 1. the steps that are going to be taken to identify necessary witnesses and to locate them;
>
> 2. the collection of relevant documents from members of the class a well as others;
>
> 3. the exchange and management of documents produced by all parties;
>
> 4. ongoing reporting to the class;

> 5. mechanisms for responding to inquiries from class members;
>
> 6. Whether discovery of individual class members is likely and if so, the intented process for conducting those discoveries;
>
> 7. The need for experts and, if needed, how those experts are going to be identified and retained;
>
> 8. If individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and,
>
> 9. A plan for how damages or any other form of relief are to be assessed or determined after the common issues have been decided.
>
> (see *Samson Cree Nation* [*v Samson Cree Nation (Chief and Council)*, 2008 FC 1308] at paras 150-151)

[275] The Plaintiffs' litigation plan is short and it says nothing, for example, on the need to retain experts, on steps to identify members of this extremely wide class and gather their evidence, or on the Plaintiffs' plan for resolving individual issues after the termination of the common issues — as stated above, they are numerous in this case. As was the case in *Kahnapace*, the litigation plan reads more like a template document with minimal information specific to this inordinately large in scope and complex in nature case.

[276] For what is presented as a 2.5-billion-dollar class action, the damage section of the litigation plan simply states:

> 19. Assuming that one or more Common Issues are resolved in favour of the plaintiffs, the plaintiffs propose the following methods for assessing and distributing damages for the class members as follows:
>
> - aggregate damages to be distributed in a manner to be determined by the Court.

> The plaintiffs are seeking an aggregate assessment of monetary relief as a common issue. If aggregate damages are not awarded, or if the Court concludes that assessments are required in addition to a determination of aggregate damages, it may still be necessary to establish a procedure in accordance with section 334.28 of the *Federal Courts Rules*, to determine the individual damages of Class Members, or any other individual issues as directed by the Court.
>
> 20. Within ninety (90) days of the issuance of the judgment on the common issues, the parties will convene for argument relating to section 334.26 of the *Federal Courts Rules* to determine the appropriate process to determine the individual issues, if any.
>
> 21. At the hearing, both parties will be at liberty to make submissions regarding the methodology for resolving the remaining individual issues.

[277] For a class action of this complexity, the Plaintiffs are putting too heavy a burden on the Court and their litigation plan does not meet the basic requirements.

IX. Conclusion

A. *On the Motion to Stay Overlapping Portion of the Claim*

[278] Several class action proceedings against individual federal entities before this Court and other courts allege racial discrimination, including discrimination resulting in career limitations, which overlap significantly with the present action. Proposed class members of the present case would therefore be included in the class definition of these other class proceedings.

[279] Thus, the Court grants Canada's Motion to Stay Overlapping Portions of the Plaintiffs' Claim with respect to the RCMP, the CAF, the DND and the CSC. The proposed class members of the Thompson action who work or have worked in those four federal institutions will have the

opportunity to join the class proceedings of Hudson, AB, Lightbody and Sanderson should these cases result in certification and/or settlement.

B. *On the Motion to Strike*

[280] The Court also grants Canada's Motion to Strike the Plaintiffs' Claim without leave to amend, as the Plaintiffs have failed to present a ground for this Court to assert jurisdiction over this case. The Plaintiffs have access to a variety of recourses provided for in legislation, regulations, and procedures to challenge staffing decisions, both as public servants seeking promotional opportunities and as unsuccessful candidates for employment opportunities.

[281] It is well established in legislation and jurisprudence that courts must defer to Parliament's choices to provide non-judicial recourses for labour and employment disputes in the CPA, Separate Agencies, and other organizations targeted by the present action. In the absence of a compelling reason to exercise the Court's residual discretion over such matters, the Court defers to the processes intended to resolve these disputes and provide remedies for substantiated claims of discrimination in staffing decisions.

[282] As for Canada's arguments regarding the Motion to Strike for lack of a cause of action, the Court refers to its analysis on the first criteria of the Plaintiffs' Motion to Certify the class proceeding.

C. *On the Certification Motion*

[283] The Court finds that the Plaintiffs' Claim does not meet the procedural criteria to certify this action as a class proceeding on each branch of the analysis:

(a) The Claim does not disclose a reasonable cause of action for a violation of equality rights under the *Canadian Charter* and the *Quebec Charter*; negligence or systemic negligence under the common law; a fault under the civil law; a breach of fiduciary duty; or a breach of contract;

(b) There is no class of persons that can be identified objectively without relying on the outcome of the merits of their individual claims;

(c) The Claim does not raise common questions of law or fact across all 99 federal entities that can appropriately be adjudicated in the context of a class proceeding;

(d) A class action proceeding is not the preferable procedure to adjudicate this Claim, as the Plaintiffs can avail themselves of the intended statutory, regulatory and procedural processes and remedies as provided for by Parliament and its delegated statutory authority; and

(e) The proposed representative Plaintiffs do not present an adequate litigation plan that satisfies the Court that this case is ready to proceed.

[284] On the issue of the first criteria, the Court notes that many causes of actions pleaded in the Claim were lacking their foundational elements to convince the Court that they could be substantiated after certification of this proceeding as a class action. Notably, the Quebec causes of action were barely touched upon, even after prompted from the Court at the hearing. To demonstrate viability, each cause of action must be thought through to ensure that there is some basis in fact for each constitutive element of their respective legal tests to show the Court that each of them has a chance of success at an eventual trial.

[285] A motion to certify a class proceeding is procedural in nature, and the Plaintiffs simply do not meet the requirements provided by the *Federal Courts Rules* in a manner that is coherent with well-established jurisprudence.

[286] The Court does acknowledge the profoundly sad ongoing history of discrimination suffered by Black Canadians, just as it recognizes the fact that each one of the representative Plaintiffs have faced challenges not faced by their non-visible minority colleagues in the federal public service. But unfortunately, that was not the issue that the Court was tasked to assess. Several times during the hearing of these motions, counsel for the Plaintiffs stated that the Court was their last hope to obtain a fair outcome for the prejudice suffered. Although I truly sympathize with the Plaintiffs, and for all the reasons stated above, I respectfully disagree.

[287] There is a French proverb that says "*qui trop embrasse, mal étreint*" [TRANSLATION] "he who grasps at too much holds little".

[288] The scope of the Plaintiffs' Claim simply makes it unfit for a class procedure.

D. *On Costs*

[289] Beyond a simple statement in the Plaintiffs' claim that they would seek costs on a substantial indemnity basis, neither party made submissions on costs in writing or orally at the hearing.

[290] The intervener, Amnesty International Canada, has requested that no costs be granted or awarded against them in their Motion for Leave to Intervene. None will be granted.

[291] If the parties cannot agree on costs, they can submit written submissions of no more than 10 pages in length within 30 days of the present Order and Reasons. The parties may make written response submissions within 14 days following that (not exceeding 2 pages).

E. *Final Comment*

[292] On the 9th day of the hearing, the Plaintiffs filed a Motion Record for an Order granting them leave to adduce a report from Dr Rachel Zellars as fresh evidence. There were several discussions between counsel and the Court as to whether the Court should entertain this late motion, and it soon became apparent that the Plaintiffs' Motion Record was not perfected, such that the Court could not rule on it as filed. On the last day of the hearing, the Court agreed to give the Plaintiffs time over the next few weeks to discuss the motion with the Defendant and let the Court know when and if they decide to perfect their Motion Record and have the Court entertain the motion. The Court did not hear back from the parties before the Plaintiffs filed a Supplementary Motion Record on February 20, 2025, when these reasons had already been sent for translation. The Court therefore refused to entertain the Plaintiff's late motion.

ORDER in T-1458-20

THIS COURT ORDERS that:

1. The Defendant's Motion for an order staying the Claims asserted in this action, pending further order of the Court, is granted in respect of:

    i) persons who serve or served in the Royal Canadian Mounted Police on the basis that they overlap with claims advanced in *Hudson v His Majesty the King* (T-723-20);

    ii) persons who serve or served in the Canadian Armed Forces on the basis that they overlap with claims advanced in the class action of *AB et al v His Majesty the King* (T-2158-16);

    iii) persons who work or worked for the Department of National Defence and the Staff of the Non-Public Funds, Canadian Forces on the basis that they overlap with claims advanced in the proposed class action of *Lightbody v His Majesty the King* (T-1650-21); and

    iv) persons who work or worked for the Correctional Service of Canada on the basis that they overlap with claims advanced in the proposed class action of *Sanderson and Constant v His Majesty the King* (T-89-21);

2. The Defendant's Motion for an order dismissing the Further Fresh as Amended Statement of Claim [Claim] dated March 28, 2022, is granted and the Claim is struck without leave to amend;

3. The Plaintiffs' Motion for Certification is dismissed;

4. If the parties cannot agree on costs, they can submit written submissions of no more than 10 pages in length within 30 days of the present Order and Reasons. The parties may make written response submissions within 14 days following that (not exceeding 2 pages); and

5. No costs shall be awarded to or ordered against the Intervener, Amnesty International Canada.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1458-20
STYLE OF CAUSE:	NICHOLAS MARCUS THOMPSON et al v HIS MAJESTY THE KING and AMNESTY INTERNATIONAL CANADA
PLACE OF HEARING:	TORONTO, ON
DATES OF HEARING:	OCTOBER 28, 29, 30, 31, NOVEMBER 1, 4, 5, 6, 7, 8, 12, 13 AND 14, 2024
ORDER AND REASONS:	GAGNÉ J.
DATED:	MARCH 13, 2025

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