Federal Court  Cour fédérale

Date: 20250828

Docket: T-1650-21

Citation: 2025 FC 1433

Ottawa, Ontario, August 28, 2025

PRESENT: The Honourable Mr. Justice Pamel

PROPOSED CLASS ACTION

BETWEEN:

KAREN LIGHTBODY AND RAMA NARSING

Plaintiffs

and

HIS MAJESTY THE KING

Defendant
(Moving Party)

JUDGMENT AND REASONS

I. Overview

[1] The underlying action concerns alleged systemic racism within the Department of National Defence [DND] and the Canadian Armed Forces [CAF] directed at racialized civilian employees who work, or worked, with the DND and the Staff of Non-Public Funds, Canadian Armed Forces [SNPF], a group of civilian employees who work to support the well-being of the CAF community. I should mention that the amended statement of claim also refers to the "Defence Team", which is comprised of the DND and the CAF as an integrated organization.

[2] The plaintiffs, Karen Lightbody and Rama Narsing, were unionized civilian public servants holding grievance rights under the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [FPSLRA], who both worked for the DND. Ms. Lightbody is an Indigenous woman who held various positions within the DND from 1985 to August 2020. Ms. Narsing is an Indian woman of Hindu heritage who worked with the DND from July 2005 to March 2019. Ms. Lightbody and Ms. Narsing seek to certify the present claim as a class proceeding and be

appointed as representative plaintiffs on behalf of the proposed class members pursuant to Rule 334.16 of the *Federal Courts Rules*, SOR/98-106 [Rule or Rules].

[3] The claim is based on two causes of action, a claim in negligence and a Charter claim; the plaintiffs allege that while employed with the DND, they and other racialized civilian employees (both unionized and non-unionized) of the DND and the SNPF were subjected to systemic racism, discrimination and harassment perpetrated by the DND and the CAF personnel who, in doing so, also breached their constitutional right to work in an environment free from discrimination on the basis of race, national or ethnic origin, colour and religion as provided under the common law, section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter], and section 10 of the Quebec *Charter of Human Rights and Freedoms*, CQLR c C-12.

[4] The plaintiffs also allege that the defendant His Majesty the King failed to provide an effective, adequate, or reasonable remedy or internal mechanism that would allow racialized individuals to report incidents including racism and racists acts or that would address their complaints or grievances regarding such incidents. In short, the plaintiffs say that the internal grievance structure for civilian employees provided ineffective relief to Class Members.

[5] In addition to opposing the present motion for certification, the Attorney General of Canada [AGC], on behalf of the defendant, has filed a motion under Rule 221(1)(a) to strike the amended statement of claim in its entirety without leave to further amend, for failing to disclose a reasonable cause of action; the AGC argues that the Court lacks jurisdiction over the portion of

the claims which occurred since April 1, 2005, being the date of the coming into force of section 236 of the FPSLRA (which, going forward, I will simply refer to as "section 236") which provides that grievance rights for any dispute are in lieu of any right of action in relation to the matters giving rise to the dispute. As regards the portions of the claims which predate the coming into force of section 236, the AGC argues that I should adopt a deferential posture in favour of existing labour relations mechanisms as endorsed by the Supreme Court of Canada in *Weber v Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 [*Weber*] and *Vaughan v Canada*, 2005 SCC 11, [2005] 1 SCR 146 [*Vaughan*], and decline to entertain such claims in the face of collectively bargained grievance rights.

[6] For the reasons that follow, I am granting the AGC's motion to strike the amended statement of claim in its entirety, without leave to amend. In short, I find that the claims of systemic racism, discrimination and harassment put forward by the plaintiffs are grievable under the statutory mechanism set out in the FPSLRA. Accordingly, section 236 applies to oust the jurisdiction of this Court in relation to the portion of the claims which arose after April 1, 2005. I have also decided to decline to exercise my discretion to allow the portion of the claims which arose prior to that date to move forward before this Court, as I have not been convinced that the circumstances of this case justify deviating from the general rule of judicial restraint in favour of existing labour relations mechanisms under the governing statute. Finally, I am also dismissing the plaintiffs' motion for certification; in addition to the failure to establish a reasonable cause of action on account of the jurisdictional issue, I find that a class proceeding is not the preferable procedure for resolving the plaintiffs' claims.

II. Background

[7] I should mention from the outset that as a department within the federal public service, the DND is part of the core public administration under the *Financial Administration Act*, RSC 1985, c F-11 [FAA]. As such, the Treasury Board is ultimately the employer for collective bargaining purposes of unionized public servants appointed to positions within the DND pursuant to section 29 of the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 [PSEA], and whose grievance process is set out in the FPSLRA. However, for simplicity, and as no issue has been made of this distinction by either party, I will continue to refer to the plaintiffs as DND employees.

[8] For its part, the SNPF is a separate designated agency in the federal public service identified in Schedule V to the FAA, and thus has independent status as an employer whose civilian employees are employed to provide morale and welfare services to members of the CAF and their dependents, primarily by operating retail and grocery stores, gyms, golf courses, fitness and sports programs, the running of the mess halls, and family services and health promotion. The employees of the SNPF—whose employer is an entity created under the *National Defence Act*, RSC 1985, c N-5, called the Canadian Forces Morale and Welfare Services—is not part of the core public administration, however, SNPF employees are nonetheless considered public service employees under section 206 of the FPSLRA and, subject to subsection 236(3), which would in any event not apply to any of the proposed class members, their grievance process is governed by the FPSLRA as well as by policy documents that set out the grievance rules that apply to them. That said, although the plaintiffs amended their initial statement of claim to also

claim against the CAF on behalf of the civilian staff of the SNPF, the record does not include any evidence from SNPF staff members.

[9] Ms. Lightbody began her career with the DND in 1985 as a custodian at the Canadian Forces Base in Calgary and was quickly transferred to the kitchen staff. In 1988, she relocated to 4 Wing Cold Lake, Alberta [4 Wing Cold Lake], where in 1993, Ms. Lightbody began working at the DND's Telecommunication and Information Services while completing a 2-year diploma in Business Administration and Computer Science at Lakehead College. In 1995 she was hired as a CS-01 classification in the Computer Systems group at 4 Wing Cold Lake, and for most of her career she held a computer science position at a CS-02 classification. In 2006, Ms. Lightbody was hired as the Network Manager of the Aerospace Engineering Test Establishment at 4 Wing Cold Lake, where she remained until 2010 when she relocated to 19 Wing Comox on Vancouver Island [19 Wing Comox]. She remained at 19 Wing Comox until 2020, having previously gone on extended sick leave in 2016 on account of, as she asserts, the stress of "being around racist colleagues, managers, and leaders at the DND". It is not clear when Ms. Lighbody returned from extended sick leave to active employment in her position with the DND, if at all, prior to leaving the DND in August 2020, however the record does indicate that she did volunteer as National Civilian Co-Chair for the Defence Aboriginal Advisory Group [DAAG] from 2015 to 2018 during which time she authored a report on systemic racism in the DND and the CAF [2016 Lightbody Report]. She also mentions in her evidence that she "worked in the organization for over 33 years". Ms. Lightbody's affidavit details her experience with systemic racism, discrimination and harassment, and the hardship she had endured while at 4 Wing Cold Lake and 19 Wing Comox.

[10] Ms. Narsing immigrated to Canada from Zimbabwe in 1981 and began working at 19 Wing Comox in the Administration Service group in July 2005, holding the rank of AS-05. She remained with the DND for 14 years, throughout which, as she asserts, she was continuously passed over for promotions, denied access to other employment opportunities, and generally had to suffer through racial slurs, unequal treatment and continual discrimination as a woman of colour. Ms. Narsing asserts that the racism at DND was so horrendous that she had to take several leaves of absence; she also attended counselling sessions through the Employee Assistance Program. The evidence of the defendant is that Ms. Narsing remained employed by the DND until May 2021; her status between 2019 and 2021 is not clear, however, it may be that Ms. Narsing was on a formal leave of absence.

[11] The plaintiffs have filed a series of motions seeking to introduce new evidence and supplement their record, particularly in answer to the AGC's motion to strike; the AGC has filed an additional affidavit in response to them. I will deal first with the preliminary matter of the evidentiary motions, then proceed with the motion to strike and finally the certification motion.

III. Preliminary Matters—motions to introduce new evidence

[12] Initially, the plaintiffs filed the following evidence in support of their motion for certification:

A. the affidavit of Ms. Lightbody affirmed on October 27, 2022 [Lightbody Affidavit 1] wherein she sets out her background and experience with racism and with the internal grievance procedure within DND. Ms. Lightbody also confirms having knowledge of the present proceedings and that she is willing to act as

representative plaintiff. She also attaches the 2016 Lightbody Report as an exhibit to her affidavit.

B. the affidavit of Ms. Narsing affirmed on October 26, 2022, wherein she sets out her background and experience with racism within DND, and also confirms having knowledge of the present proceedings and that she is willing to act as representative plaintiff.

C. the affidavit of Whitney Santos, a paralegal within the office of plaintiffs' counsel, affirmed on October 31, 2022, attaching a series of exhibits, amongst others, which speak to the issue of the organizational structure of DND, the history of racism and discrimination within DND and the department's response, reports and papers authored by the National Defence and Canadian Armed Forces Ombudsman [Ombudsman's Reports] dealing with the history of racism and discrimination within the DND and recommendation for the future, and a January 2022 report authored by the Minister of National Defence Advisory Panel on Systemic Racism and Discrimination [2022 MNDAP Report].

[13] On April 4, 2023, the AGC filed his motion to strike the pleadings. In support of that motion, the AGC filed:

A. the affidavit of Mr. Drew Heavens affirmed on March 21, 2023, wherein Mr. Heavens sets out the grievance process available to public service employees as well as additional recourse mechanisms with which employees may engage in pursuit of claims.

B. the affidavit of Ms. Geneviève Lord affirmed on March 22, 2023, which describes the Workplace Harassment and Violence Program and the implementation of the Workplace Harassment and Violence Prevention Regulations [WPHVRP].

C. the affidavit of Robin Ross affirmed on March 21, 2023, which describes the SNPF and the internal grievance procedure available for SNPF employees.

D. the affidavit of Ms. Barbara Williams affirmed on March 23, 2023, which explains the organizational structure of the DND, training within the DND, diversity and inclusion efforts at the DND, the estimated class size, description of the unions who represent public servants within the DND, and the employment history of Ms. Lighbody and Ms. Narsing.

[14] As a result of the AGC's motion to strike, the plaintiffs filed the affidavit of James Craig dated May 24, 2023, in response to the evidence filed by the defendant which attaches his expert report on the challenges, impediments and limitations for class members in utilizing the statutory grievance procedure and avenues of redress set out in the affidavits of the defendant. I should mention that Mr. Craig filed a second affidavit on December 22, 2023 [Craig Affidavit 2], to rectify an oversight in his initial expert report. The AGC does not oppose the filing of the Mr. Craig's second affidavit. As such, leave for its filing will be granted.

[15] Neither party cross-examined any of the affiants, however as the proceedings progressed, they sought to file additional evidence, as follows:

A. the affidavit of Karen Lightbody affirmed February 8, 2024 [Lightbody Affidavit 2] in which Ms. Lightbody clarifies the categories of employees with

whom she spoke in preparing the 2016 Lightbody Report. The affidavit also attaches the Report of the Standing Senate Committee on Human Rights, Anti-Black Racism, Sexism & Systemic Discrimination in the CHRC [2023 Senate Committee Report].

B. the affidavit of Laurie-Lynn Myers affirmed on March 20, 2024, on behalf of the defendant, where Ms. Myers responds to the Lightbody Affidavit 2 and clarifies Ms. Lighbody's grievance history from 2013 to the present.

C. the affidavit of Karen Lightbody affirmed on February 29, 2024 [Lightbody Affidavit 3] in which Ms. Lightbody attaches various exchanges and clarifies the nature of the grievances in which she was involved over the years, in response to some of the information provided by Ms. Myers.

[16] The plaintiffs seek leave to file Lightbody Affidavits 2 and 3. The AGC seeks leave to file the affidavit of Ms. Myers in the event I grant leave regarding the Lightbody Affidavit 2.

[17] The test for the admission of new evidence was set out in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tseil-Waututh*]. Ultimately, additional affidavits are permitted where it is in the interests of justice (*Tseil-Waututh* at para 11; *Atlantic Engraving Ltd. v LaPointe Rosenstein*, 2002 FCA 503 at paras 8–9, 299 NR 244).

[18] The AGC argues that the evidence sought to be introduced in Lightbody Affidavits 2 and 3 is neither admissible under a motion to strike nor probative, was available to the plaintiffs when they filed their evidence in chief, and will cause prejudice to the defendant as the motions

were filed late in the day, possibly jeopardize the hearings of the motions. As specifically regards the 2023 Senate Committee Report attached to Lightbody Affidavit 2, in addition to arguing that the report is hearsay, unreliable and not being introduced simply to contextualize evidence, the AGC argues that it is subject to parliamentary privilege.

[19] Overall, I disagree with the AGC, save as regards the 2023 Senate Committee Report, and will grant leave to the plaintiffs to file their additional evidence, save for that report.

[20] As regards the 2023 Senate Committee Report, it is a report which summarizes the testimony, personal stories, anecdotes and opinions of a number of witnesses who testified before the Senate Committee. It discusses many of the recommendations proposed by those witnesses to address systemic racism in the federal public service—in particular, criticisms levied against the CHRC—and provides recommendations to address the issue across the federal public service. The plaintiffs wish to introduce the report for the truth of its content so as to question the ability of the CHRC (one of the additional recourse mechanisms available to the plaintiffs as set out by Mr. Heavens in his affidavit) to adjudicate systemic complaints, and not simply to contextualize their own personal evidence.

[21] The difficulty I have with the report's introduction relates to the reliability of the testimony. They are stories and experiences not given under oath of which testing by cross-examination is not available—thus highly prejudicial to the defendant. As such, I cannot see how the stories related in the report could be of any assistance on either the motion to strike or the

certification motion. I will therefore not grant leave to file the 2023 Senate Committee Report, and strike paragraph 2 of Lightbody Affidavit 2 which purports to introduce it.

[22] As regards the remainder of the affidavits and documents they seek to introduce, the evidence is relevant on both the motions to strike and certification because it purportedly goes to the jurisdictional issue and arguably relates to the plaintiffs' position regarding the effectiveness of the remedies available under the statutory labour relations scheme; thus, it is relevant for the purpose of the exercise of my discretion to possibly retain residual jurisdiction to hear the plaintiffs' claims. I also find such evidence to be probative. Lightbody Affidavit 2—save for paragraph 2—discusses the process Ms. Lightbody followed in preparing the 2016 Report attached to her first affidavit. Also, Lightbody Affidavit 3 puts more meat on the bone of Ms. Lightbody's initial affidavit regarding her history with the grievance process and brings the evidence on her experience up to date.

[23] On the issue of prejudice, I am not convinced by the AGC, as much of the new information which Ms. Lightbody is seeking to introduce in relation to her grievances was also available to the defendant. I accept that the new evidence was available to Ms. Lightbody well before the filing of her new affidavits, however, I find the new evidence to be most helpful to the Court in understanding the history of Ms. Lightbody's experience with the grievance process and in addressing the arguments of the parties, in particular the AGC, and the issues raised by them. I appreciate that the reports sought to be introduced may be hearsay and relate only in part to the issues before me on the motion to strike and the certification motion, but I will take that into account when assessing relevance and weight.

[24] On the whole, I find that it is in the interests of justice that the new affidavits be admitted, save as regards the 2023 Senate Committee Report, and I exercise my discretion to grant the plaintiffs' motions in part so as to admit Lightbody Affidavit 2 (save as to paragraph 2) and Lightbody Affidavit 3, as well as Craig Affidavit 2, as part of the evidentiary record on the motion to strike and the motion for certification. Considering my decision, I would also accept for filing the defendant's affidavit of Laurie-Lynn Myers prepared in response to Lightbody Affidavit 2.

[25] Given logistical difficulties in striking paragraph 2 and Exhibit A of the Lightbody Affidavit 2 now that the hearing on the certification motion has taken place, I will order simply that they be deemed struck from the record. I will therefore not consider them on either the motion to strike or the motion for certification.

IV. Motion to Strike

[26] I include the relevant sections of the FPSLRA in the annex to my decision.

[27] The AGC contends that the effect of section 236 is to remove any residual discretion this Court may have to intervene in labour disputes involving employees with grievance rights, and to revoke any statutory grant of jurisdiction this Court might otherwise have possessed. Although the plaintiffs have remedies for the injuries that they have purportedly suffered, it is simply not, according to the AGC, in the form of a class action before this Court because section 236 acts as a complete and explicit ouster of the Court's jurisdiction in favour of a comprehensive legislative grievance scheme in relation to claims that are grievable under section 208 of the FPSLRA—

including claims of workplace racism, discrimination and harassment—and which arose since the coming into force of section 236 on April 1, 2005. According to the AGC, section 236 leaves no room for the continued residual jurisdiction of this Court to deal with claims that are otherwise grievable in nature.

[28] As regards any cause of action which arose prior to the coming into force of section 236, the AGC argues that the principles set out by the Supreme Court of Canada in *Weber* and *Vaughan* apply. According to the AGC, *Weber* sets out that courts will not entertain civil claims in the face of collectively bargained grievance rights; *Vaughan* extends that principle to statutory workplace resolution schemes, but also suggests that courts may exercise their residual discretion to nonetheless entertain a claim where there is evidence that the grievance mechanism is compromised and cannot therefore provide the claimant with "effective redress". While this Court retains residual jurisdiction for pre-section 236 claims under the principles set out in *Vaughan*, the AGC argues that I should nonetheless decline to exercise my discretion to allow such claims to move forward before this Court.

A. *Applicable Principles on a Motion to Strike*

[29] There is no issue between the parties as to the principles which apply on a motion to strike. Rule 221(1)(a) provides that the Court may strike a claim, with or without leave to amend, where, assuming the material facts pleaded to be true on a generous reading of the pleadings, the claim discloses no reasonable cause of action, with the burden being on the moving party to so establish. A claim will have no reasonable chance of success where it is plain and obvious that the Court lacks the jurisdiction to hear it (*McMillan v Canada*, 2023 FC 1752 [*McMillan FC*],

aff'd *McMillan v Canada*, 2024 FCA 199 [*McMillan FCA*] at paras 16, 17, 19, 20). As to what constitutes material facts, the Federal Court of Appeal stated the following in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 (leave to appeal to SCC refused, 36889 (23 June 2016)):

> [18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.
>
> [19] What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability.

[30] In addition, although a party need not ground its motion on Rule 221 when moving to strike a statement of claim based on jurisdiction (*Ebadi v Canada*, 2022 FC 834 at para 26 [*Ebadi FC*], aff'd *Ebadi v Canada*, 2024 FCA 39 [*Ebadi FCA*]), it may nonetheless choose to do so (*Berenguer v Sata Internacional - Azores Airlines, S.A.*, 2023 FCA 176 [*Berenguer*] at para 24; *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at paras 12 and 24). Here, the AGC is grounding his motion on Rule 221(1)(a) as he is moving to strike the action on jurisdictional grounds and, alternatively, he is seeking to strike all allegations of negligence for failing to disclose a reasonable cause of action on the pleadings. In the further alternative, the AGC argues for the striking of all the claims in relation to the SNPF proposed class because the amended statement of claim does not plead any material facts in support of any cause of action on behalf of these class members.

[31] Moreover, although ordinarily the Court may not rely on any evidence on a motion to strike under Rule 221(1)(a), evidence may be considered on the aspect of the motion which concerns the issue of the Court's jurisdiction (*Berenguer* at para 26). There is then a shift in the burden of proof; where the Court is first satisfied, the onus being on the AGC in this case, that a pleading fails to disclose a reasonable cause of action for reasons of jurisdiction, purportedly by way of section 236 in this case, the onus then shifts to the plaintiffs to demonstrate that their claims come within an exception to the general rule (*Davis v Canada (Royal Canadian Mounted Police)*, 2024 FCA 115 [*Davis*] at para 74). I should mention that the AGC takes the position that once I am satisfied that section 236 applies, there are no exceptions to the application of that provision other than as is provided for in the FPSLRA, and that consequently there is no requirement in this case to consider any evidence of possible residual jurisdiction under the *Vaughan* principle for claims arising after section 236 came into force.

[32] Grievances are determined according to the procedures set out in the relevant legislation, regulations and terms of the applicable collective agreement, and the grievance process is internal, with management personnel initially determining the merits of the grievance. There seems to be little dispute that the claims being made in these proceedings are in relation to the employees' terms or conditions of employment that can be grieved under Part 2 of the FPSLRA. Section 208 of the FPSLRA provides employees with a broad right to grieve almost all employment-related disputes affecting the terms or conditions of their employment, and there is no issue that claims of systemic workplace discrimination and harassment fall within that category. Matters affecting an employee's terms or conditions of employment "have been found to encompass allegations of assault, defamation, discrimination, harassment, malice and bad

faith, *Charter* breaches, and intentional torts, including intentional infliction of mental suffering" (*Ebadi FCA* at para 29; see also *Weber* at para 67; *Davis* at para 75; *Jane Doe v Canada (Attorney General)*, 2018 FCA 183; *Hudson v Canada*, 2022 FC 694 [*Hudson*] at para 103), therefore encompassing the nature of claims asserted by the plaintiffs in this matter.

[33] In addition, this Court has determined that claims involving conduct of a systemic nature—where employees feared reprisal from management—could be grieved as a group or policy grievance under their collective agreement rather than as an individual grievance (*Hudson* at para 44). In fact, the record before me contains evidence of policy grievances being filed on behalf of several public service employees regarding conduct of a systemic nature, thus confirming the grievance process is available to deal with such claims. I should point out, however, that the plaintiffs dispute the appropriateness of the grievance procedure to handle policy grievances that would be applicable to all class members.

[34] As stated, the AGC argues that subsection 236(1) of the FPSLRA is clear and unambiguous, and acts as an explicit and complete ouster of the Court's jurisdiction in favour of the grievance mechanism provided by the FPSLRA for claims arising after April 1, 2005, with no exception in this case—the exceptions in subsections 206(1), 209(3) and 236(3) of the FPSLRA have no application here—and with no room for any residual jurisdiction to entertain such claims regardless of the circumstances. The AGC cites the Ontario Court of Appeal decision *Bron v Canada (Attorney General)*, 2010 ONCA 71 [*Bron*] at paragraph 30, for the proposition that there is only one exception to this rule, being subsection 236(3) of the FPSLRA, which has no application in this case, and suggests that this is the extent to which I need to

consider the evidence on the jurisdictional issue in relation to the claims made by the proposed class members which arose on or after April 1, 2005. As such, any debate regarding the exercise of my discretion comes to an end, section 236 applies, and the proceedings in relation to those claims should be struck. This would mean that Ms. Narsing's entire claim would be barred, as she only became a DND employee in July 2005, and that Ms. Lightbody's claims arising after April 1, 2005, would also be barred on jurisdictional grounds.

[35] The AGC acknowledges that prior to the coming into force of subsection 236(1) of the FPSLRA, there was a residual jurisdiction of the Courts to entertain otherwise grievable claims, as in *Vaughan*, along with a process by which Courts determined whether to exercise their discretion to assume that jurisdiction. The AGC maintains, however, that section 236 put an end to such residual jurisdiction in the context of matters grievable under the FPSLRA.

[36] In addition, the AGC acknowledges that the application of section 236 as an ouster of jurisdiction of the courts is not without parameters (*McMillan FC* at para 25); however, in this case, there is no dispute between the parties that those parameters have been met. First, the evidence confirms that the proposed class members are "employees" within the meaning of section 206 of the FPSLRA; none of the exceptions listed therein apply to them and they are not employees of a separate agency that has not been designated under subsection 209(3) of the FPSLRA. Section 236 applies to all employees as defined by section 206 of the FPSLRA, which includes employees of departments within the core public administration—such as the DND—and persons employed in agencies listed in Schedule V to the FAA—such as the SNPF—whether or not they are unionized and covered by a collective agreement, thus fully covering the

proposed class members. As mentioned, the exception set out in subsection 236(3) of the FPSLRA has no application here.

[37] The plaintiffs take the position that the case law interpreting section 236 is not so unequivocal, and that the exceptions to the application of the rule set out in subsection 236(1) of the FPSLRA include where the grievance procedure is demonstrably ineffective, i.e., where the statutory workplace resolution scheme is unable to provide "effective redress". The plaintiffs argue that the evidentiary record establishes that the internal grievance process in this case is flawed, compromised and inept when it comes to dealing with wide-ranging, long-spanning, systemic issues and addressing the full picture of systemic racism; they assert that those who file complaints are systematically subjected to retaliation.

[38] In response, the AGC acknowledges what he described as a pernicious *obiter* through line in the case law where Courts hesitate to shut the door completely. Although section 236 is acknowledged by the Courts as clear and unequivocal language which ousts their jurisdiction, Court continue to refer to the concept of a residual jurisdiction post-section 236 in a completely hypothetical and speculative manner, and nonetheless consider the record to determine whether the evidence is sufficient to grant Court jurisdiction, and consistently finding that, in the end, it is not. However, the AGC argues that such references are *obiter*, that they do not and should not affect what is otherwise a clear and unequivocal ouster of jurisdiction of the courts in these circumstances. In other words, the AGC wants this Court to shut that door.

[39] Much of the discussion regarding a possible residual jurisdiction of the courts in respect of otherwise grievable claims since the enactment of section 236 consistently reverts to the Supreme Court decisions *Weber* and *Vaughan*. Consequently, it is best to start there. In addition, I think it important, as did the Court of Appeal of Ontario in *Bron*, to draw a distinction between the general principles flowing from cases that predate the enactment of section 236 from cases that came afterwards, or in which section 236 did not come into play. As Justice Doherty in *Bron*, I too consider the enactment of section 236, a provision that had no counterpart in the prior legislation, as somewhat of a game changer in this area (*Bron* at para 4).

B. *The Legal Landscape prior to the Enactment of Section 236 of the FPSLRA*

[40] To properly understand *Weber*, we should start with *St. Anne Nackawic Pulp & Paper Co v Canadian Paper Workers Union, Local 219*, 1986 CanLII 71 (SCC), [1986] 1 SCR 704 [*St. Anne Nackawic*].

[41] In *St. Anne Nackawic*, an employer took action against a union for damages suffered as a result of a strike which was both illegal under the applicable labour relations statute as well as a breach to the governing collective agreement. The employer had also obtained an interlocutory injunction enjoining the continuance of the strike by a group of employees. As regards the jurisdiction of the courts to deal with the action in damages, the Supreme Court found that "[t]he courts have no jurisdiction to consider claims arising out of rights created by a collective agreement" (*St. Anne Nackawic* at para 19). The Court expressed the idea that judicial deference to the arbitration process is necessary to avoid "violence [being] done to a comprehensive statutory scheme [in this case the *Industrial Relations Act* of New Brunswick] designed to

govern all aspects of the relationship of the parties in a labour relations setting" if courts remain "available to the parties as an alternative forum"; where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal for its enforcement (*St. Anne Nackawic* at para 20).

[42] As regards the issue of the courts' residual jurisdiction—in this case in relation to the issuance of injunctions—the Supreme Court held that courts nonetheless retained "a limited residual presence" to issue injunctions "where the conduct amounts to an illegal strike or lock out" (*St. Anne Nackawic* at para 34). At paragraphs 21 and 22, the Supreme Court queried whether the issuance of injunctions to enforce provisions of a collective agreement constituted an affront to the principle of deference towards the arbitration process, thus prejudicing employers who were party to a collective agreement—who should, arguably, have no recourse to injunctive relief—as compared with employers who were not subject to binding arbitration. Ultimately, the Supreme Court stated that "[t]his prejudice may be more apparent than real, however, as in fact it entails only a shift of forums and procedure, but not necessarily a real deprivation of ultimate remedy" [emphasis added].

[43] The "ultimate remedy" to which Justice Estey was referring was the remedy sought to enforce the no-strike provision of the governing legislation during the currency of the collective agreement, a remedy which the arbitrator was not empowered to grant; Justice Estey, however, made clear that the courts' limited residual jurisdiction to issue injunctions does not extend to the enforcement of "claims arising out of rights created by a collective agreement" (*St. Anne Nackawic* at para 19), but is, however, available to "enforce the general law as embodied in the

statute"—in that case the no-strike provision of the governing legislation—and although the issuance of an injunction restraining a strike during the currency of a collective agreement may incidentally also uphold the no-strike clause in the collective agreement, "[s]uch incidental effects … are not sufficient reason to deny an injunction to prevent immediate harm arising out of a clearly illegal act, where no adequate alternative remedy exists" (*St. Anne Nackawic* at para 30) [citation omitted, emphasis added].

[44] By "alternative remedy" the Court was referring to a remedy available under the grievance and arbitration process which the arbitrator would be empowered to grant. Since no such alternative remedy was available to the arbitrator, and to avoid a real deprivation of the ultimate remedy of the no-strike provision provided for in the governing legislation, the courts' limited residual jurisdiction to issue injunctive relief was found not to be inconsistent with the statutory provisions ousting the courts' jurisdiction in dealing with disputes arising under collective agreements (*St. Anne Nackawic* at para 37; see also *Weber* at para 57; and *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Ltd*., 1996 CanLII 215 (SCC), [1996] 2 SCR 495 [*Canadian Pacific*] at para 5).

[45] In *Weber*, the Supreme Court reiterated the principle of deference and judicial restraint confirmed in *St. Anne Nackawic* in respect of claims arising from collectively bargained grievance rights. In *Weber*, an employee grieved his employer's method of investigation into the employee's claims to sick leave benefits; the employee also took a concurrent action before the courts on the grounds of tort and a breach to the Charter. Subsection 45(1) of the *Ontario Labour*

Relations Act, RSO 1990, c L.2 [OLRA], provided that every collective agreement was to include a final and binding arbitration clause for the settlement of all differences between the parties. Where such agreements did not contain such a clause, the OLRA deemed one to be included within the collective agreement.

[46] It was "common ground that s. 45(1) of the Ontario *Labour Relations Act* prevents the bringing of civil actions which are based solely on the collective agreement" (*Weber* at para 37). Thus, there was no issue in *Weber* that the statutory language and context of the governing labour legislation were strong enough to act as an explicit ouster of the jurisdiction of the courts.

[47] The Supreme Court confirmed the "pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts" (*Weber* at para 58), and adopted what had been referred to as an exclusive jurisdiction model, where:

> if the difference between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute. There is no overlapping jurisdiction. [Emphasis added.]
>
> (*Weber* at para 50).

The Supreme Court confirmed that mandatory arbitration clauses in labour statutes such as subsection 45(1) of the OLRA "generally confer exclusive jurisdiction on labour tribunals" to hear disputes that expressly or inferentially arise out of the collective agreement, regardless of how the otherwise grievable claims are framed (*Weber* at para 67), including claims where relief was being sought for breach of a Charter right.

[48] The circumstances in *Weber* did not involve the issuance of an injunction or other interlocutory relief engaging directly on the issue of the courts' residual jurisdiction, however, while discussing the attributes of the exclusive jurisdictional model, Justice McLachlin, speaking for the majority, confirmed that courts may take jurisdiction where "a remedy is required which the arbitrator is not empowered to grant" (*Weber* at para 57). The Supreme Court found that courts "possess limited residual jurisdiction based on their special powers, as discussed by Estey J. in *St. Anne Nackawic*" and that, ultimately, "[t]he exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal" (*Weber* at paras 54, 67).

[49] Justice McLachlin adopted the language of Estey J. in *St. Anne Nackawic*: a "real deprivation of ultimate remedy" must be avoided, where, as in *St. Anne Nackawic*, a right was being invoked, which the arbitrator had no power to address. In such cases, "courts of inherent jurisdiction in each province may take jurisdiction" (*Weber* at para 57). As examples, Justice McLachlin cited the residual jurisdiction for remedies such as the issuance of injunctions (*St. Anne Nackawic*) and declaratory relief (*Moore v British Columbia*, 1988 CanLII 184 (BC CA), 50 DLR (4th) 29).

[50] In *Canadian Pacific*, the Supreme Court reiterated the "residual discretionary jurisdiction in courts of inherent jurisdiction to grant relief not available under the statutory arbitration scheme" and stated that, notwithstanding the existence of a comprehensive code for settling labour disputes, when "no adequate alternative remedy exists" under a comprehensive scheme for settling labour disputes, the courts retain a residual discretionary power to grant interlocutory

relief such as injunctions, “a power which flows from the inherent jurisdiction of the courts over interlocutory matters” (*Canadian Pacific* at para 5). The relief being sought by the union for which an alternative remedy did not exist was an injunction to prevent the unilateral imposition of a new work schedule by the employer, an issue that was neither governed under the collective agreement nor provided for under the governing labour legislation; in fact, the collective agreement “did not touch it” (*Canadian Pacific* at para 10). The Supreme Court determined that the courts’ residual jurisdiction was not confined to restraining illegal activity (such as the illegal strike in *Weber*) but also extended to grant relief which labour relations schemes did not offer (*Canadian Pacific* at para 8), and which, consequently, the arbitrator was not empowered to grant. As such, injunctive relief was available where the collective agreement and the governing statutory scheme “provided no means to secure” the claim being sought (*Canadian Pacific* at paras 6, 9). In other words, where no adequate alternative remedy existed.

[51] In *St. Anne Nackawic*, *Weber* and *Canadian Pacific*, the Supreme Court made clear that courts had no jurisdiction to deal with disputes where a remedy exists under a collective agreement within a comprehensive statutory labour relations scheme, subject to limited residual jurisdiction under the special powers to grant interlocutory relief where there is “no adequate alternative remedy” under the scheme, i.e., where the collective agreement and the governing statutory scheme provide no means to secure the claim, resulting in the risk of there being “a real deprivation of ultimate remedy” (see also *Northern Regional Health Authority v Horrocks*, 2021 SCC 42, [2021] 3 SCR 107 [*Horrocks*] at paras 13, 22 and 23). It should be made clear, however, that *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of

the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction (*Quebec* (*Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, 2004 SCC 39 (CanLII), [2004] 2 SCR 185 at para 11; *Horrocks* at para 27).

[52] I think it important to keep in mind as well that the situations in *St. Anne Nackawic*, *Weber* and *Canadian Pacific* involved the prospect of independent third-party adjudication of the disputes which arose from collective agreements rather than a statutory scheme which provided for an internal grievance procedure; what was important was the availability of the relief being sought, not whether the remedy provides effective redress. In addition, the language and context of the statutory scheme in those cases were found to have amounted to an explicit ouster of the jurisdiction of the courts, subject only to limited residual jurisdiction of an interlocutory basis for relief the arbitrator has no power to grant.

[53] We then come to *Vaughan* where the Supreme Court extended the doctrine of judicial deference set out in *Weber* beyond collective agreements to statutory schemes providing for an internal grievance procedure, whether or not the employee is covered by a collective agreement. *Vaughan* concerned an action brought by a federal government employee against his employer for having been denied early retirement benefits available under regulation but that had not been incorporated into the collective agreement. Under the *Public Service Staff Relations Act*, RSC 1985, c P-35 [PSSRA]—the predecessor to the FPSLRA—decisions denying employees benefits under plans outside the collective agreement were grievable under the departmental dispute resolution scheme but did not thereafter benefit from independent third-party adjudication;

decisions rendered under the employer's internal grievance authority were final, subject solely to a judicial review before the Federal Court.

[54] Unlike the situation in *Weber*, the limited privative clause found in subsection 96(3) of the PSSRA was found not to be sufficient to oust the courts' residual jurisdiction in regard to matters that were grievable but not arbitrable under that statute (*Vaughan* at paras 2 and 33). Justice Binnie confirmed that it takes very clear language to oust the jurisdiction of the court (*Vaughan* at para 21, citing Cromwell J.A. in *Pleau (Litigation Guardian of) v Canada (Attorney General)* (1999), 1999 NSCA 159 at 381, 182 DLR (4th) 373 (NSCA) [*Pleau*]), in which case, and reaffirming the principles of *Weber*, "the courts will retain jurisdiction if the remedy sought is not one which the statutory scheme can provide" (*Vaughan* at para 30, citing *St. Anne Nackawic* at para 74 and *Weber* at para 57) [emphasis added].

[55] However, that was not the issue in *Vaughan*, as the remedy sought was available and the decision-maker was empowered under the departmental grievance mechanism to order early retirement benefits to be provided to the appellant (*Vaughan* at para 30). Rather, the employee argued that the court should retain jurisdiction because the internal grievance mechanism was corrupt, suggesting that the departmental procedure "reeks of conflict of interest" and that the "departmental officials have an interest in denying [early retirement benefits] benefits to an employee who comes within the applicable policies so as to constitute some sort of institutional bias". Justice Binnie found these assertions to be not credible (*Vaughan* at para 37).

[56] On the issue of the court's residual jurisdiction, Justice Binnie discussed the decisions of *Pleau* and *Guenette v Canada (Attorney General)* (2002), 2002 CanLII 45012 (ONCA), 60 OR (3d) 601 (CA) [*Guenette*] (the whistle blower cases) where although the legislative scheme provided a remedy for the claims being made, the remedy may not have provided the individuals with "effective redress" since the integrity of the grievance procedure might be compromised by employer retaliation. At paragraph 39, Justice Binnie stated: "While the absence of independent third-party adjudication [a concern which, as I mentioned, did not exist in *St. Anne Nackawic*, *Weber* or *Canadian Pacific*] may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistle-blower cases) the general rule of deference in matters arising out of labour relations should prevail".

[57] However, Justice Binnie provided two caveats to that assertion. First, the lack of independent third-party adjudication is not by itself conclusive, and the task of the court remains to determine whether the legislative scheme reflects an intention by Parliament to have workplace disputes decided by the courts or under the grievance procedure which the scheme establishes (*Vaughan* at para 22). Second, and I think most importantly in respect of the matter before me, although Justice Binnie expressed support for the proposition that "where there is a right, there ought to be a remedy" and that consequently, "the capacity of the scheme to afford *effective redress* must be considered" when determining whether to adhere to the doctrine of judicial restraint as regards grievable claims (*Vaughan* at para 22, citing *Pleau* at p 391 [emphasis in original]), he nonetheless underscored the fact that, as was the case in *Vaughan*, the decisions in *Pleau* and *Guenette* rested on the premise "that the 'exclusivity' language of ss. 91 to 96 of the PSSRA was weaker than the labour relations provision at issue in Weber. The

legislative door had been left open enough for the judiciary to enter" (*Vaughan* at para 20) [emphasis added].

[58] Even though the language and context of the PSSRA was not strong enough to constitute an explicit ouster of the jurisdiction of the courts, and notwithstanding that the legislative scheme did not provide for independent third party adjudication, the Supreme Court in *Vaughan* nonetheless determined that "Parliament's intent expressed in ss. 91, 92 and 96(3) of the PSSRA is clearly to deny access to third-party arbitration in the case of regulation-conferred benefits such as" those being sought by the employee (*Vaughan* at paras 32 and 34). At paragraph 36, Justice Binnie cited the Manitoba Court of Appeal in *Phillips v Harrison* (2000), 196 DLR (4th) 69, 2000 MBCA 150 to say: ""What is important is that the scheme provide a solution to the problem" (para. 80)".

[59] I read *Vaughan* to stand for the proposition that even in the absence of statutory language strong enough to oust the jurisdiction of the courts, deference should be nonetheless be accorded to a comprehensive statutory scheme for resolving employment disputes regardless of whether the statutory scheme makes any provision for adjudication by an independent third party, and where there is sufficient evidence to suggest that the remedies available under the statutory scheme are unable to provide the claimant with effective redress, the court may exercise its discretionary residual jurisdiction to hear the claim. In other words, it is not the inability of the statutory remedy to provide effective redress which nourishes the Court's residual jurisdiction beyond its interlocutory powers; rather, the residual jurisdiction flows from the intention of Parliament as reflected by the statutory language not to close the legislative door. When the

legislative door has been left open, and although the general rule of deference continues to apply, the inability of the available remedy to provide effective redress may "impact the court's exercise of its residual discretion" in retaining jurisdiction over the claims (*Vaughan* at para 39). However, where the legislative door has been closed with very clear language ousting the jurisdiction of the court, its residual jurisdiction is limited to remedies which are not available under the statutory scheme (*Vaughan* at para 30, citing *St. Anne Nackawic* at para 74 and *Weber* at para 57).

[60] The *Attorney General of Canada et al v Smith*, 2007 NBCA 58 [*Smith*], and *Lebrasseur v Canada*, 2007 FCA 330 [*Lebrasseur*], are two decisions involving allegations of wrongful conduct against the Royal Canadian Mounted Police [RCMP] by certain of its members. I should mention that RCMP members are subject to their own statutory grievance scheme and only became covered by their first collective agreement in 2021. The court in *Smith* determined that the applicable internal grievance procedure prescribed by legislation—in this case the RCMP Act — was "insufficient for purposes of ousting the jurisdiction of the courts" (*Smith* at para 18); the court retained jurisdiction, citing *Vaughan*, as there was evidence to suggest that the internal grievance procedure would not afford the claimant effective redress. In *Lebrasseur*, the court determined that the record contained "no evidence that impugns the integrity of the grievance procedure" (*Lebrasseur* at para 19) and thus refused to take jurisdiction over the claim. The Federal Court of Appeal confirmed that *Vaughan* "stands for the proposition that, where an individual has recourse to a statutory grievance scheme such as [the RCMP Act] to seek a remedy for a complaint arising from a workplace event, the Courts generally should decline to

deal with claims for damages arising out of the same event, even if the statutory grievance scheme does not expressly oust the jurisdiction of the courts" (*Lebrasseur* at para 18).

C. *The Legal Landscape since the Enactment of Section 236 of the FPSLRA*

[61] On April 1, 2005, the PSSRA was repealed and replaced by the FPSLRA, of which section 236 was in direct response to the Supreme Court of Canada's decision in *Vaughan* (see *Attorney General of Canada, on behalf of Correctional Service of Canada v Robichaud and MacKinnon*, 2013 NBCA 3 [*Robichaud*] at para 7; *Hudson* at para 74).

[62] In *Bron*, a federal civil servant claimed to be harassed by his employer, Transport Canada, in retaliation for his whistle-blowing activity, and argued that he could not expect fair treatment through the internal grievance procedure. The Court of Appeal of Ontario made clear that the principle set out in *Vaughan* whereby courts, in the exercise of their residual discretion, may consider whether the available grievance mechanism was able to provide effective redress, turned on the statutory language of the legislation, and that the enactment of section 236 of the FPSLRA since then was, in essence, a game changer (*Bron* at para 28). In addition, and echoing Justice Binnie in *Vaughan* at para 21, and Justice Cromwell in *Pleau* at p 381, Justice Doherty found that although it will take clear language to "confer exclusive jurisdiction to determine certain disputes on a forum other than the courts", section 236 is clear and unequivocal to that effect, and subject only to an appropriate remedy not being available under the grievance process (echoing Justice McLachlin in *Weber* and *Canadian Pacific*), he stated that grievable claims "must be determined using the grievance procedure" (*Bron* at para 29).

[63] Justice Doherty acknowledges the passage in *Canadian Pacific* at paragraph 8 of that decision, that the common law developed the notion of courts of inherent jurisdiction to resolve matters for which there is a "gap" or a "remedial lacunae", which the statutory scheme has not foreseen, in other words, a remedy that is not available (*Bron* at para 32). However, he states clearly that no legislative gap exists where the legislative scheme speaks to the workplace complaint that is grievable under the legislation (*Bron* at para 32).

[64] As to whether there exist any exceptions under section 236 for complaints where effective redress may not be available, Justice Doherty stated that ""[t]here is nothing in the language of s. 236 to support this limitation. To the contrary, Parliament has identified in s. 236(3) the one and only exception to the general language used in s. 236(1) and (2). That exception has nothing to do with whistle-blowing" (*Bron* at para 30). More importantly for the matter before me, although acknowledging that such a narrow interpretation of section 236 may deny those vulnerable to reprisal during the grievance process "a fair and independent process to adjudicate complaints", Justice Doherty determined that such a concern is a "policy argument" at best, and although it "might assist in the interpretive process if the statutory language were in any way unclear or ambiguous", such is not the case with section 236 (*Bron* at para 31). In other words, what Justice Doherty is saying is that section 236 has closed the legislative door.

[65] I read *Bron* to be consistent with *Weber*, *Vaughan* and *Canadian Pacific*, and supporting the proposition that, where the statutory language is strong enough to oust the jurisdiction of the courts, any residual jurisdiction is limited to the courts' interlocutory powers where a gap in the statutory scheme causes the remedy being sought not to be available for an adjudicator to grant.

As I stated earlier, I do not read the comments of Justice Binnie in *Vaughan*, nor those of Cromwell J.A. in *Pleau* for that matter, as recognizing the court's residual jurisdiction beyond purely interlocutory matters, even where the integrity of the grievance procedure has been compromised, when the statutory language of the governing labour legislation clearly and unequivocally ousts the jurisdiction of the courts. Thus, consideration as to the court's residual jurisdiction to entertain otherwise grievable claims begins with an assessment of the strength of such statutory language. Here, section 236 is "clear and unequivocal", and strong enough to explicitly oust the jurisdiction of the courts (*Bron* at para 29).

[66] In *Robichaud*, the New Brunswick Court of Appeal described *Bron* as standing for the proposition that "the residual discretion outlined in Vaughan had been displaced" by section 236 (*Robichaud* at para 9). The determinative issue in *Robichaud* was whether the employer's failure to undertake a formal investigation into allegations of harassment and misconduct levelled at the two employees was a grievable dispute to which section 236 applied (*Robichaud* at paras 2, 13). The Court held that nothing that was decided in *Vaughan* undermined the principle that grievable claims are subject to section 236, "as s. 236 is Parliament's direct response to the common law principles articulated in Vaughan" (*Robichaud* at para 3). Justice Robertson commented that section 236 "provides that if an employee can grieve that employee cannot sue", and that the provision "expressly eliminates" the argument that a grievance procedure which does not provide for assessment by an independent party does not provide an adequate remedy (*Robichaud* at para 16).

[67] Justice Robertson discussed the notion of an expansive residual jurisdiction under *Vaughan*, where "the privative clause was not sufficient to oust the Court's residual discretion to intervene" (*Robichaud* at para 8) and what he referred to as the "truly problematic" whistle blower cases where the grievance process is itself "corrupt" on account of the griever having to "to grieve to those who were responsible for the bad faith conduct" (*Robichaud* at para 10). In the end, Justice Robertson stated that under section 236, "the right to grieve "is in lieu of" the right to sue", and the availability of third-party adjudication "is of no moment" … "[t]he only question that we need decide is whether the employer's failure to undertake a formal investigation into the unsigned allegations leveled at the two employees was a "grievable" dispute relating to "terms and conditions of employment" (*Robichaud* at para 13).

[68] Although it was not necessary for the Court to determine whether section 236 ousted the residual discretion of the courts in relation to claims otherwise grievable under the FPSLRA, Justice Robertson determined that "if there is a residual discretion it must be found in the concept of "grievance" as used in s. 236" (*Robichaud* at para 10). In other words, does the claim relate to a "grievable" dispute relating to "terms and conditions of employment" where the remedy being sought is available for the adjudicator to grant. Also at paragraph 10, Justice Robertson stated that "the fact that the grievance procedure does not allow for third-party adjudication with respect to the matter at hand would not by itself be sufficient to attract the residual discretion. Section 236 is clear on that point".

[69] The Federal Court of Appeal's decision in *Canada v Greenwood*, 2021 FCA 186, [2021] 4 FCR 635 (leave to appeal to SCC refused, 19060 (17 mars 2022)) [*Greenwood FCA*] involves

the certification of a proposed class action against the RCMP for systemic bullying, intimidation, and harassment that was fostered and condoned by RCMP leadership. As already discussed, RCMP members were not considered employees under section 206 of the FPSLRA thus section 236 did not apply to them. As the matter of the dispute was not grievable under the FPRLRA, the issue of whether the court's residual jurisdiction survived the enactment of section 236 did not arise. Rather, citing *Vaughan* and its progeny, the Crown argued that the Court should decline jurisdiction in favour of other legislative remedies and internal grievance processes within the RCMP available to address the issues of bullying and harassment (see trial decision *Greenwood v Canada*, 2020 FC 119 [*Greenwood FC*] at para 39; *Greenwood FCA* at para 78).

[70] Consequently, although the Federal Court of Appeal in *Greenwood FCA* referred to *Vaughan* and to what it called an exception to the general rule of deference where the internal mechanisms are incapable of providing effective redress (*Greenwood FCA* at para 130), the Court was describing the principle that applied at common law, outside the scope of a statutory provision strong enough to oust the jurisdiction of the Court. Consequently, I do not find *Greenwood FCA* of assistance in the determination of the scope and extent of any residual jurisdiction of the courts under section 236.

[71] The Court in *Greenwood FCA* did however comment on the importance of unionization in the court's exercise of discretion regarding its residual jurisdiction. The Federal Court had made a factual determination that the internal recourse mechanisms available to RCMP members and reservists were ineffective and proceeded to accept jurisdiction on the basis of the principles

set out in *Vaughan* (*Greenwood FC* at para 39); that finding of fact was confirmed by the Federal Court of Appeal (*Greenwood FCA* at para 132). The Federal Court considered the RCMP, at the time, as a non-unionized workplace (*Greenwood FC* at para 30) however, the situation on the ground was shifting, and by the time the matter was before the Federal Court of Appeal, the RCMP members were in the process of ratifying their first collective agreement (*Greenwood FCA* at para 134).

[72] In certifying the class proceeding, the Federal Court had set no end date for the class period, however the Federal Court of Appeal observed that a claim in negligence for workplace harassment, whether brought on an individual or systemic basis, is liable to be struck if brought on behalf of persons governed by contracts of employment (*Greenwood FCA* at para 155). Thus, the Federal Court of Appeal, amongst other things, amended the class definition so that the Class Period terminates the on "the date a collective agreement becomes or became applicable to a bargaining unit to which [the class members] belong" (*Greenwood FCA* at para 202). As to the importance of unionization on the application of the principles in *Vaughan*, the Federal Court of Appeal stated at paragraph 136:" once a collective agreement comes into force, the principles from *Weber* are applicable and the exception mentioned in *Vaughan* can no longer obtain", and at paragraph 137, that "once RCMP members and reservists have a collective agreement, it is no longer possible to say that there is no means available to effectively address their claims of harassment, intimidation or bullying within the narrow exception established under *Vaughan*".

[73] The effect of section 236 as an ouster of the court's jurisdiction in respect to matters that are otherwise grievable under the FPSLRA has been consistently recognized by this Court as

well as the Federal Court of Appeal (*Hudson* at para 73; *Ebadi FC* paras 37 and 51; *Adelberg v Canada*, 2023 FC 25 [*Adelberg FC*] at para 13; *McMillan FC* at para 24; *Ebadi FCA* at para 28; *Adelberg . Canada*, 2024 FCA 106 [*Adelberg FCA*] at para 51; *Davis* at para 68; *McMillan FCA* at para 45; *Thompson v Canada*, 2025 FC 476 at paras 109 and 119). Where the disagreement between the parties lies is whether jurisdictional bar of section 236 is subject to the common law exception set out in *Vaughan*, where residual discretion of the courts is maintained where the internal grievance mechanism is incapable of providing effective redress.

[74] As stated earlier, the AGC argues that any vague reference in the case law to a more expansive residual jurisdiction where the effectiveness of the grievance mechanism is being considered in the context of section 236 is simply *obiter*, hypothetical and speculative, as this Court never definitively stated that the exception set out in *Vaughan* applied when the statutory language is strong enough to oust the jurisdiction of the courts.

[75] I must agree with the AGC. Clearly the decisions in *Hudson*, *Ebadi FC*, *Adelberg FC* and *McMillan FC* referenced *Vaughan* and *Greenwood FCA* regarding the Court's residual jurisdiction where the statutory remedy was not able to provide effective redress. However, in fairness, this Court has never had to specifically engage with the issue of whether the common law exception in *Vaughan* continued under section 236, either because the plaintiffs had not alleged the available internal grievance process was corrupt or incapable of providing effective redress (*Adelberg FC* at para 21), because the issues before the Court took the discussion along another path (*Ebadi FC* at para 47) or because the Court was in any event unconvinced of the plaintiff's arguments on that issue (*Hudson* at para 93; *Ebadi FC* at para 59).

[76] The Federal Court of Appeal has had occasion to confirm the Court's residual discretion to hear otherwise grievable claims where the available mechanisms were demonstrably ineffective in situations where the legislative language was not strong enough to oust the jurisdiction of the courts (*Davis* at para 88, citing *Greenwood FCA* for support of that proposition). As I stated earlier, I read *Bron* to stand for the proposition that any argument that available statutory remedies are demonstrably ineffective is negated by section 236.

[77] As stated by Justice Binnie in *Vaughan*, it was the strength of the statutory language to oust the jurisdiction of the courts which opened the legislative door for courts to consider retaining residual discretionary jurisdiction when the available statutory remedies cannot provide effective redress. The notion that consideration of the available remedies provide effective redress is limited to situations where the statutory language is not strong enough to oust the jurisdiction of the courts was repeated in *McMillan FC*, affirmed on appeal in *McMillan FCA*. On the AGC's motion to strike, principally on the strength of section 236, this Court confirmed that with strong language, a legislative scheme may completely oust the Court's jurisdiction "such that no residual jurisdiction remains" (*McMillan FC* at para 21; see also *Vaughan* at para 21 and *Pleau* at p 381).

D. *Striking of the Claims that arose after the Enactment of Section 236*

[78] As I mentioned earlier, the AGC urges that I deal squarely with the issue and not entertain suggestions made in *obiter* that consideration of whether available statutory remedies provide effective redress remains an option where the statutory language is strong enough to oust the jurisdiction of the courts. The AGC argues that the common law exception set out in

Vaughan does not apply to unionized employees covered by a collective agreement and, in any event, did not survive the enactment of section 236. The issue therefore is whether section 236 is strong enough to beat back the possible application of the common law exception of "effective redress" set out in *Vaughan* in respect of claims that are otherwise grievable under section 208 of the FPSLRA; for my part, I agree with Justice Doherty in *Bron* to say that it is (*Bron* at paras 29–33).

[79] Looking at it through the prism of statutory interpretation, the principles of which the Supreme Court again recently reminded us in *Piekut v Canada (National Revenue)*, 2025 SCC 13 [*Piekut*], the text of section 236 is deceptively straightforward. It says that the right to grieve "is in lieu of any right of action". It is the text of the statute "which remains the anchor of the interpretative exercise" (*Piekut* at para 45). The context of section 236 is within a statute which is meant to create a framework for labour relations within the federal public service, and the purpose of subsection 236(1) is to channel the determination of grievable claims, as defined in section 208 of the FPSLRA, through the established grievance process, rather than allowing employees to pursue separate legal actions. Also, as mentioned, section 236 was enacted to specifically address the Supreme Court's decision in *Vaughan*, which although recognizing that the comprehensive dispute resolution process contained in the legislation should not be jeopardized by permitting routine access to the courts, nonetheless left the door open for court access where the grievance procedure did not provide the employee with an adequate remedy. As mentioned, "the task of the court remains to determine whether the legislative scheme reflects an intention by Parliament to have workplace disputes decided by the courts or under the grievance procedure which the scheme establishes" (*Vaughan* at para 22). Under the circumstances, the

intention of Parliament seems clear, and section 236 has the effect of shutting that door in the context of grievances under section 208 of the FPSLRA.

[80] From my perspective, the effect of the language of subsection 236(1) is to extinguish any right of action by the employee in respect to claims that may otherwise be grieved under section 208 of the FPSLRA, with the role of the courts in addressing such claims being limited to judicial review and its interlocutory powers as set out in *St. Anne Nackawic* and *Weber* if the grievance process could not provide an appropriate remedy (*Bron* at para 29); "if there is a residual discretion it must be found in the concept of "grievance" as used in s. 236" (*Robichaud* at para 10). With such clear language, "[t]here is no overlapping jurisdiction" … to entertain an action in respect of that dispute (*Weber* at para 50). As such, where section 236 finds application, "a court no longer has any residual discretion to entertain a claim that is otherwise grievable under section 208 on the basis of an employee's inability to access third-party adjudication" (*Bron* at para 29); under the circumstances, "no residual jurisdiction remains" (*McMillan FC* at para 21). Any suggestion of the statutory remedies being unable to provide effective redress—also referred to in some previous decisions as "adequate redress"—is, to borrow the language in *Robichaud*, of no moment.

[81] Having found as I did, the AGC has met his burden of establishing that section 236 applies to oust the jurisdiction of this Court as regards claims arising after April 1, 2005 (*Davis* at para 74). With the parameters for the application of subsection 236(1) having been established, the AGC asserts there is no requirement to consider any evidence of possible residual jurisdiction under the *Vaughan* exception for claims arising after section 236 came into force. I agree.

Section 236 has also shut the door to any consideration by courts of the effectiveness of the statutory remedies to provide effective redress on account of being, in the words of the plaintiffs, demonstrably ineffective. As stated, the issue to consider is the availability of the remedy within the statutory framework, and not whether the remedy that exists within that framework provides effective redress. Any argument of unfairness regarding such a strict application of the general rule, as determined in *Bron*, is but a policy issue. On a similar note, when addressing a similar access to justice issue in the context of arbitration under a collective agreement, Mr. Justice Brown in *Horrocks* stated:

> [38] Of course, there will be instances of a union declining to advance a grievance to arbitration without breaching its duty of fair representation or engaging in discrimination. And, in such cases, the employee will indeed be left without a forum for resolution. But this state of affairs — which, it bears restating, can be undone by clearly expressed legislative intent to the contrary — is a product of the union's statutorily granted monopoly on representation (*Bisaillon*, at paras. 24-28; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, at para. 41). In other words, it is a product of legislative choice, to which we are bound to give effect.

[82] Here, section 236 constitutes the "state of affairs". That is not to say that I need not consider any evidence of the plaintiffs as regards the application of section 236, but only that we are no longer dealing with a shifting burden of proof. As mentioned, the application of section 236 as an ouster of jurisdiction of the courts is not without parameters, and evidence by both parties is to be considered in determining whether those parameters have been met: whether the matter is grievable, whether the remedy the claimants seek is available, and whether any statutory exceptions to the application of section 236 provided for in the FPSLRA have been triggered. But once that is done, and the Court is satisfied that section 236 applies, no further

evidence is required to deal with the jurisdictional issue. The onus does not shift back to the plaintiffs because there are no further exceptions to consider.

[83] Here, the parameters for the application of section 236 have been met. As mentioned earlier, there is no dispute that the proposed class members are "employees" within the meaning of section 206 of the FPSLRA, unionized or non-unionized. The plaintiffs concede that although there may be small pockets of employees to whom section 208 of the FPSLRA may not apply, as these proceedings are meant to be a class action, they make no distinction and accept that for the purposes of this motion, all the proposed class members are subject to section 208 of the FPSLRA. There is also no real dispute between the parties that claims of systemic racism, discrimination and harassment fall within the category of claims that may be grieved and that the remedies they seek are available to them under the statutory grievance process—putting aside the issues of efficiency and effectiveness.

[84] The evidence is that the FPSLRA and its predecessors, including the PSSRA, have provided federal public service employees a statutory right to grieve issues relating to the terms and conditions of their employment, including grievances related to workplace racism, discrimination and harassment, and also claims seeking Charter remedies. I should mention as well that the Federal Public Sector Labour Relations and Employment Board has the power to interpret paragraph 53(2)(e) and subsection 53(3) of the *Canadian Human Rights Act*, RSC 1985, c H-6) [CHRA], and order damages. Thus, there is no legislative gap or lacunae in this case. In addition, none of the exceptions listed in the FPSLRA apply to the plaintiffs, nor are the proposed class-member employees of a separate agency that has not been designated under

subsection 209(3) of the FPSLRA. The exception set out in subsection 236(3) of the FPSLRA has no application here.

[85] The plaintiffs point to *Greenwood FCA* which provides that evidence as to the nature and efficacy of the alternate administrative processes is required where the Court is asked to decline to exercise its jurisdiction so as to provide a basis for the Court's determination of whether it ought to decline jurisdiction in favour of the alternate administrative remedies, thus avoiding having to make a ruling in a factual vacuum (*Greenwood FCA* at para 95). I agree, but in the context of *Greenwood FCA* where the exception of *Vaughan* was at play and where there was no issue as to the application of a strong privative clause. Here, this passage applies only in relation to the pre-section 236 claims.

[86] Overall, I find that section 236 has completely ousted the jurisdiction of this Court to entertain any of the claims that arose after April 1, 2005. I also am unconvinced that any amendment to the statement of claim would lead to a different result. Consequently, I would strike the portion of the claims that arose after the coming into force of section 236, without possibility of amendment.

E. *Striking of the Claims that predate Section 236*

(1) Applicable Principles

[87] Here, the jurisdictional issue takes a different form. In respect of the claims subject to section 236, the jurisdictional issue was to what extent section 236 oust the jurisdiction of the

Court in respect of otherwise grievable claims. For pre-section 236 claims, we fall back upon the principles of *Weber* and *Vaughan, to wit,* that courts should generally, as a matter of discretion, decline to get involved in workplace-related issues, and the "jurisdictional" issue becomes whether I should nonetheless exercise my residual discretion and retain jurisdiction in light of any evidence suggesting the grievance procedure under the FPSLRA and other recourse mechanisms available to the plaintiffs were compromised to the point where the statutory remedy available cannot provide effective redress, the burden being on the plaintiffs to establish (*Lebrasseur* at para 19; *Hudson* at para 93).

[88] In addition, the personal experience evidence goes back many years, and the issue arose as to whether I was to assess the availability of the grievance process to provide effective redress at the time the incidents of racism, harassment and discrimination occurred or as of the present. What is clear is that the plaintiffs' claim is brought forward today, and it seems to me that if I am to exercise my discretion not to defer to the statutory grievance procedure, I would need to be convinced that the internal grievance procedures of today are not able to provide effective redress. Moreover, the AGC's assertion in bringing forward the motion to strike is that the plaintiffs have access to a grievance scheme to deal with their claims, including those which predate section 236. As such, the issue of effective redress is to be assessed as at the date the AGC makes that assertion, and not as of the date the claim arose. Here, the plaintiffs confirm that the evidence they rely upon is the same whether for pre-section 236 claims or post-section 236 claims. That also means that if I was wrong on the issue of whether the exception in *Vaughan* survived the enactment of section 236, the analysis below would apply to claims which arose after April 1, 2005.

[89] The AGC argues that, in respect of pre-section 236 claims, the principles of *Weber* apply to the extent that any of the employees are covered by a collective agreement and part of a union, such that any residual jurisdiction is limited to the Court's interlocutory powers. I must agree. The Federal Court of Appeal was clear that "once a collective agreement comes into force, the principles from *Weber* are applicable and the exception mentioned in *Vaughan* can no longer obtain" (*Greenwood FCA* at para 136). As mentioned, the plaintiffs make no complaint regarding their union, and there is insufficient evidence to demonstrate that collective bargaining units of the class members are institutionally incapable of assisting them with their grievances and complaints (*Hudson* at para 162). Unionization militates in favour of deference towards the statutory labour relations regime.

[90] The AGC accepts that the principles of *Vaughan* apply to the extent that any of the employees are not covered by a collective agreement and not part of a union. The AGC asserts that I should nonetheless decline to accept those claims as the evidence does not support any conclusion that the statutory remedies are unable to provide effective redress.

[91] What is also clear is that in considering exercising my discretion to retain jurisdiction, I should be considering all avenues of redress available to the plaintiffs under the various labour relations statutes. The evidence confirms that in addition to the formal grievance process under the FPSLRA, class members have other recourse mechanisms to address workplace racism, discrimination and harassment under various non-grievance procedures such as those under the PSEA and the *Canada Labour Code*, RSC 1985, c L-2, and various policies such as the Treasury Board Harassment Policies (see also *Hudson* at para 81).

[92] The plaintiffs raise the fact that the AGC has not produced any of the collective agreements upon which he relies, nor any evidence of the grievance procedure in place prior to April 1, 2005, that would have been available to the plaintiffs other than section 91 of the PSSRA, nor any evidence as to the subject matter that may be grieved prior to section 236. Accordingly, argue the plaintiffs, the defendant has not met his burden of establishing that the general rule of judicial restraint applies. I do not agree. The affidavit of Drew Heavens filed on behalf of the AGC provides that the federal public service has been governed by public service labour legislation—various versions of the FPSLRA—for the entirety of the proposed Class Period and that individuals have used the grievance process for some time. I find this to be sufficient for the application of the general rule set out in *Vaughan*; clearly a statutory labour relations process exists, to which I am to show deference subject only to the exception suggested in *Vaughan*. If there was any evidence specifically relevant to the exercise of my discretion to retain residual jurisdiction, it was for the plaintiffs to put forward (*Lebrasseur* at para 19; *Hudson* at para 93).

[93] Finally, although courts benefit from residual jurisdiction at common law as provided for in *Vaughan* where the statutory language would allow for it, simply because I continue to have residual jurisdiction does not mean that I must exercise it; the burden is upon the plaintiffs to convince me to do so.

(2) The Evidence

[94] The plaintiffs stated that they rely heavily on the Ombudsman's Reports to bolster their evidence on the jurisdictional issue. In addition, the plaintiffs accept that for the purpose of the

motion to strike, reports of racism, harassment and discrimination within DND, for example, the January 2022 MNDAP report which speaks to the issue of racism within DND and contains some discussion on the fear of retaliation and the effectiveness of the anti-racism initiatives which DND has undertaken, would by itself be insufficient to overcome the burden upon them to convince me that I should find that their situation falls within the exception set out in *Vaughan*. If the reports are to bolster the primary evidence of the plaintiffs in relation to the motion to strike, they must speak directly to the jurisdictional issue raised by the plaintiffs, i.e., the purported inability of the statutory remedies to provide effective redress; the plaintiffs look to the Ombudsman's Report to do just that.

(a) *Personal Experience Affidavits*

[95] The plaintiffs readily admit that the evidence of Ms. Narsing is light on the jurisdiction issue as she never filed a grievance. However, the evidence of Barbara Williams is that Ms. Narsing did file a grievance in 2012 relating to the DND's refusal to pay her membership fees as a certified management accountant; the grievance was heard and denied at the third level in March 2013. In any event, having reviewed her evidence, I agree with the plaintiffs that the evidence of Ms. Narsing is rather weak on the jurisdiction issue. Although her experience with racism and discrimination is well set out in her evidence, the issue before me is whether the internal grievance procedure is, as put by the plaintiffs, demonstrably ineffective. Ms. Narsing does, however, say that she was afraid to speak up about her differential treatment and lack of promotion, fearing reprisal and attacks if she would draw attention to racism within DND when

she was already being subjected to racial slurs and vulgar language by her colleagues. Ms. Narsing decided to leave DND in 2019.

[96] As to Ms. Lightbody's experience with the grievance process, I have tried to piece together her various affidavits given that I have accepted that they form part of the record. I must say that I found Ms. Lightbody's evidence to include several gaps, which I looked to fill with the evidence of the defendant. Where Ms. Lightbody's evidence seemingly contradicts that of the defendant, I highlight where the contradiction exists.

[97] Ms. Lightbody too speaks of her fear of reprisal as the reason she would not report racist behaviour. She highlights an incident in 2004 when she tried to intervene in a sexual harassment matter involving one of her colleagues and was met with threats of retribution and loss of employment; Ms. Lightbody soon thereafter went on stress-related sick leave.

[98] She also speaks of events she attended in 2006 and 2010 when she was subjected to racial slurs and offensive comments and gestures. In 2010, Ms. Lightbody, as a DAAG member, was advised that she was being recognized as the Defence Team Champion for Indigenous Peoples, however, her supervisor failed to afford her any formal recognition within her workplace although other non-racialized employees were being so recognized for their achievements. As National Civilian Co-Chair of the DAAG between 2015 and 2018, Ms. Lightbody was told on multiple occasions that funding Indigenous ceremonies was a "misuse of funds", and when she sought to rename a DND recreation area that was offensively named Teepee Park, her efforts were met with rebuke.

[99] Ms. Lightbody recounts that in 2010, she submitted a grievance notwithstanding that her Commanding Officer disagreed with it. However, she withdrew it after relocating from 4 Wing Cold Lake to 19 Wing Comox because she did not want to be labelled a problem worker.

[100] In January 2013, Ms. Lightbody was assigned most of her supervisor's duties immediately following the supervisor's retirement, however, in her opinion, not compensated accordingly. Ms. Lightbody filed a classification grievance through her union in May 2014 [classification grievance]. By May 2016, the first level grievance hearing had not yet been scheduled, so Ms. Lightbody followed up with her union representative. Ms. Lightbody says the delay was because her supervisor had not yet signed the form—a prerequisite for her grievance to move forward. However, the exhibit she attaches suggests only that the copy of the grievance with the supervisor's signature had not been submitted. In any event, the plaintiffs confirm before me that they are not suggesting bad faith on the part of the supervisor, but only that the formal requirement that the grievance be first signed by a supervisor was an impediment to the grievance process moving forward, as any superior would then have the ability to block the grievance process—what the plaintiffs call a flaw in the system. I am not convinced. There may be good reason for the grievance system requiring initial sign-off by an employee's immediate supervisor. In any event, the plaintiffs concede that any act by a supervisor to intentionally block a grievance may itself be grieved, in which case the issue would be put before someone else.

[101] In 2016, as National Civilian Co-Chair of the DAAG, Ms. Lightbody wrote a report on systemic racism and discrimination within the DND and the CAF, during which she received numerous emails from other Indigenous members of the Defence Team, both military and

civilian, sharing their experiences of racism and discrimination. Soon after writing the report, Ms. Lightbody was forced to go on extended sick leave on account of the stress caused by the level of racism of her colleagues, managers and leaders at the DND. Ms. Lightbody was forced to consult with a psychologist who recommended she remain on long-term disability rather than returning to a work environment that would negatively affect her mental health.

[102] Ms. Lightbody says that she resubmitted her classification grievance in September 2016. The evidence of the defendant, attaching various exhibits, is that what Ms. Lightbody submitted in September 2016 with the assistance of her union was a new, separate grievance relating to her work description [work description grievance], and that Ms. Lightbody confirmed in December 2016 that she was no longer pursuing her classification grievance. I do not think anything turns on what may simply be confusion on the part of Ms. Lightbody given the passage of time.

[103] Ms. Lightbody states that the work description grievance she filed in September 2016 was again delayed, this time on account of her supervisor trying to convince her to withdraw the complaint, and that it was only signed after she resubmitted it in 2017. The evidence of the defendant suggests that the work description grievance was proceeding without any initial delay, however, for some unexplained reason, Ms. Lightbody resubmitted it in June 2017.

[104] In any event, Ms. Lightbody's first level work description grievance was denied in January 2018. Her request to proceed to a second level hearing—assisted by her union—being delayed, Ms. Lightbody filed a complaint with the Ombudsman's Office. Following what seems

to be the intervention of the Ombudsman's Office, Ms. Lightbody's second level hearing was set for March 2023; however, it was adjourned, according to the defendant, at the request of Ms. Lightbody who required an additional week to prepare her submission. From the evidence of the defendant, I note that in June 2023, the work description grievance was placed in abeyance at the request of Ms. Lightbody's union.

[105] In the meantime, sometime in 2020, Ms. Lightbody approached her union representative to file a human rights complaint on account of systemic racism and harassment within the DND. She indicates that she felt free to file her complaint because she knew that she would eventually be leaving DND and not have to suffer any reprisals while her complaint was proceeding through the grievance system. In July 2020, her union representative, having considered the elements of her complaint, made substantial recommendations as to the approach to be taken, and even went as far as making drafting suggestions to support her claim. From what I can tell, Ms. Lightbody's human rights' complaint seems substantially similar to the claim she is bringing forward in the present action.

[106] Ms. Lightbody left DND in September 2020. It does not seem that her human rights' complaint had been filed. Ms. Lightbody says that she heard nothing further from the union representative until after she filed the underlying action in October 2021, although she does not go into any detail as to the nature of those exchanges or whether she had followed up with her union representative during the previous year. In any event, with fear of reprisal no longer being an issue, Ms. Lightbody says that she instituted the underlying action "for everyone else who is afraid to speak up".

[107] Eventually, with the assistance of her union, Ms. Lightbody filed a formal Individual Grievance with the Treasury Board in October 2022 [systemic racism and harassment grievance] about one year after the institution of the underlying action, claiming that DND had discriminated against her on the basis of her sex, race, colour, and national and ethnic origin, in violation of various provisions of the collective agreement and the CHRA. Mention of this parallel systemic racism and harassment grievance appears in the Lightbody Affidavit 1.

[108] There was an attempt at alternative dispute resolution [ADR] in December 2022 for which assistance was sought from the Conflict and Complaint Management Services within the DND [CCMS]; however, the CCMS determined that ADR was not appropriate for the systemic nature of the grievance, and in January 2023, suggested a different course of action to Ms. Lightbody and her union representative to move the systemic racism and harassment grievance forward. From the evidence of the defendant, it seems the matter was placed in abeyance upon consent of the parties, although a virtual hearing on the systemic racism and harassment grievance was eventually held in October 2023. About a month later, Ms. Lightbody's union requested to move the grievance to the third level and to discuss a settlement.

[109] In February 2024, Ms. Lightbody's union representative wrote to her, forwarding an email from the defendant's representative relating to the structure of a possible settlement in relation to both of Ms. Lightbody's outstanding grievances—the work description grievance and the systemic racism and harassment grievance—including the possibility of retroactive compensation as well as an amount in damages, the whole contingent upon Ms. Lightbody being

open to withdrawing from the present action; nevertheless, the present action continues. In essence, I have no information on the status of Ms. Lightbody's systemic racism and harassment grievance, or whether it is being held in abeyance pending the determination of the present action.

[110] The plaintiffs argue that they have sufficient evidence of a systemic problem within the DND and the CAF throughout the class period, that Ms. Lightbody's evidence goes back to 1985, and that the Ombudsman's Reports take us to the present. However, again, the issue is not whether there existed a permeating culture of harassment and discrimination within DND throughout the class period, but rather whether there is sufficient evidence of an internal grievance system not being able to provide effective redress so as to persuade me to exercise my discretion to not defer to the statutory grievance process in relation to the claims that predate the coming into force of section 236.

[111] The plaintiffs say that the grievance procedure at the time of these events was demonstrably ineffective, as demonstrated by the fact that her outstanding grievances date back to 2014. True, a considerable amount of time has elapsed since the first filing of Ms. Lightbody's original compensation grievance, but that is not the whole story. In fact, the compensation grievance was withdrawn in 2016. There may have been pockets of delays in respect of the other grievances, but the reasons for the delays are not very clear. Ms. Lightbody suggests that she was being stonewalled. Although the evidence may somewhat support her appreciation of events, on the whole, I find Ms. Lightbody's assertions to be rather speculative, in particular as regards the systemic racism and harassment grievance.

[112] The plaintiffs say that their personal situation is an exceptional circumstance and that they are not looking to impugn the entire federal public service grievance procedure as a whole, nor are they looking to undermine the collective agreements and the grievance procedures connected to them, but to simply seek justice in circumstances where systemic discrimination has infected the internal grievance procedure as regards the DND and the SNPF employees. Although the distinction the plaintiffs are making is a delicate one given that the same grievance process applies to DND employees as all other federal public servants, in the end, the plaintiffs' direct evidence simply does not bear their claim out. I have not been convinced that that grievance process under the FPSLRA cannot address the plaintiffs' concerns, nor that there is sufficient evidence in this case to establish the presence of a completely corrupt and unworkable internal grievance system to which the plaintiffs are bound. It seems to me that the affidavit of Mr. Drew Heavens, in particular exhibits C through H of his affidavit, confirms that pernicious conduct constituting systemic racism has been grieved in the past, and can be grieved in the future. It is not enough for the plaintiffs not to like the process or simply think it is ineffective — putting aside that there is no evidence regarding the effectiveness of the grievance process prior to the enactment of section 236.

[113] Consequently, I am of the view that the personal experience evidence alone is not sufficient to convince me that the statutory remedies available to the plaintiffs are unable to provide effective redress.

(b) *The Ombudsman's Reports*

[114] To buttress their personal experience evidence, the plaintiffs rely heavily on several Ombudsman's Reports which speak of the history of racism, discrimination, sexual misconduct and sexual harassment in the Canadian military, and although much has been done to address the issues, much still needs to be done as military and civilian personnel continue to recount stories of harassment, discrimination and sexual assault. The plaintiffs claim that the toxicity of racism and discrimination is well entrenched within the organization as a whole, which, according to them, is also known to have more limited grievance ability and to have problems within its grievance structure. The plaintiffs also point to the 2022 MNDAP report—where the mandate of the advisory panel was to provide the Minister of National Defence with recommendations on how to eliminate from the DND and the CAF systemic racism and discrimination—as further evidence of the toxic environment for racialized individuals within the organization. Although it is sometimes difficult to ascertain whether the comments within the reports are directed to the civilian side or the military side of the organization, the plaintiffs are looking to the reports to extrapolate their personal experiences to the entire class.

[115] The plaintiffs argue that the Defence Team to which they refer in the amended statement of claim operates as a single, cohesive and integrated unit or organization "where military members report to civilians and vice versa, and where the civilian and military entities essentially operate as one". As further evidence of an integrated system, the plaintiffs point to the 1999 Ombudsman's Report entitled *The Way Forward – Action Plan for the Office of the Ombudsman*, which indicates that the core constituency of the Ombudsman's office who file complaints includes civilian employees and not just the military and their families. Within this

military organization, approximately 20% of the employees are civilians, including all the employees at the DND and the SNPF civilians within the CAF who make up the proposed class members. Although the 80% military personnel (within the CAF) are not included in the class definition, the plaintiffs' argument is that the proposed class members are a group of civilian employees embedded within an organization that is riddled with toxicity, which bleeds through to their circumstance. In short, the plaintiffs are looking to the reports to support their claim of systemwide evidence of a grievance process that is unable to provide effective redress.

[116] The difficulty for the plaintiffs is that the reports are not standalone evidence; they can only put their firsthand evidence into context. It is the firsthand evidence which must be sufficiently compelling to convince me, either alone or within the amplified context set out in the reports, to exercise my discretion to retain jurisdiction over their claims. Under the circumstances of this case, I have not been so convinced.

[117] The difficulty I have with the reports is similar to the difficulty I have with the plaintiffs' personal experience evidence: although they set out at length the challenges DND and CAF have had with racism, sexual harassment and discrimination within the military organization, there is very little in the reports which speaks to the inability of the grievance procedure under the FPSLRA or other non-grievance recourse mechanisms to properly address systemic issues of the type being raised by the plaintiffs, or that those procedures and mechanisms are, as the plaintiffs contend, demonstrably ineffective. Care must be taken not to read any comments in those reports which address external accountability processes of the Ombudsman's Office as relating to the internal grievance procedure under the FPSLRA. In fact, Ms. Lightbody herself prepared a report

while she was in a leadership position with the DAAG, which goes mainly to the racism issue, but which contains only one paragraph that touches upon the adequacy of the DND internal grievance process. In any event, I also note that the Defence Team has different streams for grievances, and just as was the case in *Hudson*, there is no evidence to suggest that all the different grievance procedures that apply to the class members cannot provide effective redress.

[118] The plaintiffs point to a 2005 Ombudsman's White Paper entitled *Overhauling Oversight*, which deals with the Ombudsman's vision of effective military oversight. In speaking about the military culture within CAF (in which the civilians must work), the report highlights the possible conflicts between a military culture of "blind unquestioning obedience" where at times, individuals within this culture "can become single-minded, even blinkered, in extreme cases treating human beings as mere troops or military tools—abstracting them and forgetting their humanity". The plaintiffs argue that this military culture militates against there being any adequacy of an internal grievance process for a civilian workforce having to go through military personnel as part of their grievance process. The plaintiffs argue that it is this feature, of civilians having to address their complaints to individuals within a military culture, which makes this situation unique and thus worthy of the exercise of my discretion not to defer to the statutory grievance procedure. I do not agree with the plaintiffs. Although I understand the reality of what the report identifies as a military culture, there is nothing in the report to suggest that the entire grievance system is compromised because complaints must proceed through various levels involving individuals within that culture.

[119] To the contrary, the evidence suggests that Ms. Lightbody did avail herself of the internal grievance procedure when required. I appreciate that she may have only found the strength to do so after 20 years of working at DND, however, the evidence of the grievance system that exists today does not convince me that the plaintiffs are not able to obtain effective redress; the fact that Ms. Lightbody filed such a grievance in parallel with the present action, receiving union support along the way, speaks to the ability of the grievance system to provide such redress for claims of this nature.

[120] The plaintiffs say that the failures in the grievance process are similar to those set out in the *Greenwood* cases. However, it should be kept in mind that the situation in *Greenwood* did not involve the same grievance process as the one available to the plaintiffs, and the RCMP members were not unionized at the time of the Federal Court decision. Here, the plaintiffs were clear that they are not faulting the unions. Rather, they say that the union must also work within that same military culture and cannot change the military structure, and that the fault lies with the nature of the grievance structure within which the unions themselves must work.

[121] The plaintiffs further argue that the first level, internal grievance process is demonstrably ineffective because it is operationally corrupt; Ms. Lightbody states in her affidavit that complaints go through an internal chain-of-command, and that she would consequently be complaining about management to management. The plaintiffs accept that if one can get through the internal grievance process, one has access to an independent adjudication, but argue that employees are simply not getting through because they are not proceeding with the grievance process on account of fear of retribution and retaliation, or their grievances are being delayed or

outright blocked. They argue that, as confirmed by the Ombudsman's Reports, fear of reprisal is what has been inhibiting individuals from coming forward and filing grievances of this kind.

[122] I accept that the fear of being seen as not rowing in the same direction as your teammates may be more acute within a military culture, however, it seems to me that the risk of reprisal is not confined to a military culture and would exist in any event if the matter were to proceed before the public forum of the courts. In any event, as found in *Hudson*, fear of reprisal is insufficient for the Court to exercise residual jurisdiction not to defer to the statutory grievance procedure (*Hudson* at paras 100–103). The evidence is that for individual and group grievances, where the grievance contains allegations against a particular supervisor or manager, the level of grievance that may involve that individual is bypassed. In addition, policy grievances bypass the internal chain-of-command as they are filed directly with the Treasury Board. The plaintiffs argue that each case turns on its facts. That is true, however, no doubt that the presence of the union plays a large part in the assessment process.

[123] I accept that there may be some aspects where the union engages in a screening process, where the unionized employee cannot proceed unless the union agrees that there is a problem. However, if the union unreasonably refuses to take up a grievance, the employee has recourse against his or her bargaining agent under the duty of fair representation (*Hudson* at para 87). Where the refusal by the union is reasonable and does not to breach any duty of fair representation or engage in discrimination, such is the "state of affairs" and "a product of legislative choice, to which we are bound to give effect" (*Horrocks* at para 38). In any event, as stated, the plaintiffs raise no issue with the support of their union in this case.

[124] Overall, I am not convinced that the reports filed by the plaintiffs expose a statutory grievance scheme which is incapable today of providing class members with effective redress. As such, the reports are insufficient to bolster the already weak direct evidence submitted by the plaintiffs on the jurisdictional issue.

(c) *The Expert Reports of James Craig*

[125] Finally, the expert affidavits of James Craig were filed to address the affidavits of defendant which set out the different forms of recourse the class members may have, primarily under the collective agreements and thereafter different forms of redress. Individual grievances may be filed pursuant to section 208 of the FPSLRA; group grievances may be presented under section 215 of the FPSLRA, and policy grievances under section 220 of the FPSLRA. The affidavit of Drew Heavens sets out the process. Individual and group grievances follow the internal chain of command—from the employee's immediate supervisor to an intermediate level of management, then to the chief executive or deputy head of the department—while policy grievances are made directly to the Treasury Board. Thereafter, certain classes of grievances can be brought before the Federal Public Sector Labour Relations and Employment Board for independent adjudication.

[126] Mr. Craig's Report raises a number of what he refers to as challenges, impediments and limitations involved in union-led grievances and grievance arbitration, particularly as regards systemic policy grievances. Many of the issues raised go to the efficiency of the grievance process and the preferability criterion for certification of a systemic negligence claim such as the present action.

[127] The plaintiffs argue that the number of collective agreements and bargaining agents involved would make such a grievance process in relation to systemic issues unworkable. There are 19 separate collective agreements and 11 bargaining units for the DND, and 21 collective agreements with, it would seem, at least 2 bargaining units for SNPF employees. The plaintiffs' main concern is that their claim is systemic in nature, requiring either a group or policy grievance. The say that the grievance system does not permit individuals to pursue change across the DND because a group grievance may only be undertaken of one's own union, to say nothing of the need to also include non-unionized class members. I am not convinced that the seemingly more complex process of bringing group or policy grievances in this context militates in favour of not showing deference to the statutory process; this is an efficiency issue (*Hudson* at para 73). I am also not convinced that a group grievance filed with the support of one's union cannot navigate the internal processes of the grievance procedure, nor that a group or policy grievance, if successful, will not bear fruit for the employees whose unions did not take part in the grievance process. The affidavit of Drew Heavens contains evidence of several unions bringing coordinated policy grievances—including claims for damages—against the Treasury Board in 2020 regarding systemic discrimination in respect of employees of the CHRC with another policy grievance on behalf of racialized employees within Immigration, Refugees and Citizenship Canada filed in 2022.

[128] The plaintiffs argue that the situation of this case is different, given the national scope of the issues raised and because they would be dealing with a greater number of collective agreements and bargaining units. I do not think the evidence bears that out, and I am not prepared to make the leap of faith that the plaintiffs are asking of me to make in finding that the

increased number of collective agreements and bargaining units in the present case would render the grievance process on a national scale ineffective. In addition, it seems to me that the concerns raised by Mr. Craig do not relate to the issue of the effectiveness of the grievance process but rather to one of efficiency, and the fact remains that reasons of efficiency are insufficient to circumvent the grievance process (*Hudson* at para 73, citing *Bouchard*). Putting aside what often seems like advocacy on the part of Mr. Craig, nowhere does he actually say that the grievance procedure and other available recourses cannot provide effective redress to the class members. His opinion that the challenges of a piecemeal approach would constitute a "roadblock" is predicated upon class members having to proceed with all recourses at the same time to address the systemic nature of their claim. The affidavits of Mr. Drew Heavens and Genevieve Lord have me believe otherwise. I also do not see how *Stonechild v Canada*, 2022 FC 914, cited by the plaintiffs on this issue, is of any assistance to their position.

[129] I am not convinced that the plaintiffs will need to bring a series of individual grievances or human rights complaints to properly address the systemic nature of their claim. The evidence of the defendants establishes that group and policy grievances are available to address systemic issues. As regards filing a complaint with the CHRC, the affidavit of Mr. Drew Heavens establishes that complaints under the CHRA allows for comprehensive remedies, both individual and systemic.

(3) Conclusion on Claims that predate Section 236

[130] On the whole, I do not feel that I can extrapolate from the personal experiences of Ms. Lightbody and Ms. Narsing to a grievance process unable to provide effective redress

throughout an entire organization using the Ombudsman's Report so heavily relied upon by the plaintiffs or the affidavits of Mr. Craig. The thrust of both the personal experience evidence and the reports goes to the existence of a culture of racism and discrimination within DND and CAF. Neither, however, are enough, either alone or together, to convince me that the grievance procedure itself is today unable to properly deal with the systemic issues raised by the plaintiffs. The concerns raised by Mr. Craig are equally unconvincing on this issue. I therefore see no reason to deviate from the general rule set out in *Vaughan* and will defer to the statutory grievance system for the portion of the claims that arose prior to the enactment of section 236. I also am unconvinced that any amendment to the statement of claim would lead to a different result. Consequently, I would also strike the portions of the claims that predate section 236, without possibility of amendment.

[131] I appreciate that although I am not required to determine jurisdiction at this preliminary stage (*Hodgson v Ermineskin Indian Band No. 942*, 2000 CanLII 16686 (FCA) at para 5 [*Hodgson*]), I think it is important that I nonetheless do so. I find that the AGC has met his burden of establishing the lack of jurisdiction of the Court as regards claims caught by section 236. As regards the claims that predate section 236, the AGC has established the parameters for the application of the general rule of judicial restraint set out in *Vaughan*, and the plaintiffs have not convinced me that their situation comes within the exception to that rule. This is not a case where I think the jurisdictional issue needs to await that all of the evidence in the case be adduced (*Hodgson* at para 10). Having found as I have on the jurisdictional issue, I need not address the subsidiary arguments put forward by the defendant in support of the motion to strike.

V. Motion for Certification

[132] To certify a class proceeding under Rule 334.16(1) of the Rules, the Court must be satisfied that the proceeding meets all of the following five requirements:

i. The pleadings disclose a reasonable cause of action;

ii. There is an identifiable class of more than one person;

iii. The claims raise common issues of fact and law;

iv. A class proceeding is the preferable procedure for the just and efficient resolution of the common questions; and

v. There is an appropriate representative plaintiff.

[133] As regards the first requirement, the plaintiffs' inability to establish that this Court has jurisdiction to determine the post-section 236 claims and their failure to convince me to exercise my discretion to hear the pre-section 236 claims are fatal to their motion for certification as the test for certification is conjunctive; a plaintiff must meet all five of the listed criteria, or the certification motion must fail. That said, in the event I am wrong on the jurisdiction issues, I will proceed with dealing with the remaining four requirements for certification.

[134] Although the onus is on the plaintiffs with respect to the remaining issues to establish the evidentiary basis for certification, the evidentiary bar is low. There must be "some basis in fact" for each of the certification requirements. The notion of "some basis in fact" means the plaintiff

must provide some evidence to support each certification requirements, however the standard of proof is below a balance of probabilities (*Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys Consultants*] at paras 99 to 101; *Greenwood FCA* at para 94). That said, certification remains a "meaningful screening device" and does not "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny" (*Pro-Sys Consultants* at para 103). In fact, it is "part of the courts' expected role and duty to do more than a rubber-stamping and symbolic review of proposed class actions at the certification stage, and to be satisfied that the certification requirements are effectively met" (*Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 at para 292). In short, the analysis is more than mere symbolic scrutiny, but less than a determination on the merits (*Canada (Attorney General) v Nasogaluak*, 2023 FCA 61 [*Nasogaluak*] at para 20).

[135] In addition, and as discussed earlier in the section dealing with the motion to strike, public reports are admissible and have "frequently been relied on in certification matters, along with other evidence, to support that there is some basis in fact for the final four criteria for certification" (*Greenwood FCA* at para 96; *Araya v Canada (Attorney General)*, 2023 FC 1688 [*Araya*] at paras 48). However, reports are not equivalent to direct evidence, are not to be admitted for the truths of their content (*Bigeagle v Canada*, 2021 FC 504 at paras 39, 40 and 46) and their use is circumscribed in that they must be tethered to the direct evidence, and used to supplement and provide context to the direct evidence and expert evidence so as to extrapolate the experiences of the representative plaintiff to the proposed class (*Araya* at para 49). On certification, the role of the Court is not to assess the veracity or probative value of the reports

(*Bruyea v Canada*, 2022 FC 1409 at para 225), but only to use them alongside the direct evidence to demonstrate there is some basis in fact for the criteria for certification.

[136] The AGC opposes certification of the proposed class action on the basis that none of the five requirements for certification have been met. He argues that in addition to the jurisdictional bars to this Court's ability to adjudicate the plaintiffs' claims addressed in his motion to strike the amended statement of claim, (1) the proposed class is overly broad and unmanageable, (2) the proposed common issues cannot be addressed in common, (3) the plaintiffs' claims are barred by various statutes and have no connection to the proposed common issues or the evidence filed in support of the motion for certification, (4) that a class action is not the preferable procedure for resolving the plaintiffs' claims, and (5) that the representative plaintiffs cannot adequately represent the proposed class as they themselves do not possess viable claims.

A. *Identifiable Class*

[137] Rule 334.16(1)(b) requires that there be "an identifiable class of two or more persons". The plaintiffs' proposed class is composed of:

> Primary Class Members: All racialized individuals who are, or were, employees of the Department of National Defence or employees of the Staff of Non-Public Funds, Canadian Forces during the Class Period.
>
> Family Members: 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, or equivalent or comparable legislation in other provinces and territories.

[138] The proposed Class Period is 1988 to 2021. Although Ms. Narsing states she began at the DND in 1985, the start of the proposed Class Period is 1988 so as to coincide with Ms. Lightbody first experience with racism from the time she joined DND. As to the end of the class period, Ms. Narsing's evidence suggests she left active employment with DND in 2019, although she may have been on active sick leave until 2021. As for Ms. Lighbody, although there is no evidence when Ms. Lightbody returned to active employment with DND following her extended sick leave in 2016, she formally left DND in 2020. In any event, the proposed Class Period extends until the time of the filing of the present claim on October 26, 2021. Also, the potential class size is unknown; the evidence of the respondent is that the number of racialized DND and SNPF employees, based on data over periods of time, is estimated at about 8,900 for DND employees and about 4,238 for SNPF employees.

[139] All that is required for this element of the certification test is "some basis of fact" supporting an objective class definition bearing a rational connection to the common issues, and which is not dependent on the outcome of the litigation (*Greenwood FCA* at para 168; *Nasogaluak* at para 84). While class members do not all need to be identically situated, all class members must benefit from successful prosecution. The class member definition may appropriately include class members who have not suffered harm (*Pro-Sys Consultants* at paras 108-110). Consequently, I need to review the issues of sufficiency of the evidence, the clarity and objective nature of the class definition, and the extent to which it bears a rational connection to the common issues.

[140] The plaintiffs claim that the class definition is objective and sufficiently clear to permit class members to readily self-identify, and bears a rational connection to the common issues in that all class members have the shared characteristic of workplace involvement with the Defence Team, under the line of departmental authority from the Deputy Minister of National Defence [Deputy Minister], and that the pleadings focus on the military chain-of-command and abuses-of-power which allowed racism to thrive and foiled the internal recourse system. In fact, argue the plaintiffs, a similar class definition capturing DND and SNPF employees was certified in *Heyder v Canada (Attorney General)*, 2019 FC 1477 (see paras 31, 44). According to the plaintiffs, the proposed class definition constitutes a rational connection to the systemic negligence claim for racism in the military.

[141] Before me, the AGC argued the plaintiffs' proposed class definition is unclear, overly broad and likely unmanageable. He says as well that there is no basis in fact for the proposed class, and that in any event, the entire class consists of individuals with claims that are barred by various statutes and/or limitation periods.

[142] First, the AGC takes issue with the clarity of proposed class including all racialized DND or SNPF employees, regardless of whether they have experienced racism or racial discrimination themselves; he asserts that the class definition is unclear as to how to distinguish between racialized individuals who have experienced racism and discrimination as opposed to those individuals who may have not, yet may nonetheless benefit from a Charter claim as members of the racialized group within the employ of the DND and the SNPF. He also argues that there is a

problem with the identifiable nature of the class given that it is unclear how class members are to be identified, in particular given the different causes of action.

[143] I agree with the AGC that the class definition is unclear as it does not create a clearly identifiable class based on objective criteria. What the plaintiffs are suggesting in essence is two different classes with two different causes of action, and it is difficult to envisage how those two standards would fit within one class definition. I think part of the problem is caused by the comprehensive nature of the class definition. The plaintiffs accept that being identified as racialized does not necessarily mean you have experienced racism, or discrimination and harassment based on your race, religion or ethnic heritage, but argue that they have taken a comprehensive class definition approach—as opposed to a claims-based class approach—so that every racialized individual is a member of the class giving them the ability to come forward to make a claim, and also because of the potential for every racialized individual to have a Charter claim. I appreciate that it need not be shown at the certification stage that each class member be successful in establishing a claim for one or more remedies (*Hudson* at para 127), but it is the lack of a criterion of having asserted a claim which makes the class definition not sufficiently objective. I am satisfied that moving to a claims-based approach would solve the concerns over identifiability and overcome the shortcoming of the proposed class definition raised by the AGC.

[144] Which brings me to the issue of the sufficiency of the evidence. To establish some basis in fact, the plaintiffs rely not only on their direct evidence as set out in their affidavits, but also the reports that have been filed, including the expert reports of Mr. Craig. Keep in mind that I have excluded from the evidence the 2023 Senate Committee Report as well as paragraph 2 of

Lightbody Affidavit 2 which purports to introduce it, both for the purposes of the motion to strike and the motion for certification. Before me, the plaintiffs place significant emphasis on the 2022 MNDAP Report which seemingly encompasses all individuals who are in the proposed class. Although I had found that this report was not helpful to the plaintiffs on the issue of the effective redress of the statutory grievance procedure, the plaintiffs argue that the report—which deals with the history of, and provides recommendations to eliminate, systemic racism, discrimination and sexual orientation-based prejudice within the DND and the CAF—assists in creating a rational connection between the proposed class and the common issues.

[145] The plaintiffs allege that the DND, despite being a civilian organization and not part of the military, operates in a closed military system with a shared code of values and ethics, with a long history of racial and ethnic discrimination, harassment, and bullying against racialized minorities both inside and outside of its ranks. Ms. Narsing speaks of an “appalling” work environment within DND, having been singled out for her brown skin, being consistently passed over for promotion and continuously prevented from advancing in her career, and generally being convinced by her colleagues that she was worthless than white people. As for the evidence of Ms. Lightbody, I have already set out the essence of her history with racism, discrimination and racist aggression as part of the motion to strike.

[146] The AGC argues that there is no basis in fact for the proposed class, as the vast majority of the class is not grounded in the evidentiary record before me. Specifically, says the AGC, there is no evidence of any basis in fact that the proposed class should include all DND and SNPF employees in all workplaces. The AGC accepts that evidence from every workplace across

the country and for the entire timeline of the Class Period is not what is required, however argues that there needs to be some basis for a broader class beyond 4 Wing Cold Lake and 19 Wing Comox.

[147] Having reviewed the evidence and having read the reports, I am satisfied that there is some basis in fact for their allegations of systemic racism, discrimination and harassment within the DND. The plaintiffs have provided evidence intended to illustrate the systemic nature of DND's operational failures and "military culture" which reinforces an environment of racism and discrimination. The plaintiffs have described the harm they have endured leading to the need to go on extended sick leave; Ms. Lightbody has provided evidence of similar experiences of racism and racist acts beyond her base unit, and the plaintiffs seek to extrapolate their own experiences to that of the class membership as a whole through the various reports that have been filed. I recognize that the primary purpose of the reports was not always to target the nature of the claims that form the subject matter of the present proceeding, and that some reports reflect a new, more positive reality. I also note that Ms. Lightbody 2016 report mentions that there existed no significant problems in certain areas, for example the National Capital Region, suggesting "that the military life outside the NCR is a different culture or that racism is non-existent, non prevalent or not reported" (2016 Lightbody Report, para 4 on p 2). However, there are nonetheless sufficient references to a culture of persistent racial discrimination and harassment towards racialized civilian members across a larger group where the DND is particularly singled out, to satisfy me that the evidence of Ms. Lightbody and Ms. Narsing, with the support of those reports, meet the some basis in fact threshold in respect of the DND.

[148] The same cannot be said as regards the portion of the proposed class of SNPF employees. The plaintiffs argue that although neither Ms. Lightbody nor Ms. Narsing worked within the SNPF, what is most damning is that the various reports that have been filed, in particular the 2022 MNDAP Report, link the experiences of DND employees with the experiences of the civilian employees of the SNPF; that report treats both workplace experiences with systemic racism, discrimination and harassment as one, and speaks of the toxic environment within both the military and civilian workplaces, without any carve out or reserve for the different units, divisions or offices across the country. Consequently, argue the plaintiffs, it is difficult to accept the AGC's argument that the two workplace situations—distinguishing between the DND and the SNPF—must be treated as separate for the purposes of meeting the low bar of some basis in fact.

[149] I do not agree with the plaintiffs and am afraid that they are tying to use the reports in a way for which they are not intended. I am not satisfied that the low threshold of some basis in fact has been met for SNPF employees as there are insufficient material facts for that portion of the proposed class. As mentioned, neither Ms. Lightbody nor Ms. Narsing worked as SNPF employees and none of their direct evidence speaks to the specific workplace reality of SNPF employees, which the defendant's evidence suggest are often in different locations from that of DND. Although there is evidence that both DND and SNPF possibly share an integrated grievance process, there is no direct evidence that DND and SNPF employees, as civilians, face the same workplace constraints. As stated by the Federal Court of Appeal in *Greenwood FCA* at paragraph 169: "While the "some basis in fact" requirement establishes a lesser standard than the balance of probabilities, a plaintiff is nonetheless required to set out a factual underpinning to

support the existence of claims on behalf of class members …". Similarly to the case in *Greenwood FCA*, the plaintiffs' evidence and experiences cannot be extrapolated to provide some basis in fact for a different category of personnel working in different areas and under different conditions and with a different employer (*Greenwood FCA* at para 173)—such is the case regarding SNPF employees.

[150] If the reports are to be used as a jump off point to extrapolate personal experiences to the class as a whole, I would think there would have to be some evidentiary basis from which to jump off. I appreciate that Lightbody Affidavit 2 mentions that in preparing the 2016 Lightbody Report, Ms. Lighbody spoke with numerous civilian and military members across Canada including employees of the SNPF, however she relates none of their stories and does not specifically confirm that the workplace experience of the SNPF employees she spoke with was similar to her own at DND. That is not to say that the racialized employees of the SNPF did not suffer from systemic racism while undertaking their functions in support of the CAF, however the issue before the Court now is to determine whether the record before me meets the test for certification of a class proceeding—a much narrower issue. Also, the fact that the Deputy Minister may be responsible for human resource management throughout the DND and the SNPF, by itself, is not compelling so as to change the outcome of my finding. On the whole, I find that there is insufficient evidence to establish some basis in fact for the claims of the SNPF employees.

[151] As regards the proposed Family Class, it is entirely a derivative claim, and the plaintiffs argue that even if Ms. Lightbody and Ms. Narsing do not have family members who can assert a

claim, that should not preclude other individuals who are members of the proposed Family Class from asserting a claim derivative of Primary Class members. However, the only evidence going to the experience of family class members is a single reference to the Ombudsman's Office having spoken with family members of members of the DND and the CAF in one of the Ombudsman's Reports which dealt primarily with overhauling the internal functioning of the Ombudsman's own office. The plaintiffs characterized such a reference as "not a lot" and concede that there is insufficient evidence to support the certification of the family class before the Court at this time; they ask that this portion of the claim be struck with leave to amend, and citing *Tippett v Canada*, 2021 FC 1338 [*Tippett*], request that I permit them to file additional evidence on the issue of the family class without prejudice to the AGC's ability to object. In *Tippett*, this Court certified a proposed class, and the plaintiff in that case brought a motion to expand the class definition to include sea cadets. While the motion was unsuccessful, at paragraph 36, Justice Southcott held that: "if new evidence of abuse of sea cadets had been adduced, that would almost certainly have warranted an expansion of the class definition".

[152] I cannot agree with the plaintiffs as it is not the role of the Court to grant adjournments "in order to permit those seeking certification to cooper up their motion or to help them meet the substantive certification requirements under Rule 334.16. The burden of satisfying the certification requirements is solely upon those seeking certification and a motions judge, of course, must remain a neutral arbiter of whether those requirements have been met" (*Buffalo v Samson Cree Nation*, 2010 FCA 165 at paras 12–13).

[153] On the evidence before me, I am afraid the inclusion of the Family Class suffers from the same insufficiency of evidence which struck the employees of the SNPF, with the plaintiffs looking to make use of the report in the same way in which I found inappropriate with respect the inclusion of those employees within the class definition. In short, I find that there is insufficient evidence to establish some basis in fact for the claims of Family Class Members (*Greenwood FCA* at para 169; *Canada v Greenwood*, 2024 FCA 22 at para 32). The plaintiffs' reliance on *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 (CanLII), [2001] 2 SCR 534 at para 41 on this issue seems to be misplaced.

[154] As regards whether the proposed class definition bears a rational connection to the Common Issues, I am satisfied that it does as regards the DND specific Primary Class Members as they have the shared characteristic of workplace involvement with the DND, under a line of departmental authority from the Deputy Minister, with the pleadings focusing on the military chain-of-command and abuses of power as supported by the reports.

[155] As to whether the class definition spans a time period which does not take into account time bar, as was the case in *Greenwood FCA* and *Hudson*, I am not convinced that I need to consider addressing limitation periods or statutory bars to compensation at the certification stage, as this issue is heavily dependent on a factual inquiry.

[156] Neither party has proposed an alternative class definition. Having considered the matter, and in line with my findings, I would trim down the proposed class definition proposed by the plaintiffs by removing reference to SNPF employees and to the Family Class, and by inserting a

provision so that it becomes a claims-based class definition. Also, although the temporal parameter remains the Class Period, the spatial parameter must bear a rational connection to the Common Issues which refer to the class members' workplace. Accordingly, and subject to my finding on the motion to strike, I find that the evidence adduced by the plaintiffs establishes "some basis in fact" to support the following alternative class definition:

> Class Members: All racialized individuals who are, or were, employees of the Department of National Defence during the Class Period who allege having experienced racism, racist acts, racial discrimination and racial harassment by the Department of National Defence management and staff at their workplace.

B. *Common Issues of Fact or Law*

[157] I will address the common issues of fact and law on the basis of the narrower, alternative class definition that I set out above (*Jensen v Samsung Electronics Co. Ltd*., 2023 FCA 89 [*Jensen*] at para 177). The plaintiffs propose the following common issues of fact and law be certified pursuant to Rule 334.16(1)(c):

> i. Did the Defendant owe a duty to the Plaintiffs and Class Members to take reasonable steps in the operation or management of the DND and the CAF to provide a workplace free from discrimination on the basis of race, national or ethnic origin, colour and religion?
>
> ii. If the answer to Common Issue # 1 is yes, did the Defendant, through its agents, servants and employees, breach its duty to the Plaintiffs and Class Members?
>
> iii. Was the Defendant, through its agents, servants and employees, obligated to respect the Plaintiffs and Class Members' rights under the *Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms* and to provide a workplace free from discrimination on the basis of race, national or ethnic origin, colour and religion?

> iv. If the answer to Common Issue #3 is yes, did the Defendant, through its agents, servants and employees, breach the rights of the Plaintiffs and Class Members to work in an environment free from discrimination on the basis of race, national or ethnic origin, colour and religion, pursuant to section 15 of the *Canadian Charter of Rights and Freedoms* and section 10 of the Quebec *Charter of Human Rights and Freedoms*?
>
> v. Was the Defendant's conduct a reasonable limit prescribed by law within the meaning of section 1 of the *Canadian Charter of Rights and Freedoms* and section 9.1 of the Quebec *Charter of Human Rights and Freedoms*?
>
> vi. If the answer to either or both Common Issue #2 and Common Issue #4 is yes, was the Defendant vicariously liable for its agents', servants' and employees' failure to provide a workplace free from discrimination on the basis of race, national or ethnic origin, colour and religion?
>
> vii. Does the conduct of the Defendant justify an award of punitive damages, and if so, in what amount?

[158] I should mention that the plaintiffs had initially also proposed a common issue relating to aggregate damages, however confirmed at the hearing before me that they were no longer seeking to certify such a common question at this time. This of course does not preclude the common issues judge from concluding that the requirements for an aggregate award of damages have been met and awarding damages on this basis (*Nasogaluak* at para 115; *Pro-Sys Consultants* at para 134).

[159] This prong of the certification test asks whether the class members' claims raise common questions of law or fact, and whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis (*Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 [*Vivendi Canada*] at para 41; *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46, [2001] 2 SCR 534 [*Dutton*] at para 39). The common issues requirement has a two-step

approach: for each common issue, there has to be some basis in fact that it (1) actually exists in fact, and (2) can be answered in common across the entire class [two-step approach] (*Jensen* at paras 27, 76 and 80).

[160] The threshold is some basis in fact, and the Court need not assess the merits of the case or to weigh the evidence. Rather, the Court should take a purposive approach on this analysis (*Dutton* at para 39; *Greenwood FC* at para 60); as stated by the Federal Court of Appeal in *Greenwood FCA*: "the requisite commonality will exist if the common issue will meaningfully advance class members' claims, which may be said to be the case unless individual issues are overwhelmingly more significant" (*Greenwood FCA* at para 180). In the end, the answer to each question need not be identical and may vary from one member of the class to another, however the answers to the common question must serve "to at least advance the resolution of every class member's claim" (*Vivendi Canada* at paras 45 and 46; *Dutton* at para 39). As stated by the Supreme Court in *Dutton*: "all members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests" (*Dutton* at para 40).

[161] As to common issues 1 and 2, the AGC takes the position that the defendant has no common law duty towards class members, and that any duty it has is limited to the collective agreement and the various harassment policies. That may be so, but that goes to the merits to the question, and for now, I certainly see some basis in fact supporting the plaintiffs' argument. Although the plaintiffs concede that there is no case law supporting their proposition of a duty of care owed by employers to provide a workplace for employees free from discrimination on the

basis of race, national or ethnic origin, colour and religion, they argue that such a proposed tort has survived two motions to strike before this Court, in *Hudson* and *McMillan*, both cases involving employment contracts. Accordingly, the plaintiffs cite *Greenwood FCA* at paragraph 146, in support of their argument for the recognition of a new duty of care under the principles established in *Anns v Merton London Borough Council*, [1978] AC 728 (HL) [*Anns*]. At this stage of the certification process, I am not inclined to deny the plaintiffs the right to make that argument (*Greenwood FC* at para 63; *Cloud v Canada (Attorney General)*, 2004 CanLII 45444 (ON CA) at para 97).

[162] The plaintiffs argue that the proposed common issues relate to systemic conduct and that all class members will benefit from a finding that the defendant owes the proposed class a duty to provide a workplace free of systemic racism and discrimination and that the defendant breached this duty on a systemic level. The AGC argues that the proposed common issues cannot be resolved in common as they presume a universal experience for any racialized employee working across all DND workplaces. In addition, the AGC argues that there is no evidentiary foundation for the common issue of systemic negligence, that the Charter issues cannot be determined without individual fact finding, that vicarious liability cannot be resolved in common, and that there is no basis in fact for common issue in damages.

[163] First, the AGC submits that the common issues presume a universal experience for all racialized individual across different workplaces and a 35-year span. I do not agree. Neither the fact that abuses may have taken place across a number of institutions or workplaces, nor the systemic nature of the claims, have prevented this Court in the past from certifying common

issues similar to the ones proposed by the plaintiffs (see *Nasogaluak*, *Greenwood FCA* and *BW v Canada (Attorney General)*, 2024 FC 77 [*BW*]) and I see no reason to find otherwise in this case. I accept that there are different workplaces, different job responsibilities and different locations, but the evidence and reports suggest the purported toxic culture within DND which forms the basis of the plaintiffs' claims goes well beyond the workplaces of Ms. Lightbody and Ms. Narling and suggest a problem exists or existed system wide. As mentioned, the AGC has conceded that there need not be evidence from every workplace in every part of the country to support the claim.

[164] Commonality focuses on the issues, and requisite commonality exists if the common issue will meaningfully advance class members' claims. I appreciate that there may be individual issues to address for each class member and that the particular experiences of racialized individuals holding varied roles across what is today, according to the defendant's evidence, over 70 different occupational groups and subgroups, may be different, however the common issues relate to duties and rights that are purportedly owed to all of them and supposedly breached by the defendant, in particular the top echelons of the DND and across those groups and subgroups within DND. These are duties and rights which transcend the individual circumstances of their employment such as different workplaces, different times and in different portfolios of the DND. The claims-based approach to the class definition should alleviate the concern that the common issues cannot be determined in common. At the same time, I have not been convinced that the individual issues of class members will significantly overwhelm the common issues.

[165] The AGC also agues that the Court's determination of the common issue would not benefit the individual class members' claims, as there remains a need to address individualized issues. Again, I must disagree with the AGC. As noted by this Court in *BW*, "[f]lexibility is infused into the Rules, and there are numerous avenues to resolve individual issues that may arise" including the ability to create subclasses, to have court-supervised individual assessment processes, and ultimately for decertification in the event matters become unmanageable and the conditions for certification are no longer met (*BW* at para 120).

[166] Second, I have already found there to be an evidentiary foundation for the common issue of systemic negligence within DND and I do not consider the systemic negligence issues to be too general to account for the complexities of experiences of the class members across DND. I appreciate that the evidence from Ms. Lightbody and Ms. Narsing speaks of individual experiences, however Ms. Lightbody does recount similar stories from other racialized individuals in the preparation of the 2016 Lightbody Report, and the remaining reports filed by the plaintiffs succeed in extrapolating those personal experiences to suggest that the problem of racism within DND is systemic in nature. Whether such failures within DND translate to a breach of duty owed to the class members by the defendant is precisely the questions that form the basis of common issues 1 and 2.

[167] To require direct evidence of a systemic problem at the some basis in fact stage of certification belies the very nature of a systemic claim—a top-down claim that is not necessarily grounded on personal circumstances and, I would add, rarely evident at an individual level (*Nasogaluak* at paras 8, 71 and 95; *BW* at para 100). In that way, the challenges of establishing a

systemic negligence claim are similar to establishing a reasonable apprehension of bias against an administrative tribunal; rarely is evidence of what is in the mind of the decision-maker available, so what is left is the establishment of such bias through a collection of various indicia of bias. The suggestion, as is being made by the AGC, that to meet the some basis in fact threshold the plaintiffs must have shown evidence of the systemic failure, say for example by producing evidence of policies of institutional condoning of racism and discrimination, is untenable.

[168] I appreciate, as was the case in *Greenwood FC*, that the determination of whether there was a breach of any duty of care referred to in common issue 1 possess a challenging feature of the present claim, however challenging as it may prove to be for the plaintiffs, I too feel that such challenges to be insufficient to deny certification (*Greenwood FC* at para 63). I appreciate that, unlike the matter before me, the situation in *Greenwood FC* involved the application of a common sexual harassment policy throughout the RCMP. Here, the AGC points to a number of anti-discrimination provisions in the various collective agreements and to series of harassment policies and regulations which deal with discrimination and harassment as a form of discrimination, all of which call for the creation of measures to prevent and protect against workplace harassment, and of a general framework for the investigation and resolution of workplace harassment complaints within departments and agencies in the core public administration. At their core, the collective agreements in evidence call for a workplace free of discrimination; fair enough. The policies identified by the AGC look to create a methodology to identify, track and deal with circumstances of discrimination. However, I am not convinced that what the AGC refers to as a patchwork of collective agreements and policies affect the

commonality of the systemic negligence common issues and the ability of the Court to address them. Again, we must keep in mind that a purposive approach is called for.

[169] As for the common issues under the Charter, the AGC accepts that allegations of Charter liability have been certified by this Court as common issues in the past, but argue that those cases were specifically where the impugned law or policy applied to all members of the putative class; he says that is not the case here. I disagree. First, both section 15 of the Charter and section 10 of the Quebec Charter deal with the same issue, equality rights. Also, the impugned conduct is similar for all class members, *to wit*, the alleged breach of an obligation to provide a workplace free from discrimination. The fact that the class definition is claims-based focuses the analysis on specific individual circumstances which share a common issue, i.e., whether there has been a breach of the class member's right to a workplace free from racism and discrimination. The AGC points to *Cirillo v Canada*, 2021 ONCA 353 [*Cirillo*], for the proposition that the claims must arise from a single course of conduct giving rise to the alleged breaches (*Cirillo* at para 65). Here, I think the plaintiffs have made out a case of some basis in fact to anchor their claim that the failure to provide a workplace free from discrimination on the basis of race, national or ethnic origin, colour and religion stemmed from a singular course of conduct by DND and its management.

[170] As regards the common issue relating to vicarious liability, this issue found its way into the common issues previously certified in by this Court (*Hudson* at paras 145 to 153; *Greenwood FCA* at paras 182–186). The AGC criticize the common issue because the large number of individuals would, argues the AGC, make it impractical to determine whether the defendant was,

in each case, vicariously liable for the acts of its servants, agents and employees; the issue is entirely dependent upon an individual multi-factorial fact-finding analysis. However, the same argument failed in both *Hudson* and *Greenwood*, as such an argument ignores the top down systemic nature of the allegations.

[171] The AGC points to the decision of *John Doe (GEB #25) v The Roman Catholic Episcopal Corporation of St. John's,* 2020 NLCA 27 [*John Doe*] at paragraph 58, citing the Supreme Court decision in *Bazley v Curry*, 1999 CanLII 692 (SCC), [1999] 2 SCR 534 [*Bazley*], which provides guidelines for courts in determining vicarious liability. The questions to consider include "whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability". In addition, the Court in *Bazley* stated that "vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom" (*Bazley* at para 41).

[172] I do not see how those cases assist the AGC. Both *Bazley* and *John Doe* dealt with situations where the fault was that of the employee towards third parties, and the issue was whether the employer was vicariously liable for such fault in which it took no part. Liability was dependent upon whether the unauthorized acts were "so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act" (*Bazley* at para 10). Here, the purported fault or breach, if any, is that of the defendant itself, acting through its agents, servants and employees, for failure to provide a workplace free from discrimination. As such, given the class definition, it may be relatively straightforward for the common issues

judge to “openly confront the question of whether liability should lie against the employer” (*Bazley* at para 41).

[173] The AGC tries to distinguish the similar common issue certified in *Hudson* and *Greenwood* on the basis that, unlike the questions certified in those cases, common issue 6 is not tied to the operation and management of DND, but simply asks whether the defendant is vicariously liable for the failure of its agents, servants and employees. Again, as mentioned, the defendant acts through its agents, servants and employees who are there to implement policies to respect whatever duty may be owed by the defendant towards the class members. I see the distinction which the AGC is trying to make as being one without a difference in this case.

[174] As regards punitive damages, the AGC argues that, to the contrary, the reports filed by the plaintiffs actually speak to an improvement in culture within the DND. I agree, but that is not all the reports speak of, and the extent to which punitive damages may be appropriate will be the job of the common issues judge. It is not for me to make that assessment at this point. Suffice it to say that the history of Ms. Lightbody and Ms. Narsing’s experience within DND provides some basis in fact to allow for this common issue to survive.

[175] I agree with the plaintiffs in that the questions here focus on the conduct of DND management, and as was stated in *Greenwood FCA*, although a finding of liability does require an individual assessment, the question that is being certified “does not depend upon a finding of liability to any individual class member” (*Greenwood FCA* at para 185). Moreover, the facts

relevant to the punitive damages claim are substantially similar to those relevant to a vicarious liability assessment. Here, I find that there does exist some basis in fact on this issue.

[176] All in all, and subject to questions of jurisdiction under FPSLRA, the plaintiffs have met the criteria requiring that claims of class members raise common questions of law or fact in relation to the alternative class definition. I find that the proposed common issues are appropriate for moving the proceeding forward and for avoiding duplication of legal analysis in light of the individual issues; the answers to the common questions will thereafter simplify what I expect will be the determination of each individual class member's personal circumstances. Although the evidence at this stage may not answer all the questions for which answers are sought, as was stated by the Federal Court of Appeal in *Nasogaluak*: "the evidence on a certification motion need not establish the case on the merits; it need only show some basis in fact for the common issues" (*Nasogaluak* at para 104, citing *Pro-Sys Consultants* at paras 100, 110).

C. *Preferability*

[177] Here, the plaintiffs must establish that the class proceeding is the preferable procedure for the fair, efficient and manageable resolution of the common issues; preferability would include a review of all reasonably available alternative means of adjudication of the dispute which the court has before it (*Hollick v Toronto (City)*, 2001 SCC 68 (CanLII), [2001] 3 SCR 158 [*Hollick*] at paras 28 and 31). As stated by the Federal Court of Appeal, the preferability criterion for certification raises very similar, if not identical, questions as that which I have already considered under the jurisdictional issue (*Greenwood FCA* at para 98).

[178] The AGC accepts that he has the burden of establishing the existence of other means which may provide for the fair, efficient and manageable resolution of the common issues, at which point the burden shifts back to the plaintiffs to show that the class procedure is the preferable proceedings. The AGC argues, as it did in *Hudson*, that no court has ever found a class proceeding to be preferable to a collectively bargained grievance process, let alone one that is supplemented by access to other avenues of redress (*Hudson* at para 161).

[179] There is no argument being made that individual litigation is a viable option. By alternative procedures, the parties have confined themselves to the options set out in the defendant's affidavits, i.e., the internal grievance procedure, the *Canadian Human Rights Act*, the *Public Service Employment Act*, the Treasury Board harassment policies, the *Canada Labour Code*, the *Government Employees Compensation Act*, the *Public Servants Disclosure Protection Act* and complaint mechanisms under the Informal Conflict Management Systems [alternative available recourses].

[180] Also, as was recently stated by the Federal Court of Appeal in *Wenham v Canada (Attorney General),* 2018 FCA 199 [*Wenham*], "the preferability of a class proceeding must be "conducted through the lens of the three principal goals of class action, namely judicial economy, behaviour modification and access to justice": *Fischer* at para. 22" (*Wenham* at para 78).

[181] The affidavits of Drew Heavens, Genevieve Lord and Barbara Williams identify the alternative available recourses to address the plaintiffs' claims. The plaintiffs principally argue

that those recourses alone or together are clearly not preferable to a class proceeding, although they accept that this Court in *Hudson* found otherwise. As such, and assuming, as conceded by the plaintiffs, they get over the section 236 bar, the plaintiffs point to the report of Mr. Craig, prepared in direct responses to the defendant's affidavits, to underscore the challenges that class members would face in the event they were to engage those recourses.

[182] I have reviewed the evidence. Up front, it seems to me that the grievance process would be less costly and more efficient than a class proceeding as it may facilitate an informal resolution to the claims. As mentioned in *Hudson*, the grievance process is consistent with Parliament's legislative scheme, and this allows for members of the relevant bargaining unit to receive assistance and representation from their union at any stage of the process. The AGC flags the expertise in labour and employment issues that the grievance process provides, which the courts cannot always supply, and points as well to the availability of group or policy grievances through which employees may grieve collectively. I have already discussed the prospect of a group or policy grievance being advanced to address the systemic nature of the claims. Such grievances, although limited to the bargaining agents involved, would bring systemic behaviour modification notwithstanding the concerns of the plaintiffs to the contrary.

[183] As mentioned earlier, Mr. Craig raises challenges and limitations inherent with each alternative available recourse, however no doubt each available recourse, including litigation, has its own limitations and challenges. In any event, as we are reminded in *Hudson*, "court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress

for the substance of the plaintiffs' claims, and to do so in a manner that accords suitable procedural rights (*Fischer* at para 37)" (*Hudson* at para 158).

[184] Mr. Craig gives his opinion regarding proceedings before the CHRC and the Canadian Human Rights Tribunal [Tribunal], however he does not state that he has had any specific experience with the CHRC or having appeared before the Tribunal. I accept that there are procedural challenges to making a human rights complaint, and also note that the Tribunal is limited in the amount it can award, but I do not consider those challenges or limitations to make the present proceedings the preferable vehicle of redress. The CHRC route allows for the appointment of an investigator empowered to compel production of information and/or appoint a conciliator. If the matter were to go before the Tribunal, the CHRC may present evidence and make submissions in the public interest. In fact, representative human rights complaints may be brought before the CHRC (*Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at para 227). All avenues would be at no additional cost to the plaintiffs who, where they are members of a bargaining unit, would presumably have the support of their union. Keep in mind that here, the plaintiffs have no complaint against their union and make no claim that their union was not available to assist them with any claim they wished to bring forward. In fact, the evidence, at least as regards Ms. Lightbody, would seem to establish otherwise.

[185] Nor have I been convinced that the limitations to filing individual, group or policy grievances militate in favour of the class action being the preferred route. It is interesting to note that Mr. Craig expresses the view at paragraph 57 of his report, that the grievance procedure, in

contrast with a complaint to the CHRC, is the preferable method of resolving discrimination cases. The grievance process is simpler for class members as they will have the support of their union if they are part of a bargaining unit. It will be less expensive. The investigation is conducted on their behalf. In fact, Ms. Lightbody has already filed a grievance for the very same complaints she is looking to address in the present action. I am satisfied that group and policy grievances, if successful, will provide the proper mechanism for the promotion of systemic behaviour modification on the part of the defendant.

[186] There is also the question of how long the process will take. The parties are only at the starting line in respect to the present claim. Coming to a resolution of a class action may take years. On the other hand, the evidence of the defendants suggest that the grievance process may offer a resolution in a matter of months with a more flexible process at its core.

[187] The plaintiffs made clear that they are not suggesting that the alternative available recourses are not useful recourses, but only that each has limitations, challenges and problems, and that they are not preferable to the coordinated approach to the class proceeding. I have not been convinced. It also bears repeating that there is no evidentiary foundation to conclude that the various unions are institutionally incapable of assisting the class members with their grievances and complaints.

[188] Overall, and did this Court in *Hudson*, I find that the internal grievance process, supplemented by the other alternative available recourses, remains the preferable procedure for resolving the claims brought forward by the plaintiffs. Looking at this matter from the lens of

judicial economy, behaviour modification and access to justice, I find that having the plaintiffs proceed through the internal grievance process and other internal recourse mechanisms to which they have access would more readily serve the interests of judicial economy, would allow for corrective action so as to promote systemic behaviour modification and insure access to justice. Consequently, I find that the plaintiffs have failed to satisfy the requirement in Rule 334.16(1)(d) that a class proceeding be the preferable procedure for resolving their complaints.

D. *There is an Appropriate Representative Plaintiff*

[189] The proposed representative plaintiffs do not need to be "typical" of the class, or the "best" possible representatives—but the Court should be satisfied they will vigorously and capably prosecute the interests of the class (*Hudson* at para 176). I find that the plaintiffs meet the requirements of acting as representative plaintiffs in these proceedings (*Dutton* at para 41). The AGC's concerns over the representative plaintiffs not being able to fairly and adequately representing interests of the SNPF proposed class is no longer an issue given the trimming down of the class definition.

[190] Other than that, both representative plaintiffs have said they are willing to serve as representative plaintiffs. Their affidavits state they will fairly and adequately represent the interests of all class members, are committed to acting in the class members' best interests, and that their interests are not in conflict with other class members regarding the common questions. They have disclosed their counsel fee and disbursement agreements, and produced, at least at this point, what seems to be a reasonable yet still barebones litigation plan, although I am not being asked to approve it at this time. I am satisfied with the competence of class counsel.

[191] The AGC submits that Ms. Narsing's claim is entirely statutorily barred by section 236 of the FPSLRA, and also points to both Ms. Narsing and Ms. Lightbody's entitlement to damages under the *Government Employees Compensation Act*, RSC 1985, c G-5, for alleged psychological injury as another statutory bar to their claim. However, it is neither necessary nor appropriate to address bars to compensation at the certification stage (*Hudson* at para 180). Additionally, the plaintiffs have conceded to the striking of the family class.

VI. Conclusion

[192] I am satisfied that the plaintiffs should be granted leave to file their additional evidence, with the exception of paragraph 2 of Lightbody Affidavit 2 and the report it attaches, and that the responding affidavit of Ms. Myers should be given the same benefit. For the reasons that I have provided, the motion for certification will be denied on jurisdictional and preferability grounds, and the Amended Statement of Claim struck without leave to amend.

JUDGMENT in T-1650-21

THIS COURT'S JUDGMENT is that:

1. Leave is granted for the filing of the affidavit of James Craig affirmed on December 22, 2023, the affidavit of Karen Lightbody affirmed February 8, 2024, the affidavit of Karen Lighbody affirmed on February 29, 2024 and the affidavit of Laurie-Lynn Myers affirmed on March 20, 2024. Paragraph 2 and Exhibit A of the affidavit of Karen Lightbody affirmed on February 8, 2024 are deemed struck from the record.

2. The plaintiffs' motion for certification is denied.

3. The Attorney General of Canada's motion to strike the Amended Statement of Claim is granted, without leave to amend.

4. There will be no order as to costs in the matter.

"Peter G. Pamel"
Judge

ANNEX

Federal Public Sector Labour Relations Act, SC 2003, c 22, s 2	*Loi sur les relations de travail dans le secteur public fédéral*, LC 2003, c 22, art 2
Definitions	**Définitions**
206 (1) The following definitions apply in this Part.	206 (1) Les définitions qui suivent s'appliquent à la présente partie.
employee means a person employed in the public service, other than	***fonctionnaire*** Personne employée dans la fonction publique, à l'exclusion de toute personne :
(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;	a) nommée par le gouverneur en conseil, en vertu d'une loi fédérale, à un poste prévu par cette loi;
(b) a person locally engaged outside Canada;	b) recrutée sur place à l'étranger;
(c) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;	c) qui n'est pas ordinairement astreinte à travailler plus du tiers du temps normalement exigé des personnes exécutant des tâches semblables;
(d) a person who is an *officer* as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act*;	d) qui est un *officier*, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du Canada*;
(e) a person employed on a casual basis;	e) employée à titre occasionnel;
(f) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been	f) employée pour une durée déterminée de moins de trois mois ou ayant travaillé à ce titre pendant moins de trois mois;

so employed for a period of three months or more;

(g) a *member* as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act* who occupies a managerial or confidential position; or

(h) a person who is employed under a program designated by the employer as a student employment program. (f*onctionnaire*)

g) qui est un *membre*, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du Canada*, et qui occupe un poste de direction ou de confiance;

h) employée dans le cadre d'un programme désigné par l'employeur comme un programme d'embauche des étudiants. (*employee*)

…

[…]

Right of employee

208(1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award; or

(b) as a result of any occurrence or matter affecting his or her terms

Droit du fonctionnaire

208(1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé

a) par l'interprétation ou l'application à son égard :

(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,

(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

and conditions of employment.

[Emphasis added.]

[Je souligne.]

Reference to adjudication

209(1) An employee who is not a member as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act* may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(c) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(d) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason

Renvoi d'un grief à l'arbitrage

209(1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un membre, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du Canada*, peut renvoyer à l'arbitrage tout grief individuel portant sur :

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la *Loi sur la gestion des finances publiques* pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour

that does not relate to a breach of discipline or misconduct, or	toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,
(ii) deployment under the *Public Service Employment Act* without the employee's consent where consent is required; or	(ii) la mutation sous le régime de la *Loi sur l'emploi dans la fonction publique* sans son consentement alors que celui-ci était nécessaire;
(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.	d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).
Application of paragraph (1)(a)	**Application de l'alinéa (1)a)**
(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.	(2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)a), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.
…	[…]
Designation	**Désignation**
(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).	(3) Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)d), tout organisme distinct.
Group Grievances Presentation	**Griefs collectifs Présentation**

Right of bargaining agent

215(1) The bargaining agent for a bargaining unit may present to the employer a group grievance on behalf of employees in the bargaining unit who feel aggrieved by the interpretation or application, common in respect of those employees, of a provision of a collective agreement or an arbitral award.

Droit de l’agent négociateur

215(1) L’agent négociateur d’une unité de négociation peut présenter un grief collectif à l’employeur au nom des fonctionnaires de cette unité qui s’estiment lésés par la même interprétation ou application à leur égard de toute disposition d’une convention collective ou d’une décision arbitrale.

Consent required

(2) In order to present the grievance, the bargaining agent must first obtain the consent of each of the employees concerned in the form provided for by the regulations. The consent of an employee is valid only in respect of the particular group grievance for which it is obtained.

Consentement

(2) La présentation du grief collectif est subordonnée à l’obtention au préalable par l’agent négociateur du consentement — en la forme prévue par les règlements — de chacun des intéressés. Le consentement ne vaut qu’à l’égard du grief en question.

Single portion

(3) The group grievance must relate to employees in a single portion of the federal public administration.

Même secteur

(3) Le grief collectif ne peut concerner que les fonctionnaires d’un même secteur de l’administration publique fédérale.

Limitation

(4) A bargaining agent may not present a group grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*.

Réserve

(4) L’agent négociateur ne peut présenter de grief collectif 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*.

Limitation

(5) Despite subsection (4), a bargaining agent may not present a group grievance in respect of the right to equal pay for work of equal value.

Réserve

(5) Par dérogation au paragraphe (4), l'agent négociateur ne peut présenter de grief collectif relativement au droit à la parité salariale pour l'exécution de fonctions équivalentes.

Limitation

(6) If an employee has, in respect of any matter, availed himself or herself of a complaint procedure established by a policy of the employer, the bargaining agent may not include that employee as one on whose behalf it presents a group grievance in respect of that matter if the policy expressly provides that an employee who avails himself or herself of the complaint procedure is precluded from participating in a group grievance under this Act.

Réserve

(6) Si le fonctionnaire choisit, pour une question donnée, de se prévaloir de la procédure de plainte instituée par une ligne directrice de l'employeur, l'agent négociateur ne peut inclure ce fonctionnaire parmi ceux au nom desquels il présente un grief collectif à l'égard de cette question si la ligne directrice en question prévoit expressément que le fait de se prévaloir de la procédure rend impossible la présentation d'un grief sous le régime de la présente loi.

Limitation

(7) A bargaining agent may not present a group grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Réserve

(7) L'agent négociateur ne peut présenter de grief collectif portant sur une mesure prise en vertu d'une instruction, d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Order to be conclusive proof

Force probante absolue du décret

(8) For the purposes of subsection (7), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, a direction or a regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

(8) Pour l'application du paragraphe (7), tout décret du gouverneur en conseil constitue une preuve concluante de ce qui y est énoncé au sujet des instructions, directives ou règlements établis par le gouvernement du Canada.

…

[…]

Determination of reasonableness of opinion

230 In the case of an employee in the core public administration or an employee of a separate agency designated under subsection 209(3), in making a decision in respect of an employee's individual grievance relating to a termination of employment or demotion for unsatisfactory performance, an adjudicator or the Board, as the case may be, must determine the termination or demotion to have been for cause if the opinion of the deputy head that the employee's performance was unsatisfactory is determined by the adjudicator or the Board to have been reasonable.

Décision sur le caractère raisonnable de l'avis

230 Saisi d'un grief individuel portant sur le licenciement ou la rétrogradation pour rendement insuffisant d'un fonctionnaire de l'administration publique centrale ou d'un organisme distinct désigné au titre du paragraphe 209(3), l'arbitre de grief ou la Commission, selon le cas, doit décider que le licenciement ou la rétrogradation étaient motivés s'il conclut qu'il était raisonnable que l'administrateur général estime le rendement du fonctionnaire insuffisant.

No Right of Action
Disputes relating to employment

Absence de droit d'action
Différend lié à l'emploi

236(1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.

Application

(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.

Exception

(3) Subsection (1) does not apply in respect of an employee of a separate agency that has not been designated under subsection 209(3) if the dispute relates to his or her termination of employment for any reason that does not relate to a breach of discipline or misconduct.

…

[Emphasis added.]

236(1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.

Application

(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.

Exception

(3) Le paragraphe (1) ne s'applique pas au fonctionnaire d'un organisme distinct qui n'a pas été désigné au titre du paragraphe 209(3) si le différend porte sur le licenciement du fonctionnaire pour toute raison autre qu'un manquement à la discipline ou une inconduite.

[…]

[Je souligne.]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1650-21
STYLE OF CAUSE:	KAREN LIGHTBODY AND RAMA NARSING v HIS MAJESTY THE KING
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 9, 10 AND 11, 2024
JUDGMENT AND REASONS:	PAMEL J.
DATED:	AUGUST 28, 2025

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