

Supreme Court declines to review certification of RCMP bullying and harassment class action

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On March 17, 2022, the Supreme Court of Canada dismissed the federal government's application for leave to appeal a decision certifying a class action against the RCMP. The class action, which was certified by the Federal Court in 2020, alleges that RCMP leadership fostered and condoned a work environment of systemic bullying, intimidation and harassment.

What you need to know

- The federal government, on behalf of the RCMP, unsuccessfully argued that the plaintiff employees' claims should not proceed as a class action because there are "legislative remedies and internal processes within the RCMP" that could provide redress¹.
- The Federal Court rejected this argument, in part because the internal processes referenced by the government formed a "core component" of the claims advanced by the plaintiffs², and certified all of the plaintiffs' proposed common issues³.
- The Federal Court also rejected the government's argument that the claim did not disclose a reasonable cause of action. In doing so, the Federal Court indicated a willingness to recognize a new tort of workplace harassment⁴.
- The Federal Court of Appeal affirmed this approach, noting that there is "divided appellate authority" on whether such a tort exists but it is not "plain and obvious" that the claim will fail⁵.
- The issue of aggregate damages continues to have mixed success in being certified in workplace class actions⁶. An aggregate damages issue was certified by the Federal Court but de-certified on appeal because the plaintiffs tendered no evidence to suggest a method for the assessment, and their litigation plan was equally silent on the issue⁷.
- The case highlights an increased focus on employers' internal procedures and systems for remedying bullying and harassment in class certification decisions.

The details

Federal Court decision

In January 2020, the Federal Court certified a class action against the RCMP on behalf of a class of people who have worked for or with the RCMP⁸. The claim alleged systemic negligence in the form of bullying, intimidation and general harassment.

The federal government opposed certification on the basis that the claims were “workplace disputes” which have various legislative remedies and internal processes of redress within the RCMP⁹. It argued that these mechanisms are the preferable procedure for resolving the plaintiffs’ complaints, and that the Court should decline to exercise its jurisdiction over the claim.

The Federal Court rejected both the jurisdictional argument and the government’s preferable procedure argument¹⁰. Justice McDonald determined that the plaintiffs’ claims were not ordinary workplace disputes, as they attacked the very processes and systems that the government claimed could provide suitable remedies. The plaintiffs’ evidence showed widespread and pervasive systemic issues with the RCMP’s internal processes, including its grievance process, that went beyond gender and sexual orientation-based discrimination. The Court concluded that “the RCMP internal processes do not appear to be equipped to provide redress or compensation” for the plaintiffs’ claims and “may not be able to provide an appropriate remedy, or any remedy at all, for some of the claims advanced”¹¹.

Moreover, the class definition was held to have the shared characteristics of professional involvement and being subject to the internal policies within the RCMP. These characteristics were held to bear a rational connection to the claim of systemic negligence. The class excluded anyone who is covered under existing settlements regarding gender-based (*Merlo*) and sexual orientation-based (*Ross et al*) claims of harassment against the RCMP.

Appellate decisions

In 2021, the government appealed Justice McDonald’s decision and argued, among other things, that the Federal Court made a “palpable and overriding error” in finding some basis in fact that a class proceeding is the preferable procedure for this action. The Federal Court of Appeal upheld the Federal Court’s decision with two exceptions: it narrowed the scope of the certified class (excluding all unionized, temporary civilian, seasonal, short term, casual and student employees) and de-certified the fourth common issue regarding an aggregate assessment of damages. Significantly, the Court upheld Justice MacDonald’s conclusion that a class action is the preferable procedure for resolving the plaintiffs’ claims¹².

The government sought leave to appeal the Federal Court of Appeal’s decision. The Supreme Court denied the government’s leave application and, in keeping with standard practice, did not publish reasons for its decision.

Implications

Since *Greenwood v. Canada* was decided in the Federal Court, it remains to be seen how this type of preferable procedure challenge would be addressed in Ontario. Under Ontario’s amended preferable procedure requirement in the *Class Proceedings Act* (which came into effect in October 2020), plaintiffs must demonstrate that 1) the proposed class proceeding is a superior means of determining the rights or entitlement of the class members and 2) that questions of fact or law common to the class members predominate over the individual issues¹³. Accordingly, it is unclear whether Ontario courts will now defer to organizations’ internal procedures and reporting mechanisms when faced with class actions in the workplace.

This decision is an important reminder that the mere existence of internal systems for addressing bullying, intimidation and harassment in the workplace can be insufficient to protect an employer against class certification for claims of systemic negligence. This can be especially true in cases where the inadequacy of an organization’s internal procedures forms part of the employees’ claim.

The decision also highlights the role that top-down leadership plays in developing an institutional culture which fosters and condones problematic behaviour. Best practice is for institutions to keep their internal reporting mechanisms as separate as possible from the day-to-day operations of the organization, in order to reduce the risk of retaliation against complainants and undue pressure on decision-makers by institutional leaders.

FOOTNOTES

To discuss these issues, please contact the author(s).

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