CITATION: Davidson v. Canada (Attorney General), 2015 ONSC 8008
COURT FILE NO.: CV-15-42473600CP
DATE: 20151222

ONTARIO
SUPERIOR COURT OF JUSTICE

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| **BETWEEN:** | |
| **LINDA GILLIS DAVIDSON**<br>Plaintiff | *Won J. Kim, Megan B. McPhee,* and *Sean D. McGarry* for the Plaintiff |
| **– and –** | |
| **ATTORNEY GENERAL OF CANADA**<br>Defendant | *Gina M. Scarcella, Victoria Yankou,* and *Andrew Law* for the Defendant |
| | **HEARD:** December 10, 2015 |

Proceeding under the *Class Proceedings Act, 1992*

**PERELL, J.**

## REASONS FOR DECISION

### A. INTRODUCTION

[1] In this proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the Plaintiff, Linda Gillis Davidson, a former officer of the Royal Canadian Mounted Police ("RCMP"), sues the Attorney General of Canada ("Canada" or "the Crown") in negligence and for breach of an employment contract. Ms. Davidson alleges that she and fellow female police officers and also female Civilian Members of the RCMP were victims of sexual harassment and sexual discrimination by the RCMP as an institution for which Canada is liable. She alleges that she and her female colleagues were subjected to sexual discrimination, bullying, and harassment by male members of the RCMP between 1986 and 2009. She states that the RCMP - and therefore Canada – is liable for damages for failure to provide her with a "workplace free of gender - and sexual-orientation-based discrimination, bullying and harassment."

[2] Pursuant to rule 21.001 of the *Rules of Civil Procedure*, Canada, which I will refer to hereafter as the Crown, moves to have Ms. Davidson's Statement of Claim struck without leave to amend and to have her claim dismissed for failure to disclose a reasonable cause of action. If The Crown's motion is successful, it would follow that Ms. Davidson's action cannot satisfy the s. 5(1)(a) criterion (cause of action criterion) for certification as a class action. Conversely, if the

Crown's motion fails, then the s. 5(1)(a) criterion will have been satisfied and the proposed class action can proceed to a certification hearing to determine whether the other four criteria for certification are satisfied.

[3] The Crown makes a three-part argument. First, it submits that under the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, the Crown can only be liable vicariously for the negligence of individual Crown agents and not for the institutional or systemic misconduct of the RCMP as an institution. It submits that Ms. Davidson's claim is a claim of direct as opposed to vicarious Crown liability and, therefore, the common law rule of Crown immunity prevails to preclude the systemic negligence claim made against the Crown directly. Second, the Crown submits that there is no breach of contract claim against it because the employer–employee relationship between the Crown and the proposed Class Members is statutory and not contractual in nature. Third, the Crown submits that it is plain and obvious that Ms. Davidson's personal claim for negligence or breach of contract is statute-barred under the *Limitations Act, 2002*, S.O. 2002, c.24, Sch. B. and therefore her action should be dismissed.

[4] For the reasons that follow, I strike the claim in contract, but, otherwise, I dismiss the Crown's motion. Ms. Davidson may deliver a Fresh as Amended Statement of Claim deleting the breach of contract claim.

## B. FACTUAL BACKGROUND

### 1. The RCMP

[5] The RCMP is Canada's national police force. It is continued and governed by s. 3 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10. The Commissioner of the RCMP, who has the control and management of the force, is appointed by the Governor General in Council and is under the direction of the Minister of Public Safety.

[6] The management of the RCMP's human resources is governed by the *Royal Canadian Mounted Police Act, the Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281 and the Commissioner's Standing Orders, enacted pursuant to the Act.

[7] The RCMP is part of the core public administration as defined in the *Financial Administration Act*, R.S.C., 1985, c. F-11 and pursuant to s. 7 of that Act Treasury Board is empowered to set general administrative policy, financial management, and human resources management. Those powers include the power to determine the terms and conditions of employment of public servants within the core public administration. Pursuant to s. 22 of the *Royal Canadian Mounted Police Act*, Treasury Board establishes the pay for RCMP members.

[8] The RCMP's National Headquarters are located in Ottawa, and the force is divided into 16 divisions, comprised of local detachments. The RCMP employs over 28,000 persons, the majority of whom fall into one of three categories: (1) Officer Members; i.e., sworn police officers; (2) Civilian Members, who provide operational, scientific and other technical support; and (3) public service employees, who provide services for the RCMP and who are employed under the *Public Service Employment Act*, SC 2003, c 22.

[9] Ms. Davidson intends to amend her Statement of Claim to remove public service employees as members of the class. She will, however, not be removing the Civilian Members

who had that status during the class period for the proposed class action.

[10] The police officers or the RCMP are appointed by the Governor General in Council pursuant to ss. 6(3)(a) or the *Royal Canadian Police Act* and serve at pleasure pursuant to ss. 12(1) of the Act.

[11] A member of the Royal Canadian Mounted Police is a Crown servant. This is confirmed by s. 36 of the *Crown Liability and Proceedings Act*, which states:

> 36. For the purposes of determining liability in any proceedings by or against the Crown, a person who was at any time a member of the Canadian Forces or of the Royal Canadian Mounted Police shall be deemed to have been at that time a servant of the Crown.

[12] Recently, RCMP officers were held to have a right to collectively bargain with the Crown about the terms of their employment relationship; see: *Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General)*, 2015 SCC 1.

[13] Before the coming into force of amendments to the *Royal Canadian Police Act* in 2014, Civilian Members were appointed pursuant to ss. 7(1)(a) of the Act, but on a date to be published by Treasury Board pursuant to s. 86 of the *Enhancing Royal Canadian Mounted Police Accountability Act*, S.C. 2013, c. 18, Civilian Members who do not fit the category of member as determined by Treasury Board, will be deemed to be persons appointed under the *Public Service Employment Act;* i.e., they will cease to be Civilian Members and become public service employees providing services to the RCMP.

[14] The statutory Regulations for the RCMP were also amended in 2014; i.e., the *RCMP Regulations, 1988* and the majority of Commissioner's Standing Orders were repealed and replaced. The old Regulations and Standing Orders provided and the new regulations and new Standing Orders provide a code governing the practices and conduct of RCMP members. They also provided and provide a discipline and grievance process. The ggrievance process is available pursuant to Part III of the *Royal Canadian Mounted Police Act.* Pursuant to s. 31 of the Act, police officers and Civilian Members have the right to challenge any decision, act or omission made in the administration of the affairs of the RCMP in respect of which no other process for redress is provided for in the Act, the Regulations or the Commissioner 's Standing Orders. With the 2014 amendments, there is now a standalone Commissioner's Standing Order that sets out procedures to address complaints of harassment.

[15] As of September 1, 2015, the RCMP employs approximately 18,292 police offers and 3,838 Civilian Members.

## 2. Ms. Davidson's Proposed Class Action

[16] In 1985, Ms. Davidson joined the RCMP as a trainee officer at the RCMP Academy in Regina, Saskatchewan, and from 1986 to 2009, she rose through the ranks and served as a Constable, Corporal, Sergeant, and Inspector, at detachments in Newfoundland and Ontario. She served as a Travel Officer in the Prime Minister's Protection Detail in Ottawa as an Inspector, from 2006 to 2012.

[17] The alleged discrimination, bullying, and harassment of Ms. Davidson is alleged to have begun in 1986 when she joined the Grand Falls detachment in Newfoundland. Incidents occurred

between the years 1986 and 2009, excluding 2004 to 2005. In 2009, she left active service on an extended medical leave. She remained on medical leave until her retirement from the RCMP on October 31, 2012.

[18] Ms. Davidson commenced her action on March 25, 2015.

[19] Although in the discussion part of these reasons, I shall set out seven paragraphs (paras. 18-24) that describe a portion of Ms. Davidson's personal claim for sexual harassment and sexual discrimination, it is not necessary to detail from the Statement of Claim Ms. Davidson's personal career history as an officer of the RCMP, which is set out in 67 paragraphs of the 106 paragraph Statement of Claim.

[20] Putting aside for the moment, Ms. Davidson's personal claim, for the immediate purpose of determining whether there is a viable cause of action for the proposed class action, with a few exceptions for personal matters, the portion of her Statement of Claim set out below address the class wide causes of action. It is important, however, to note that her personal allegations and the class wide allegations implicate by act or omission all male police officers of the RCMP and all male Civilian Members of the RCMP and that if her allegations are proven, then she and the putative Class Members were treated in a vile, despicable, dishonorable, and reprehensible way by male colleagues at every rank of the RCMP.

[21] For the purposes of this motion to strike the Statement of Claim, the pertinent portions of Ms. Davidson's pleading are set out below:

> RELIEF SOUGHT
>
> 1. The plaintiff, Linda Gillis Davidson, claims on her own behalf and on behalf of the Class Members, as defined below:
>
> (a) an order certifying this action as a class proceeding and appointing her as the representative plaintiff for the Class and any appropriate sub-classes;
>
> (b) a declaration that the defendant was negligent in failing to provide the Class Members with a workplace free from gender- and sexual-orientation-based discrimination, bullying and harassment;
>
> (c) a declaration that the defendant breached its statutory duties to provide the Class Members with a workplace free from gender- and sexual-orientation-based discrimination, bullying and harassment;
>
> (d) a declaration that the defendant breached its contractual duties to provide the Class Members with a workplace free from gender- and sexual-orientation-based discrimination, bullying and harassment;
>
> (e) general damages in the amount of $500,000,000.00, or such other sum as this Honourable Court deems just, plus damages equal to the costs of administering the plan of distribution of the recovery in this action;
>
> (f) punitive damages in the amount of $100,000,000.00;
>
> (g) special damages in an amount to be determined, including but not limited to past and future medical expenses, on behalf of the plaintiff and the other Class Members and the subrogated interests of the Ontario Health Insurance Plan, pursuant to ss. 30 and 31 of the *Health Insurance Act*, R.S.O. 1990, c. H.6, as amended, and the other provincial

and territorial health insurers, pursuant to the legislation in the Class Members' respective provinces or territories; ....

THE NATURE OF THIS ACTION

2. This action concerns the discrimination, bullying and harassment of female Royal Canadian Mounted Police ("RCMP") employees on the basis of their gender and/or sexual orientation.

3. The plaintiff alleges that she and the other Class Members (as defined below) were subject to gender- and sexual-orientation-based discrimination, bullying and harassment by other RCMP employees. The plaintiff further alleges that this occurred because the RCMP failed to fulfill its statutory, common law and contractual duties to provide her and the other Class Members with a work environment free of gender- and sexual-orientation-based discrimination, bullying and harassment. ...

THE CLASS

12. The plaintiff brings this action on behalf of all persons in Canada, excluding persons resident in the province of Québec, who were or are Regular Members, Civilian Members or Public Service Employees of the RCMP who identify as female (the "Class Members")

13. Additional, the plaintiff seeks to maintain this action on behalf of all individuals who are entitled to assert a claim pursuant to the *Family law Act*, R.S.O. 1990, c. F.3 and equivalent or comparable legislation in other provinces and territories (the "Family Class Members"). ....

THE FACTS ...

61. Due to the effects of the gender- and sexual-orientation-based discrimination, bullying and harassment she experienced throughout her time with the RCMP, Ms. Davidson's family physician referred her to a psychologist. The psychologist diagnosed Ms. Davidson with Post-Traumatic Stress Disorder ("PTSD"), stress and anxiety, and recommended that she take some time off of work.

62. On the medical advice of her psychologist, Ms. Davidson went on leave from the RCMP and the Prime Minister's Protection Detail in or around 2009.

*Resignation from the RCMP*

63. Despite undergoing extensive treatment for her PTSD, stress and anxiety, and making considerable efforts to improve her health, Ms. Davidson was never cleared to return to work by her treating physicians.

64. On October 31, 2012, Ms. Davidson retired from the RCMP, approximately a decade earlier than she had planned to retire. ....

70. Due to the systemic culture of harassment, bullying and discrimination in the RCMP Ms. Davidson and other female RCMP employees were ostracized and their career advancement prospects were limited. Ms. Davidson eventually found that it was not possible to perform her job properly, since supervising male Members refused to grant her the appropriate freedom to act and subordinate male Members refused to accept her authority.

71. At all material times during her career and in each detachment she served, Ms. Davidson observed that female RCMP employees were treated differently than male RCMP employees, particulars of which include but are not limited to:

(a) sexually explicit comments were frequently made to or about female employees by

male employees, without consequence;

(b) implicit and explicit comments dismissing female employees' ability to carry out their duties were made by male employees, without consequence;

(c) demeaning comments about sexual orientation and lesbian relationships were made by male employees, without consequence;

(d) male employees engaged in unwanted physical touching of female employees;

(e) male employees precipitated unwanted sexual situations with female employees, including unwanted sexual touching;

(f) as between male and female employees of equivalent rank and experience, the men received more accommodation with regard to sick leaves, vacation requests, and transfer requests;

(g) as between male and female Members of equivalent rank and experience, the men were assigned to more complex, high-profile files;

(h) as between male and female Members of equivalent rank and experience, the men received better career education and training opportunities;

(i) as between male and female Members of equivalent rank and experience, the men received better career counselling and formal mentorship;

(j) as between male and female Members of equivalent rank, experience, and job performance, the men received generally more positive consideration on their performance reviews; and,

(k) as between male and female Members of equivalent rank, experience, and testing scores, the men received more successful consideration for promotion.

All of this behaviour has had the effect of demeaning, humiliating, and limiting the careers of female RCMP employees, including Ms. Davidson.

*Damages*

72. It was extremely difficult for Ms. Davidson to excel in her work when she was subject to continual systemic harassment, bullying and discrimination on the basis of her gender and sexual orientation while at the RCMP.

73. Due to the systemic harassment, bullying and discrimination, Ms. Davidson experienced, and in some cases continues to experience, a range of health effects, including but not limited to: post-traumatic stress disorder; irritable bowel syndrome; stress; anxiety; depression; trouble sleeping; difficulty concentrating; difficulty comprehending written text; suicidal ideation; alcohol abuse; bouts of crying; obsessive behaviour; lack of energy; and, reclusiveness. ....

80. RCMP management has known for many years that harassment, bullying and discrimination on the basis of gender and sexual orientation was, and continues to be, an endemic concern within the RCMP. Successive groups of leadership have completely failed to take the necessary steps to provide female RCMP employees with a safe and supportive work environment free of mistreatment on the basis of their gender and sexual orientation. ....

NEGLIGENCE

89. At all material times, the RCMP owed a duty of care to Ms. Davidson and to the other Class

Members to create and maintain equitable workplaces which were free from discrimination, bullying and harassment on the basis of gender and/or sexual orientation. Specifically, the RCMP had a duty of care to:

(a) use reasonable care to ensure the safety and well-being of Ms. Davidson and the other Class Members;

(b) provide safe workplace environments free from gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(c) provide equal employment training and advancement opportunities to Ms. Davidson and the other Class Members, regardless of their gender or sexual orientation;

(d) establish and enforce appropriate policies, codes guidelines, and management and operations procedures to ensure that Ms. Davidson and the other Class Members would be free from gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(e) implement standards of conduct for the RCMP work environment and for RCMP employees, to safeguard Ms. Davidson and the other Class Members from gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(f) educate and train RCMP employees to promote universal understanding amongst all RCMP employees that gender- and/or sexual-orientation-based discrimination, bullying and harassment are dangerous and harmful;

(g) supervise the conduct of RCMP employees properly so as to prevent Ms. Davidson and the other Class Members from being exposed to gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(h) investigate and adjudicate complaints of gender- and/or sexual-orientation-based discrimination, bullying and harassment fairly and with due diligence; and,

(i) act in a timely fashion to resolve situations of gender- and/or sexual-orientation-based discrimination, bullying and harassment and to work to prevent re-occurrence.

90. The RCMP negligently breached its duty of care to Ms. Davidson and the other Class Members, the particulars of which negligence include, but are not limited to:

(a) failing to establish and enforce adequate policies, codes, guidelines, and management and operations procedures to ensure that Ms. Davidson and the other Class Members would be free from gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(b) permitting practices which denied employment training and advancement opportunities to Ms. Davidson and the other Class Members, on the basis of their gender and/or sexual orientation;

(c) failing to provide adequate, or any, training and education programs for RCMP employees regarding the dangerous and harmful nature of gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(d) failing to make sufficient overall efforts to promote the universal understanding amongst all RCMP employees that gender- and/or sexual-orientation-based discrimination, bullying and harassment are dangerous and harmful;

(e) permitting a workplace environment that normalized the occurrence of gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(f) failing to supervise the conduct of RCMP employees properly so as to prevent Ms. Davidson and the other Class Members from being exposed to gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(g) failing to implement adequate, or any, standards of conduct for the RCMP work environment and for RCMP employees with regard to gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(h) failing to investigate complaints of gender- and/or sexual-orientation-based discrimination, bullying and harassment adequately, or at all;

(i) failing to adjudicate complaints of gender- and/or sexual-orientation-based discrimination, bullying and harassment fairly, or at all;

(j) failing to act in a timely fashion to put a stop to incidents of gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(h) failing to apply appropriate consequences to perpetrators of gender- and/or sexual-orientation-based discrimination, bullying and harassment; and,

(i) failing to protect Ms. Davidson and the other Class Members from the continuation or re-occurrence of gender- and/or sexual-orientation-based discrimination, bullying and harassment.

91. The RCMP knew, or ought to have known, that the aforementioned negligence was of a kind reasonably capable of terrifying a normal person and that Ms. Davidson and the other Class Members would suffer damages as a result.

STATUTORY BREACHES

92. The RCMP and all of its employees have a duty to act in accordance with the *RCMP Act* and the *RCMP Regulations*. Certain individuals, who were at all material times Regular Members or Civilian Members of the RCMP, and for whose conduct the RCMP and the Crown are liable, breached their statutory duties to Ms. Davidson and to the other Class Members.

93. The plaintiff pleads and relies upon ss. 30.1-36.1 of the *RCMP Act*, which establish a formal grievance process for RCMP employees and empower the RCMP to establish an informal conflict management system. The aforementioned negligent conduct was in breach of these provisions.

94. The plaintiff pleads and relies upon ss. 36.2-45.171 of the *RMCP Act*, which govern the conduct of RCMP employees. In particular, s. 37 establishes a mandatory duty on RCMP Members and Civilian Members to:

(a) respect the rights of all persons;

(b) to maintain the integrity of the law, law enforcement and the administration of justice; ...

(e) to act at all times in a courteous, respectful and honourable manner; and,

(f) to maintain the honour of the RCMP and its principles and practices.

The aforementioned negligent conduct was in breach of these provisions.

95. The plaintiff pleads and relies upon ss. 38-58.7 of the *RCMP Regulations*, which establish a Code of Conduct for RCMP Regular Members and Civilian Members, pursuant to s. 38 of the *RCMP Act*. The aforementioned negligent conduct was in breach of these provisions.

96. These statutory breaches speak to the failure of the RCMP to meet the appropriate tortious standard of care.

BREACH OF CONTRACT

97. The RCMP entered into contracts, either orally or in writing, for the purposes of employing Ms. Davidson and the other Class Members (the "Employment Contracts"). It was a term, either express or implied, of the Employment Contracts that the RCMP would create and maintain equitable workplaces which were free from discrimination, bullying and harassment on the basis of gender or sexual orientation.

98. The RCMP breached the Employment Contracts, the particulars of which include, but are not limited to:

(a) acting in breach of the *RCMP Act* and the *RCMP Regulations*;

(b) failing to establish and enforce adequate policies, codes, guidelines, and management and operations procedures to ensure that Ms. Davidson and the other Class Members would be free from gender- and/or sexual-orientation-based discrimination, bullying and harassment; ....

(j) failing to adjudicate complaints of gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(k) failing to act in a timely fashion to put a stop to incidents of gender- and/or sexual-orientation-based discrimination, bullying and harassment;

(l) failing to apply appropriate consequences to perpetrators of gender- and/or sexual-orientation-based discrimination, bullying and harassment; and,

(m) failing to protect Ms. Davidson and the other Class Members from the continuation or re-occurrence of known gender- and/or sexual-orientation-based discrimination, bullying and harassment.

DAMAGES

99. The consequences that Ms. Davidson and the other Class Members are likely to sustain or have already sustained would not have occurred but for the negligence and contractual breaches of the RCMP.

100. Solely as a result of the RCMP's conduct described above, Ms. Davidson and the other Class Members have suffered damages and losses, which are serious and long-term in nature, including, but not limited to:

(a) physical, psychological and emotional harm and/or distress;

(b) depression;

(c) anxiety;

(d) post-traumatic stress disorder;

(e) irritable bowel syndrome

> (f) nervous shock;
>
> (g) mental anguish;
>
> (h) attempted suicide and/or suicidal ideations; ...

[22] In her argument, Ms. Davidson states that her pleading of systemic negligence was designed with a view to the principles in the Supreme Court's decision of *Rumley v. British Columbia* 2001 SCC 69, aff'd (1999), 72 B.C.L.R. (3d) 1 (B.C.C.A.).

## C. DISCUSSION AND ANALYSIS

### 1. Introduction

[23] In the next section of the Discussion and Analysis, I shall briefly describe the court's jurisdiction under rule 21.01(1)(b) to strike a claim for not disclosing a reasonable cause of action, which as it happens is the measure used for the cause of action criterion, the first criterion for certification under the *Class Proceedings Act, 1992*.

[24] In the following parts of the Discussion and Analysis, I shall discuss the Crown's three arguments, beginning with its limitation period argument, followed by the argument about the claim in contract and concluding with the argument about the vicarious liability claim in tort.

[25] To foreshadow, my conclusions are: first, it cannot be determined on this motion whether or not Ms. Davidson's claim is statute-barred; second, the Crown's argument that there is no contractual claim against it is correct and, therefore, that claim should be struck from Ms. Davidson's Statement of Claim; and third, the Crown's argument that there is no viable vicarious liability negligence claim is incorrect.

[26] With respect to the negligence claim, I accept the Crown's argument that the RCMP is not itself a legal entity capable of being sued as an institution and that under the *Crown Liability and Proceedings Act*, the Crown can only be liable vicariously (i.e., not directly) for the misconduct of individual Crown servants, but I conclude that Ms. Davidson has adequately pleaded a claim against the collective of all male police officers and all male Civilian Members of the RCMP during the Class Period, and, therefore, her systemic negligence claim is a sound claim for which the Crown is vicariously liable. In other words, it is not plain and obvious that what counts as the Crown's vicarious liability under the *Crown Liability and Proceedings Act* does not include the systemic negligence claim pleaded by Ms. Davidson and her claim satisfies the first criterion for certification as a class action.

### 2. The Test for Disclosing No Reasonable Cause of Action

[27] Rule 21.01(1)(b) states:

> 21.01 (1) A party may move before a judge, ...
>
> > (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.

[28] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959 is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.

[29] To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[30] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 41, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 , rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at p. 469.

[31] I emphasize that for the purposes of determining whether there is a reasonable cause of action, the pleading is to be read generously and with the pleaded facts accepted as true. In the immediate case, a generous reading reveals that Ms. Davidson, on behalf of the female police officers and Civilian Members of the RCMP, alleges that the male police officers and Civilian Members of the RCMP perpetrated, aided, abetted, encouraged, accepted, and condoned sexual harassment and sexual discrimination.

### 3. The Limitation Period Defence

[32] I can be very brief in dismissing the Crown's argument that it is apparent from the Statement of Claim that Ms. Davidson's personal claim is statute-barred because of the two-year basic limitation period set out in ss. 4 and 5 of the *Limitations Act, 2002*. More precisely, the argument is that based on the pleaded facts Ms. Davidson, who resigned from the RCMP in 2012, did discover or ought to have discovered her tort and breach of contract claims many years before this action, which was commenced in 2015, was commenced and therefore, the two-year limitation period for her personal claim has run its course.

[33] The fatal problem with this argument is that it is also arguable based on the pleadings that the limitation period did not begin to run at all until 2015 because Ms. Davidson was incapable of commencing her action because of her physical, mental, or psychological condition. Her Statement of Claim pleads considerable mental suffering, including a plea of a diagnosis of Post-Traumatic Stress Disorder ("PTSD"). Thus, Ms. Davidson has an argument that the limitation period did not run in respect of her claims.

[34] If the Crown actually delivers a Statement of Defence raising a limitation period defence, Ms. Davidson will deliver a Reply relying on s. 10, or in the alternative s. 7 of the *Limitations Act, 2002*, which state:

*Assaults and sexual assaults*

10. (1) The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.

*Presumption*

(2) Unless the contrary is proved, a person with a claim based on an assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise.

*Same*

(3) Unless the contrary is proved, a person with a claim based on a sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced.

...

*Incapable persons*

7(1) The limitation period established by section 4 does not run during any time in which the person with the claim,

(a) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition; and

(b) is not represented by a litigation guardian in relation to the claim.

*Presumption*

(2) A person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved.

*Extension*

(3) If the running of a limitation period is postponed or suspended under this section and the period has less than six months to run when the postponement or suspension ends, the period is extended to include the day that is six months after the day on which the postponement or suspension ends.

*Exception*

(4) This section does not apply in respect of a claim referred to in section 10.

[35] Put simply, the issue of whether Ms. Davidson's claim is statute-barred cannot be decided on this rule 21.01(1)(b) motion and will have to be tried or perhaps decided on a motion for a summary judgment.

4. <u>The Claim in Contract</u>

[36] The Crown through the Treasury Board is the employer of the police officer members of the RCMP who under the *Royal Canadian Mounted Police Act* serve at pleasure pursuant to ss. 12(1) of the Act. The Crown is also the employer of the Civilian Members of the RCMP.

[37] Typically, an employer-employee relationship is contractual in nature pursuant to individual employment contracts or pursuant to collective agreements, but an employer-employee or master-servant relationship does not have to be contractual. Employer-employee relationships can be established by statute and without contracting. Office holders, like police officers, assume their role by appointment not contract.

[38] A series of cases from across the country, in which RCMP officers have brought wrongful dismissal claims, are authority that there is no contract of employment between the Crown or the RCMP with RCMP members and that the employment relationship with members of the RCMP is fashioned by statute not contract. See: *Clark v. Canada*, [1994] 3 F.C. 323 (T.D.); *Merrifield v. Canada (Attorney General)*, 2009 ONCA 12; *Aune v. Canada (Attorney General)*, 2013 BCSC 178; *Flanagan v. Canada (Attorney General)*, 2013 BCSC 1205, aff'd 2014 BCCA 487, leave to appeal to the S.C.C. dismissed [2015] SCCA No.77. The present case is indistinguishable and following these authorities, I conclude that the Crown's argument that Ms. Davidson has no claim in contract is correct.

[39] The Crown also relies on *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, where the Supreme Court mentioned that police officers form a special category of public servant whose employment relationship is not governed by contract. The comment in *Wells* was perhaps *obiter dicta* because the issue in the *Wells* was whether there was an employment contract between the Government of Newfoundland and a senior civil servant who was not a police officer. In *Wells*, the Supreme Court held that the relationship with the senior civil servant was contractual, but the Court mentioned that there were a few instances where employment relationships between Crown servants and the Crown are not contractual in nature. Thus, Justice Major stated at paras. 29-32 of his judgment:

> 29. In my opinion, it is time to remove uncertainty and confirm that the law regarding senior civil servants accords with the contemporary understanding of the state's role and obligations in its dealings with employees. Employment in the civil service is not feudal servitude. The respondent's position was not a form of monarchical patronage. He was employed to carry out an important function on behalf of the citizens of Newfoundland. The government offered him the position, terms were negotiated, and an agreement reached. It was a contract.
>
> 30. As Beetz J. clearly observed in *Labrecque, supra*, the common law views mutually agreed employment relationships through the lens of contract. This undeniably is the way virtually everyone dealing with the Crown sees it. While the terms and conditions of the contract may be dictated, in whole or in part, by statute, the employment relationship remains a contract in substance and the general law of contract will apply unless specifically superseded by explicit terms in the statute or the agreement.
>
> 31. This is the case for most senior public officers. Exceptions are necessary for judges, ministers of the Crown and others who fulfill constitutionally defined state roles. The terms of their relationship with the state are dictated by the terms and conventions of the Constitution. The offices held by these are an integral part of "the web of institutional relationships between the legislature, the executive and the judiciary which continue to form the backbone of our constitutional system": *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 3.
>
> 32. The fundamental terms and conditions of these relationships cannot be modified by either party, even by agreement. For instance, a judge cannot negotiate his or her salary or other terms of employment; *see Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("Judges' Reference"), at para. 134. These individuals still

> serve under specified terms. Their mechanism for enforcement of those terms is not in contract, but through a declaration of the constitutional guarantees underlying their positions: see Judges' Reference, supra. There are also certain offices that survive because their historical roots are still nourished by functional consideration, e.g., the independent "office" of a police officer: *R. v. Campbell*, [1999] 1 S.C.R. 565, *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.).

[40] Justice Major's comment about the employment of police officers not being governed by contract may, technically speaking, be *obiter dicta*, but Justice Major was, in any event, not making law on the issue of the legal nature of the employment relationship between a government and police officers; rather, he was observing that the existing law is that the government's relationship with police officers is not contractual in nature, which, of course, is consistent with the law in *Clark v. Canada*, *supra*; *Merrifield v. Canada (Attorney General)*, *supra*; *Aune v. Canada (Attorney General)*, *supra*; and *Flanagan v. Canada (Attorney General)*, *supra*.

[41] These cases are indistinguishable from the case at bar and, in my opinion, it is plain and obvious that Ms. Davidson and the class members do not have a breach of employment contract action against the Crown. In employment matters, they are left with the grievance procedure provided by statute and with the recently enacted right to collectively bargain.

[42] And as I will next explain, it is not plain and obvious that they are not also left with a tort negligence claim against the Crown.

## 5. The Vicarious Liability Claim against the Crown in Tort

[43] Before considering the viability of Ms. Davidson's negligence claim against the Crown, there are five preliminary matters that need to be addressed.

[44] The first preliminary matter is that Ms. Davidson pleads breaches of the *Royal Canadian Mounted Police Act* and its Regulations and the Commissioner's Standing Orders. The Crown challenges this pleading and submits that Ms. Davidson is pleading a statutory breach as a nominate or free-standing tort, but the existence of such a tort was rejected by the Supreme Court of Canada in: *Canada v. Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at pp. 227-22; *Holland v. Saskatchewan*, 2008 SCC 42 at para.9; and *Canada (Attorney General) v. TeleZone Inc.*, 20100 SCC 62 at para.28.

[45] In the *Saskatchewan Wheat Pool* case, the Supreme Court held that proof of a statutory breach that caused damages may be evidence of negligence and may provide a standard for measuring what is unreasonable conduct, but the Supreme Court held that the idea of a nominate tort of statutory breach, giving a right to recovery merely on proof of breach and damages should be rejected. The Crown objects to Ms. Davidson's pleading as a pleading of a nominate tort of breach of statute. Ms. Davidson's response to the Crown's objection is that she is not asserting breach of statute as a cause of action but rather she is pleading the statutory breaches as relevant to her common law negligence claim, which is envisioned by the Supreme Court in the *Saskatchewan Wheat Pool* case as a proper pleading. I agree with her response, and, therefore, there is no merit to the Crown's challenge on this point.

[46] The second preliminary matter is to observe that there is no issue that Ms. Davidson has a reasonable individual cause of action for negligence for the harm done to her by individual male

RCMP police officers and by individual male Civilian Members of the RCMP, both of whom are Crown servants for the purposes of establishing the Crown's vicarious liability.

[47] See *Clark v. Canada*, [1994] 3 F.C. 323 (T.D.), which is quite similar individual cause of action by a female RCMP police officer against the Crown. Indeed, in the immediate case, the Crown does not dispute that Ms. Davidson has a personal claim of negligence against individual members of the RCMP for which the Crown would be vicariously liable. Rather, the Crown's argument in the immediate case is that Ms. Davidson's pleading, which alleges collective and not individual misconduct, by Crown servants is not a pleading for which the Crown can be vicariously liable under the *Crown Liability and Proceedings Act* because it is a pleading of direct and not vicarious liability.

[48] The significance of the second preliminary point is that because of the Crown's concession that the underlying predicate misconduct constitutes a reasonable cause of action, it is not necessary to undertake a duty of care analysis of the predicate tort of negligence for which the Crown might be vicariously liable. In other words, it is not necessary to do what is sometimes described as an *Anns v. Merton* analysis. (*Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); rather, the analysis that the immediate case calls for is about what counts for vicarious liability for the purposes of liability under the *Crown Liability and Proceedings Act*, which is a different sort of juridical analysis.

[49] In the immediate case, the precise question is whether the collective systemic misconduct of Crown servants counts for vicarious liability for which the Crown would be liable under the *Crown Liability and Proceedings Act*.

[50] The third preliminary point is that the vicarious liability spoken of in the context of the *Crown Liability and Proceedings Act* is a statutory vicarious liability; it is an exception to the Crown immunity from tort claims that existed at common law. However, and this is the third preliminary point, this statutory vicarious liability has the same rationale as the common law's approach to vicarious liability. See: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *Bazley v. Curry*, [1999] 2 S.C.R. 534; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983; *K.L.B. v. British Columbia*, 2003 SCC 51; *E.D.G. v. Hammer*, 2003 SCC 52; and *M.B. v. British Columbia*, 2003 SCC 53.

[51] In *Bazley v. Curry*, *supra*, *Jacobi v. Griffiths*, *supra*, and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, *supra*, the Supreme Court considered the doctrine of vicarious liability in the context of employer-employee relationships. In *K.L.B. v. British Columbia*, *supra*, which was heard together with *M.B. v. British Columbia*, *supra*, and *E.D.G. v. Hammer*, *supra*, the Supreme Court of Canada returned to the topic of vicarious liability at common law, where a person can be found liable for the tortious conduct of others. In *K.L.B.*, Chief Justice McLachlin explained at para. 18 that vicarious liability is imposed on the theory that in some circumstances where the risks inherent in a person's enterprise materialize and cause harm, it may be fair and socially useful to hold that person responsible for the tortious conduct of others. It can similarly be said that the where the risk's inherent in the Crown's enterprise materialize and cause harm, it may be fair and socially useful to hold the Crown responsible for the tortious conduct of the Crown servants employed in that enterprise.

[52] In *Bazley v. Currie*, *supra*, at para. 37, Justice McLachlin, as she then was, described the

policy factors underlying the imposition of vicarious liability. About imposing vicarious liability on employers, she stated:

> ... the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.

[53] In *K.L.B.*, the Chief Justice explained what is necessary to make out a claim for vicarious liability. She stated at para. 19 that at least two things must be demonstrated:

> 19. To make out a successful claim for vicarious liability, plaintiffs must demonstrate at least two things. First, they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. ... Second, plaintiffs must demonstrate that the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise. ... These two issues are of course related. A tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer.

[54] In *K.L.B.*, the court decided that the relationship between the Province of British Columbia and foster parents with whom the Province had placed children in need of protection was not sufficiently close to make the Province vicariously liable for the misconduct of the foster parents, although the government was liable on the basis of direct negligence.

[55] The significance of this third preliminary point is twofold. First, the case law about vicarious liability for the wrongs of others explains the nature of both common law vicarious liability and the Crown's statutory vicarious liability for the activities of its Crown servants. The constituent elements of both types of vicarious liability are: (1) there is a close enough relationship between the employer (the Crown) and the tortfeasor (the Crown servant) that would make a claim for vicarious liability appropriate, which is to say fair and just; and (2) the tortfeasor's (the Crown servant's) wrong is so connected with his or her employment that it can be said that the employer (the Crown) introduced the risk of the wrong. Second, and this is the most significant aspect of the third preliminary point, Ms. Davidson's pleading would appear to satisfy a common law pleading of vicarious liability which, in turn, suggests that it is not plain and obvious that she has not pleaded a viable claim for statutory vicarious liability under the *Crown Liability and Proceedings Act.*

[56] The fourth preliminary point is to remove a possible source of confusion in the analysis of the legal viability of Ms. Davidson's cause of action against the Crown. The source of confusion is the role played by *Rumley v. British Columbia, supra*, to the debate about whether or a claim of systemic negligence is a pleading of vicarious liability under the *Crown Liability and Proceedings Act.* In this regard, it needs to be noted that in *Rumley v. British Columbia, supra*, systemic negligence was not pleaded to establish the vicarious liability of the province of British Columbia for its civil servants. Rather, in *Rumley,* systemic negligence was pleaded to establish a common legal cause of action upon which a class action could be advanced. Thus, *Rumley* does not decide whether a claim of systemic negligence against a government is a direct negligence claim or a claim of vicarious liability against the government body. *Rumley* rather

decides that systemic negligence is a viable predicate cause of action that can be advanced against a government as a class action. The categorization of that negligence claim as direct or vicarious was not an issue in *Rumley* because either characterization was possible under British Columbia's *Crown Proceedings Act*, R.S.B.C. 1979, c. 86, which permits both direct Crown liability and vicarious Crown liability for the misconduct of Crown servants.

[57] This brings me to the fifth and final preliminary point, which, as it happens, is related to the fourth point. The fifth point is the decision in *Rumley* was motivated but not caused by class proceedings legislation. British Columbia's class action legislation, which is similar to Ontario's *Class Proceedings Act, 1992*, is procedural and not a substantive law statutes. The significance of this point to the immediate case is that the *Class Proceedings Act, 1992* cannot be used as a source of substantive law to circumvent the substantive law of the *Crown Liability and Proceedings Act*.

[58] Turning then to the matter of the Crown's alleged vicarious liability; I begin by acknowledging that because of ss. 3 and 10 of the *Crown Liability and Proceedings Act*, the Crown cannot be directly liable for its own negligence in failing to stop the misconduct occurring among the male police officers and male Civilian Members of the RCMP.

[59] The effect of ss. 3 and 10 of the Act are that the Crown is liable only vicariously if a Crown servant commits a tort recognized by the law. Sections 3 and 10 state:

> 3. The Crown is liable for the damages for which, if it were a person, it would be liable
>
> (a) in the Province of Quebec, in respect of ...
>
> (b) in any other province, in respect of
>
> (i) a tort committed by a servant of the Crown, or
>
> (ii) a breach of duty attaching the ownership, occupation, possession or control of property.
>
> 10. No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

[60] The Crown submits that because Ms. Davidson does not make any claims against individual members of the RCMP for acts and omissions for which the Crown would be vicariously liable, therefore, Ms. Davidson's case for systemic negligence must be directed exclusively at the wrongdoing of the RCMP - as an institution – and thus is a claim against the Crown directly, which is not permitted because of the *Crown Liability and Proceedings Act*.

[61] In my opinion, however, it is not plain and obvious that Ms. Davidson is making a claim against the RCMP as an institution. Legally speaking, the RCMP is not a legal entity. It is not a corporation or statutory body with the capacity to be sued. Rather, it is a statutorily organized collective of Crown servants that as a collective bears some resemblance to an unincorporated association of members with a leadership and rules that govern the members. It is only colloquially speaking that the RCMP can be referred to an institution. Semantically speaking, while it is possible to read Ms. Davidson's Statement of Claim as a negligence claim against the RCMP as an institution, as mentioned above, a generous reading of the Statement of Claim is

that it is a claim by the collective that is the female Crown servants of the RCMP (the putative Class Members) against the male Crown servants of the RCMP, who collectively sexually harassed or sexually discriminated against their female colleagues or who facilitated, acquiesced, or condoned the misconduct against their female colleagues.

[62] In this last regard, Ms. Davidson's personal claim is informative (as is the similar claim of Ms. Clark in *Clark v. Canada, supra*). Using paragraphs 18-24 of the Statement of Claim as an illustration, they describe Ms. Davidson's experiences at the Grand Falls, Newfoundland Detachment and the paragraphs describe the conduct of the collective comprised of her male colleagues at that detachment. Paragraphs 18-24 state:

> 18. On February 23, 1986, Ms. Davidson was posted and began working at the Grand Falls detachment in Newfoundland at the rank of Constable.
>
> 19. Ms. Davidson was the second, and, for almost two years, the only, woman working at the Grand Falls detachment. She was subject to continual harassment, bullying and discrimination on the basis of her gender, particulars of which include, but are not limited to:
>
> > (a) while on duty at the detachment, Ms. Davidson's supervisor, Constable Jim Duggan, put his hand down the front of Ms. Davidson's shirt and grabbed her breast. Two other RCMP Members who had witnessed the incident did not try to intervene and later instructed her to say nothing about Constable Duggan's behaviour or her career would be over;
> >
> > (b) male Members repeatedly placed images of bare breasts and female genitalia, along with seized sexual paraphernalia such as phallic sex toys, in Ms. Davidson's work basket on her desk at the detachment;
> >
> > (c) Constable Duggan tied balloons to Ms. Davidson's desk to falsely insinuate to the other Members that he had had sexual relations with Ms. Davidson;
> >
> > (d) Ms. Davidson's possessions and locker were often tampered with, including tampons soaked in ketchup being placed in her locker, her boot laces being tied together in a multitude of knots, the buttons of her shirts being removed, and her locker being filled with shredded paper;
> >
> > (e) anonymous negative notes about Ms. Davidson's work were inserted into Ms. Davidson's files – for example, that if the files were ever brought to court, they would be thrown out;
> >
> > (f) after Ms. Davidson intervened when she observed three male Members pushing, shoving and hitting a handcuffed prisoner, she was physically assaulted by one of the male Members, and told to mind her own business and to keep her mouth shut. From this time forward at the Grand Falls detachment, the windshield of Ms. Davidson's car was spit on daily, part of her reports went missing after she submitted them, and she was ignored for opportunities to take training courses necessary for promotion and advancement; and,
> >
> > (g) Ms. Davidson's safety was put in jeopardy when male Members refused to assist her calls for help while on patrol, including when:
> >
> > > (i) the Grand Falls Senior Constable sent Ms. Davidson alone to clear up a fight involving approximately 30 individuals. When she called for help, the Constable instructed the other RCMP officers not to help her, but to "let her go and see if she can fight"; and,

> (ii) Ms. Davidson was working alone and called on her radio for immediate assistance, but no one came to assist. It was only after Members from another detachment intervened that Ms. Davidson received assistance from Members in her own detachment. She was told that assistance did not come immediately because Constable Peter Kidd had told the rest of the detachment that "[Ms. Davidson] got herself into the situation; let her get herself out of it."
>
> 20. Ms. Davidson was in a stable heterosexual relationship while she was stationed in Grand Falls and did not publicize her sexual orientation. Nevertheless, the male Members frequently speculated about Ms. Davidson's sexual orientation and subjected her to bullying and harassment on that basis. After other women joined the Grand Falls detachment, Ms. Davidson was never allowed to work alone with them, for fear that it would lead to lesbian activity. When Ms. Davidson and the other female employees at the detachment gathered socially at Ms. Davidson's home, male Members conducted surveillance on them and informed Ms. Davidson that their behaviour was unacceptable.
>
> 21. Ms. Davidson was repeatedly called numerous gender- and sexual-orientation-based slurs by male Members, including "bitch", "stud" or "queer".
>
> 22. The harassment, bullying and discrimination also occurred at RCMP group events, where female RCMP employees were frequently and openly denigrated. Particulars of more egregious examples include, but are not limited to:
>
> > (a) when Ms. Davidson attended an RCMP mess dinner in St. John's, Newfoundland, the guest of honour was a high-ranking member of the French Foreign Legion who made a toast to "women and horses and the men who ride them" and was cheered by the male RCMP Members in attendance; and,
> >
> > (b) at a dinner during a police bonspiel held in St. John's, Newfoundland for Members, there were so many demeaning comments made towards and about women that Ms. Davidson stood up and left during the dinner, with several women following.
>
> 23. At the Grand Falls detachment, Ms. Davidson was not given the same opportunities to work on meaningful files or to partake in training courses as male Members of similar rank and experience.
>
> 24. When Ms. Davidson requested her first and only staffing interview to discuss her career progression, the male Inspector told her that there was no possible career progression for her, that she was only in the RCMP to "meet the needs of the Force", and that she did not matter, insinuating that she was not a real RCMP Member but rather was only there to provide an appearance of equality.

[63] The point I am making here by setting out the pleadings description of the personal experience of Ms. Davidson is that it is not plain and obvious that the Class Members of whom Ms. Davidson is the proposed Representative Plaintiff are suing the RCMP as an institution; rather, it appears from a generous reading of the Statement of Claim that Ms. Davidson's claim is a claim by a group of crown servants against another group of crown servants all of whom are governed by a common set of rules of conduct and statutory and common law obligations. So viewed, it is not plain and obvious that the Crown is not statutorily vicariously liable for the collective tort misconduct of one group of Crown servants against another group of Crown servants.

[64] This interpretation of Ms. Davidson's Statement of Claim, which reveals a viable cause of action for systemic negligence as statutory vicarious liability is supported by *W.W. v. Canada (Attorney General)*, 2002 BCSC 1164, aff'd 2003 BCCA 53; *Swinamer v. Nova Scotia (Attorney*

*General)*, [1994] 1 S.C.R. 445; and *Williams v. Canada (Attorney General)* (2005), 76 O.R. (3d) 763 (S.C.J.) rev'd on other grounds: 2009 ONCA 378.

[65] In *W.W. v. Canada (Attorney General), supra,* W.W., a former Sea Cadet, brought a proposed class action against the Crown on behalf of all former members of the Canadian Sea Cadets, Vancouver Corps, at HMCS Discovery that suffered sexual abuse or sexual misconduct between 1967 and 1977. Relying, as does Ms. Davidson in the case at bar on the systemic negligence claim recognized as legally viable in *Rumley v. British Columbia, supra,* which was a case of institutional abuse brought against the province of British Columbia, W.W. did not sue the two officers of HMCS Discovery who had sexually assaulted him and his fellow cadets, but he sued the Crown in a proposed class action for failing to put measures in place to prevent the offending conduct.

[66] The Crown responded, as it does in the immediate case, with the argument that that the proposed representative plaintiff, W.W. had failed to plead a case of vicariously liability against the Crown but rather had pleaded a case of direct liability that was not permitted under ss. 3 and 10 of the *Crown Liability and Proceedings Act*. Justice Cullen, in a decision that was affirmed by the British Columbia Court of Appeal, held, however, that W.W. had satisfied the cause of action criterion notwithstanding the Crown's argument.

[67] As I understand Justice Cullen's intricately reasoned decision, he rejected the Crown's argument that W.W.'s claim of systemic negligence was a direct negligence claim that focused on the Crown's conduct rather on the misconduct of the civil servants. Rather, referring to the Supreme Court's decision in *Rumley*, which accepted the idea of systemic negligence as a cause of action suitable for a class action, Justice Cullen viewed systemic negligence as attributable to the individual acts and omissions of Crown servants and hence a claim of vicarious liability under the *Crown Liability and Proceedings Act*. Thus, he stated at paragraphs 47-48 and 52:

> 47. ... it seems to me, McLachlin C.J.C. identifies the essence of what constitutes "systemic" negligence. It is not negligence that occurs without any individual acts, omissions or decisions, rather it is negligence which arises when individual acts, omissions or decisions are directed towards a general rather than a specific set of circumstances.
>
> 48. The examples cited by McLachlin C.J.C., of failing to have policies in place to deal with abuse, or negligently placing all residential students in one dormitory, are attributable acts or omissions which could give rise to individual liability in the presence of a duty of care. The fact that the negligence is described as "systemic" does not imply that it is unattributable to an individual or individuals, rather it implies that the impugned acts or omissions are said to be negligent because they create or maintain a system which is inadequate to protect the plaintiff class from the harm alleged.
>
> 52. In connection with the claim for systemic negligence I find that the plaintiff has established a cause of action, not negated by the Crown Liability and Proceedings Act. While I accept there may be problems associated with proving causation or even a breach of the standard of care, those problems, although perhaps affecting the ultimate success of the plaintiff's claim, are not such as to deprive him of the opportunity of pursuing it.

[68] I agree with Justice Cullen's reasoning and his decision, and I would follow it in Ms. Davidson's case to hold that it is not plain and obvious that her systemic negligence claim against the RCMP or more precisely the collective of male police officers and male Civilian Members of the RCMP is precluded by *Crown Liability and Proceedings Act*.

[69] In *Swinamer v. Nova Scotia (Attorney General)*, Mr. Swinamer was injured when a tree, which was suffering from severe fungus infection and that was located on private property, fell across his truck on a highway maintained by the Province of Nova Scotia. He sued the Province for negligence. In its defence, the Province argued that that its duty to repair highways did not extend to private lands. And the Province argued that Mr. Swinamer's claim was precluded by the *Proceedings against the Crown Act*, R.S.N.S. 1989, c. 360. As it happens, Nova Scotia's Act is structured in the same way as the Federal *Crown Liability and Proceedings Act*; i.e. it does not admit of a direct claim in negligence against the Crown and only allows a claim of vicarious liability for the misconduct of Crown servants. Thus, in *Swinamer*, the Nova Scotia Crown made the same argument as the Crown makes in the case at bar.

[70] The facts in *Swinamer v. Nova Scotia (Attorney General)* were that as part of its maintenance activities, the Province's Department of Transportation removed fallen trees and branches as well as trees that were regarded as dangerous. Although it had no general policy to inspect trees, a few months before the accident, a foreman, who had some knowledge of forests, and a survey technician, identified over 200 dead trees for removal. The tree that caused the accident was missed. At trial, the Department was found negligent in the manner in which it conducted the survey and in its failure to have consulted experts to train the foreman so that he might recognize a tree suffering from a severe fungus infection.

[71] The Nova Scotia Court of Appeal reversed the trial judgment, but it was restored by the Supreme Court of Canada. In the Supreme Court, Justice Cory wrote the main judgment (Justices Gonthier Iacobucci and Major concurring.) Justice Sopinka and Justice McLachlin (Justice La Forest concurring) wrote short separate concurring judgments commenting on the duty of care issue.

[72] On the issue about the application of Nova Scotia's *Proceedings against the Crown Act*, Justice Cory stated for the Court at paras. 28-29:

> 28. Next it was argued that the differences in the legislation in Nova Scotia and British Columbia which permit actions against the Crown were such that Crown liability could not be found in this case. It was stressed that s. 5(1)(a) of the *Proceedings against the Crown Act*, R.S.N.S. 1989, c. 360 (formerly R.S.N.S. 1967, c. 239, s. 4(1)(a)), provides that the province is only liable for a tort committed by its officers or agents, if that tortious act of the servant or agent would, in itself, have given rise to a cause of action. This, it was said, should be contrasted with the *Crown Proceeding Act of British Columbia*, R.S.B.C. 1979, c. 86, s. 2(c), which provides that the Crown is subject to all those liabilities to which it would be liable if it were a person. ...
>
> 29. I cannot accept this argument. Obviously the Crown can only be liable as a result of the tortious acts committed by its servants or agents since it can only act through its servants or agents. Let us assume, for the purposes of resolving this issue, that the actions complained of by the appellant were indeed negligent. That is to say the failure of the Crown to rely on trained personnel to inspect the trees and the failure of those persons or this personnel to identify the tree in question as a hazard constituted negligence. Yet those very actions or failure to act were those of the Crown's servants undertaken in the course of the performance of their work. If those were indeed acts of negligence then the Crown would be liable. The arguments of the Crown are regressive and to accept them would severely restrict the ability of injured persons to claim against the Crown. ...

[73] In the result, the Supreme Court held that if the individual civil servants from the Province's Department of Transportation were liable for negligence, then the Provincial Crown

would be exposed to vicarious liability under the *Proceedings against the Crown Act* because the Crown, which can only act through its crown servants, can only be liable as a result of the tortious acts committed by those crown servants. Applying this *dictum* to the case at bar, the acts of systemic negligence of the male Crown servants of the RCMP is an action committed by Crown servants for which the Crown is vicariously liable.

[74] For present purposes, several aspects of *Swinamer v. Nova Scotia (Attorney General)* should be noted. It should be noted that the underlying predicate wrongdoing of the Crown servants was not systemic negligence, so *Swinamer* has nothing to offer about the viability of the predicate wrongdoing for which the Crown is allegedly vicariously liable in the immediate case.

[75] Further and more importantly, it should be noted that *Swinamer v. Nova Scotia (Attorney General)* does provide an instance of vicarious liability, where once the prospect of Crown servants – singular or plural – identified or unidentified – was established, then the Crown's vicarious liability followed. This observation reveals that the preclusive effect of the *Crown Liability and Proceedings Act* is and should be narrow. This observation does not detract from the Act's effect of protecting the Crown from direct negligence claims. The Act still has the effect of preventing what happened in *K.L.B. v. British Columbia*, where the plaintiff, who failed in establishing a claim for vicarious liability, was able to grab victory from the jaws of defeat by establishing a direct liability claim against the provincial Crown. In the case at bar, Ms. Davidson's class action succeeds only if she can establish systemic negligence by Crown servants, systemic negligence being a recognized predicate cause of action.

[76] Further still, I agree with Justice Cory's comment in *Swinamer* that the Crown's argument that would give a wide ambit to what counts for direct liability and a narrow ambit for vicarious liability is regressive and to accept this argument would severely and, in my opinion, unjustly restrict the ability of injured persons to have access to justice against the Crown, which should, in my opinion, be held accountable for the systemic misconduct of the Crown servants – singular or plural - that it employs if that systemic misconduct, which is not an easy thing to prove nor to causally connect to individual harm, is actually proven to have occurred.

[77] This view of the ambit of direct negligence and vicarious liability negligence was expressed by Justice Cullity in *Williams v. Canada (Attorney General) supra.* In *Williams*, Mr. Williams brought a proposed class action against the City of Toronto, the Province of Ontario, and the federal Crown in its manifestation as Health Canada. Mr. Williams advanced a negligence action, including a claim of systemic negligence, and his proposed class action was brought on behalf of everybody who contacted SARS in Toronto during an outbreak that occurred from April to July 2003.

[78] All the defendants brought motions to have the action dismissed for failure to show a reasonable cause of action. The Crown's argument was again twofold. It argued that the Crown servants of Health Canada did not have a duty of care, and the Crown made the same argument made in the case at bar that the claim against Health Canada, which like the RCMP, is not a legal entity capable of being sued, was a claim for direct Crown liability precluded by the *Crown Liability and Proceedings Act.*

[79] Referring to Justice Cory's decision in *Swinamer v. Nova Scotia (Attorney General), supra,* and Justice Cullen's decision in *W.W. v. Canada (Attorney General), supra,* Justice Cullity held that a Statement of Claim sufficient to survive a challenge of not showing a

reasonable cause of action against the Crown would plead facts that reading the pleading generously if proven would be sufficient to find one or more Crown servants personally liable. At paragraph 40 of his reasons, he said that he was not prepared to strike the Statement of Claim against the Crown on that grounds that the Crown servants alleged to have breached duties of care were not expressly identified.

[80] For present purposes, it is worth emphasizing that Justice Cullity in *Williams* accepted that the Crown could not be liable for its own direct negligence and that the Crown could only be liable under the *Crown Liability and Proceedings Act* if some crown servant could be personally liable; however, it was Justice Cullity's opinion that it was not necessary to identify the particular individuals for whose tort the Crown would be vicariously liable.

[81] Applying, *Williams* to the case at bar, I conclude that it not plain and obvious that Ms. Davidson has failed to plead a reasonable cause of action. Moreover, I would add that in the case at bar there is actually no failure to identify the particular Crown servants for whom the Crown is vicariously liable. They are identified as all the male police officers and male Civilian Members of the RCMP during the class period who are potentially liable for systemic negligence, which is a recognized predicate tort. In the immediate case, the possibly culpable Crown servants are adequately identified; they are simply not listed by name.

[82] I, therefore, conclude that Ms. Davidson has satisfied the cause of action criterion for certification of this action as a class action.

## D. CONCLUSION

[83] For the above reasons, I strike the claim in contract and I grant leave to Ms. Davidson to deliver a fresh as Amended Statement of Claim deleting the claim in contract and the claim against the public servant members of the RCMP, but I otherwise dismiss the Crown's motion.

[84] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Davidson's submissions within 20 days following the release of these Reasons for Decision followed by the Crown's submissions within a further 20 day.

[85] I alert the parties that my present inclination is to make the costs of this motion in the cause of the certification motion.

Perell, J.

Released: December 22, 2015

CITATION: Davidson v. Canada (Attorney General), 2015 ONSC 8008
COURT FILE NO.: CV-15-42473600CP
DATE: 20151222

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**LINDA GILLIS DAVIDSON**

Plaintiff

**– and –**

**ATTORNEY GENERAL OF CANADA**

Defendant

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**REASONS FOR DECISION**

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PERELL J.

Released: December 22, 2015