CLASS ACTION ▸

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Federal Workplace Disputes: When Can I Bring a Lawsuit?

For the past 20 years, federal public service workers have been filing lawsuits regarding workplace disputes. Most of these federal public services employees are members of unions. These members benefit from free collective bargaining, which has been available to most federal public service members since the *Public Service Staff Relations Act*, RSC, 1985, c P-35 in 1967.

For federal public service workers to be successful, the court must first have jurisdiction to determine the claims. Jurisdiction is contentious when the plaintiff is a member of a union. In some cases the court assumes jurisdiction; in others, the court holds it has no jurisdiction. Typically, the court analyzes the efficacy of internal grievance and complaint processes provided by collective agreements.

Collective bargaining was intended to help employees bring grievances and complaints against their employer. Collective bargaining agents negotiate collective agreements which lay out the internal grievance and complaint processes. The internal processes are meant to be easier and faster than pursuing a lawsuit.

Typically, the availability of internal processes ousts a court's jurisdiction. However, in some circumstances a plaintiff may demonstrate the internal grievance and complaint processes are corrupt. The processes may silence victims and insulate wrongdoers. For example, several reports have highlighted problems with recourse processes available to Royal Canadian Mounted Police ("RCMP") members: that the processes are "dysfunctional" and the organization failed to prevent retaliation for speaking out against bullying and harassment.[1] When the process is corrupted in this way, it impedes access to justice and behaviour modification. Accordingly, in certain circumstances, courts maintain a residual jurisdiction to determine workplace disputes.

Rights of Action for Workplace Disputes

Federal public service employees are subject to section 236 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 ("FPSLRA"):

> **No Right of Action**
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> **Disputes relating to employment**
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> 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.
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> **Application**
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> (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.

The Federal Court recently noted: "[s]ubsection 236(1) of the FPSLRA has been recognized as an "explicit ouster" of the courts' jurisdiction. Once it is established that a matter must be the subject of a grievance, the grievance process cannot be circumvented, even for reasons of efficiency, by relying on a court's residual jurisdiction."[2]

However, this is not the end of the inquiry. In *Canada v. Greenwood,* 2021 FCA 186, the Federal Court of Appeal highlighted that "in a narrow range of cases, a court could exercise its discretion to hear such claims... [T]he harassment claim of a whistle-blower as an example of a case where a court might appropriately choose to hear a civil claim from a federal public servant as, in such circumstances, the grievance mechanism would not provide effective redress."[3] The court reiterated:

[I]n most instances, claims from employees subject to federal public sector labour legislation in respect of matters that are not adjudicable before the [Federal Public Sector Labour Relations and Employment Board] should not be heard by the courts, as this would constitute an impermissible incursion into the statutory scheme. However, an exception to this general rule allows courts to hear claims that may only be grieved under internal grievance mechanisms if the internal mechanisms are incapable of providing effective redress.[4]

This occurs where there is a gap in the internal procedures which cause a "real deprivation of ultimate remedy"[5] such as where "the grievance process is itself 'corrupt'".[6]

In this respect, "[e]vidence as to the nature and efficacy of the suggested alternate processes is necessary to provide a basis for the Court's determination of whether it ought to decline jurisdiction in favour of the alternate administrative remedies."[7]

Federal Workplaces: Are the Internal Processes Corrupt?

The Royal Canadian Mounted Police

In the last decade, there have been a number of class actions regarding workplace disputes in the RCMP. Some of the cases have been certified on consent and settled. These include two class actions regarding gender-based harassment in RCMP workplaces: *Merlo v. Canada,* 2017 FC 533; and *Tiller v. Canada,* 2019 FC 895. Canada did not raise jurisdictional challenges in these cases.

In other cases, Canada challenged the court's jurisdiction to address disputes in RCMP workplaces. Most recently, Canada raised a jurisdiction challenge in the case *Greenwood v. Canada,* Court File No. T-1201-18.

The *Greenwood* class action alleges systemic negligence in the form of bullying, intimidation and general harassment against RCMP members. The plaintiffs allege that RCMP management failed to provide a work environment free from bullying, intimidation and harassment. The class action was originally certified in the Federal Court (2020 FC 119) and mostly upheld by the Federal Court of Appeal (2021 FCA 186).

The Federal Court of Appeal noted that the RCMP has in place policies to prevent harassment and which "provide an internal redress mechanism."[8] However, the plaintiffs filed affidavits attaching government reports. These reports demonstrate that the internal process is dysfunctional:

> Some of the Reports document the existence of a workplace culture that permitted bullying and harassment to occur within the RCMP as well as a dysfunctional grievance process that failed to adequately respond to complaints of harassment filed by RCMP members and public service employees assigned to work with the RCMP. On the latter point, several reports document members' concerns about the negative impact speaking out against bullying and harassment might have on their careers.[9]

The Federal Court of Appeal agreed with the Federal Court that "the Reports supported the allegations that there are widespread and pervasive systemic issues with the internal dispute resolution processes within the RCMP." In other words, there was no reason to conclude "the internal options provide an effective remedy for the claims sought to be advanced through the class proceeding."[10]

Correctional Service of Canada

Another recent class action involved gender-based harassment and discrimination against female employees of Correctional Service Canada ("CSC"). In *Hudson v. Canada,* 2022 FC 694, the Federal Court held they do not have jurisdiction to hear the claims. The allegations included concerns with the inadequacy of CSC's grievance regime.

The plaintiffs provided evidence demonstrating problems with internal recourse processes:

> The 2012-2013 Annual Report of the Correctional Investigator noted that 31.8% of CSC employees who participated in a 2012 survey said they had been harassed in the workplace during the previous year, most commonly by their immediate supervisors or colleagues in the same work unit. The Plaintiffs note that these are the same people to whom CSC employees would be expected to present their grievances and complaints.
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> ...
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> [E]mployees in both organizations and found that they had serious or significant concerns about organizational culture and that they feared reprisal if they made complaints of harassment, discrimination, or workplace violence against fellow employees or supervisors.
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> ...
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> The March 2017 organizational assessment of Edmonton Institution described its workplace as a "toxic environment that runs on fear, intimidation and bullying [that] can only be described as a culture

> of fear, mistrust, intimidation, disorganization and inconsistency. Rarely is anyone held accountable for their actions."[11]

However, neither the pleadings nor the evidence addressed the full range of recourse mechanisms available to the class:[12]

> The pleadings and evidence of the Plaintiffs do not establish that the internal recourse procedures available to female employees of CSC are, in all circumstances, in every workplace and at all times, "corrupt" and incapable of providing effective redress.[13]

The Federal Court noted that "the role of the collective bargaining agents is key."[14] There was insufficient evidence regarding the adequacy of union representation:

> There is insufficient evidence before the Court to assess the adequacy of union representation for all proposed Class Members.
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> ...
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> Nor is there sufficient evidence demonstrating that these employees' collective bargaining units are institutionally incapable of assisting them with their grievances and complaints.
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> ...
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> The Plaintiffs make broad accusations against union representatives, claiming that they are among the worst offenders, they are complicit, or they are ineffective. But there is no evidence before the Court that these circumstances, to the extent they exist, prevail across all CSC institutions. Nor is there any evidence that concerted attempts have been made to advance grievances with the assistance of bargaining agents, or that there have been complaints of unfair representation when assistance has not been forthcoming.[15]

Ultimately, the plaintiffs were required, but failed, to demonstrate that the unions were incapable or unwilling to provide assistance for their claims. This evidence was missing from the motion record.

Unions Leaders Voice Support for Class Actions

After the decision *Hudson v. Canada,* 2022 FC 694, was released, several leaders of major federal public service unions have come out in support of class actions.

On March 27, 2023, various federal public service union leaders attended a press conference to voice support for the class action *Thompson et al v. His Majesty the King,* Court File No. T-1458-20. *Thompson* is filed on behalf of all Black individuals who work for, or have applied to work in, the public service of Canada. The claims are based on systemic racism against those Black individuals.

Attendees at the press conference included Larry Rousseau (Executive Vice President of Canadian Labour Congress), Jennifer Carr (National President of the Professional Institute of the Public Service of Canada), Chris Aylward (National President of the Public Service Alliance of Canada) and Alex Silas (Regional Executive Vice President for the National Capital Region of the Public Service Alliance of Canada).

The union leaders identified a number of systemic problems with internal grievance and complaint processes, including: [16]

- "[T]he government has decided that [workplace disputes are] a collective bargaining issue; that they want to take it to the Federal Public Sector Labour Relations Board. But I can tell you that Board is ineffective and inefficient. We talk about turning people's lives upside down, waiting five years to have your case before a judge. And what happens is you get personal justice, you don't get systematic justice. There's no way for the government to change its ways or manners when it relies on each individual person to come forward with their own story and ask for their own personal justice. And that's why we support this class action";
- "[W]hen you go through the individual grievance right through the PSR, those processes are 5 or 6 years and at the end most of the time they just want to give you individual remedy. They are not looking and they're not seeking to find out the root causes; they are not looking and seeking to say department you need to

do better. They are really just settling that individual grievance. And that's why the class action is important, is because it's going to force the government to systemic changes that we cannot get to with other means";

— Jennifer Carr (National President of the Professional Institute of the Public Service of Canada)

- "[T]he current system doesn't work... it is often extremely costly and we never get full satisfaction for our members."

— Larry Rousseau (Executive Vice President of Canadian Labour Congress)

- "[T]his is much bigger than an individual grievance or even bigger than a policy grievance, for that matter as well. As Nicholas has pointed to, this is so large and we have to make sure it encompasses everyone... the grievance process would not be able to encompass everything that we see that's going on here."

— Chris Aylward (National President of the Public Service Alliance of Canada)

The union leaders are suggesting that they are incapable of properly assisting federal public service employees due to systemic issues with the internal processes.

Going forward, it will be interesting to see whether these statements demonstrate the unions are incapable or otherwise unwilling to provide assistance. If so, the Federal Court may be more willing to assume jurisdiction to determine claims of workplace disputes.

1 *Canada v. Greenwood*, 2021 FCA 186, para 60
2 *Hudson v. Canada*, 2022 FC 694, para 74 (citations omitted)
3 *Canada v. Greenwood*, 2021 FCA 186, para 110
4 *Ibid*, para 130, emphasis added
5 *Weber v Ontario Hydro*, [1995] 2 SCR 929, para 57
6 *Attorney General of Canada v. Robichaud and MacKinnon*, 2013 NBCA 3, para 3
7 *Canada v. Greenwood*, 2021 FCA 186, para 95
8 *Ibid*, para 66
9 *Ibid*, para 60
10 *Ibid*, para 79
11 *Hudson v. Canada*, 2022 FC 694, paras 13-16
12 *Ibid*, para 87
13 *Ibid*, para 93
14 *Ibid*, para 101
15 *Ibid*, paras 87, 97, 101
16 Black Class Action, "Press Conference: Unions Call on Canada to Settle Black Class Action lawsuit", online: <https://www.youtube.com/watch?v=4bRVC3NUfJs>