Federal Court of Appeal | Cour d'appel fédérale

Date: 20250929

Docket: A-206-23

Citation: 2025 FCA 173

CORAM: **GLEASON J.A.**
GOYETTE J.A.
BIRINGER J.A.

BETWEEN:

KELLY MCQUADE, DAVID COMBDEN and GRAHAM WALSH

Appellants

and

THE ATTORNEY GENERAL OF CANADA,
Representing His Majesty the King in Right of Canada

Respondent

Heard at Toronto, Ontario, on October 28, 2024.

Judgment delivered at Ottawa, Ontario, on September 29, 2025.

REASONS FOR JUDGMENT BY: BIRINGER J.A.

CONCURRED IN BY: GLEASON J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

BIRINGER J.A.

I. Overview

[1] The appellants, Kelly McQuade, David Combden and Graham Walsh, sought certification of a class proceeding, as representative plaintiffs, on behalf of a class of current and former regular members of the RCMP with an Operational Stress Injury. An Operational Stress

Injury is defined in the second fresh as amended statement of claim as a persistent psychological difficulty resulting from operational duties with the RCMP.

[2] The appellants claimed that the RCMP was systemically negligent in delivering Mental Health Services to members of the proposed Class (terms defined in the second fresh as amended statement of claim). They also claimed that the RCMP discriminated in delivering Mental Health Services to proposed Class members, when compared to services provided to persons with physical injuries, in violation of subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter). The damages sought were not for the Operational Stress Injuries but for the "separate event" of the alleged RCMP systemic negligence and Charter breach in delivering or failing to deliver Mental Health Services.

[3] Each of the proposed representative plaintiffs received a disability pension pursuant to section 32 of the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11 (RCMP Superannuation Act). The central issue on the certification motion was whether the claims for systemic negligence or under subsection 15(1) of the Charter were barred pursuant to section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (CLPA). Section 9 of the CLPA bars a claim against the Crown if a pension or other compensation is paid or payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

[4] On the certification motion, the Federal Court concluded that the claims were barred by section 9 of the CLPA for proposed Class members entitled to receive a disability pension, including the proposed representative plaintiffs, such that there was no suitable representative plaintiff. The motion for certification was dismissed with leave to amend the statement of claim: 2023 FC 1083 (*per* Fothergill J.) (Reasons).

[5] The appellants submit that the Federal Court committed errors by: finding the appellants to have "conceded" that anyone eligible for a disability pension was barred by section 9 of the CLPA from advancing a claim in systemic negligence; concluding that section 9 bars the systemic negligence and Charter claims of all proposed Class members eligible for a disability pension; and determining that there was no representative plaintiff to advance the interests of the Class.

[6] For the reasons that follow, I agree that the Federal Court committed several errors warranting this Court's intervention. Accordingly, I would allow the appeal, set aside the order of the Federal Court, and remit the certification motion to that Court for redetermination in accordance with these reasons.

II. The Disability Pension Regime

[7] As the entitlement to a disability pension lies at the heart of the issues on appeal, I start with a brief description of the regime under which the disability pensions are payable.

[8] Each of the proposed representative plaintiffs received a disability pension pursuant to section 32 of the RCMP Superannuation Act. The specific events giving rise to their pensions are discussed below in the context of their suitability as representative plaintiffs.

[9] Section 32 provides awards for permanent disability (physical or mental) connected to service. Section 32 of the RCMP Superannuation Act provides:

32 Subject to this Part and the regulations, an award in accordance with the *Pension Act* shall be granted to or in respect of the following persons if the injury or disease — or the aggravation of the injury or disease — resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person's service in the Force:	**32** Sous réserve des autres dispositions de la présente partie et des règlements, une compensation conforme à la *Loi sur les pensions* doit être accordée, chaque fois que la blessure ou la maladie — ou son aggravation — ayant causé l'invalidité ou le décès sur lequel porte la demande de compensation était consécutive ou se rattachait directement au service dans la Gendarmerie, à toute personne, ou à l'égard de toute personne :
(a) any person to whom Part VI of the former Act applied at any time before April 1, 1960 who, either before or after that time, has suffered a disability or has died; and	**a)** visée à la partie VI de l'ancienne loi à tout moment avant le 1er avril 1960, qui, avant ou après cette date, a subi une invalidité ou est décédée;
(b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act and who has suffered a disability, either before or after that time, or has died.	**b)** ayant servi dans la Gendarmerie à tout moment après le 31 mars 1960 comme contributeur selon la partie I de la présente loi, et qui a subi une invalidité avant ou après cette date, ou est décédée.

[10] Applications for disability pension benefits are made to Veterans Affairs Canada (VAC). The amount of a disability pension depends on the degree to which the disability is related to service and the extent of the disability. A disability pension for mental health-related disabilities

is paid only for a formal, medically diagnosed disability or disabling condition, as informed by the *Diagnostic and Statistical Manual of Mental Disorders*.

[11] An applicant who is dissatisfied with a VAC decision may request a review based on new evidence. There is no limit on the number of reviews and there are no time limits for bringing an initial application or seeking a review. An applicant who is dissatisfied with the results of a VAC decision may apply to the Veterans Review and Appeal Board for a review of the decision. There is no time limit for an appeal to the Board. A detailed description of the disability pension regime is found in *Canada v. Hirschfield*, 2025 FCA 17 at paras. 10-25.

III. The Second Fresh as Amended Statement of Claim

[12] In the second fresh as amended statement of claim, the proposed Class is defined as:

> "Class" and "Class Members" means all persons who are or have been regular members (as defined in section 1 of the *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281) and who have been diagnosed with, and/or suffer or have suffered from, an Operational Stress Injury. For certainty, the Class excludes civilian and public service members of the Royal Canadian Mounted Police.

"Mental Health Services" are defined as:

> "Mental Health Services" means all mental health care services provided by the RCMP to the Class at all material times, including but not limited to the following: services provided through Occupational Health and Safety Services Offices ("OHSS Offices"); the Health Care Entitlements and Benefits Program; Operational Stress Injury ("OSI") Clinics; periodic health assessments; non-professional mental health support including through the Peer-to-Peer program; and training and education efforts, including the Road to Mental Readiness program.

"Operational Stress Injury" is defined as:

> "Operational Stress Injury" or "OSI" means any persistent psychological difficulty that results from operational duties with the RCMP and causes impaired functioning, including but not limited to diagnosed medical conditions such as Post-Traumatic Stress Disorder, depression, anxiety and panic attacks.

[13] The appellants say that regular RCMP members are at significant risk of developing Operational Stress Injuries given the inherent stresses of their occupation, including the performance of high-risk activities and exposure to psychologically traumatic events. They say that the federal Crown has a responsibility to address the prevention and detection, diagnosis, treatment and accommodation of these injuries.

[14] The appellants allege that the RCMP's negligent implementation of Mental Health Services over several decades caused proposed Class members to suffer foreseeable harm that goes beyond the stress and trauma inherent in their duties. They plead that the RCMP had evidence of a mental health crisis in the workplace and actual knowledge of the risks of psychological injury from duty-related operational stress, yet acted with systemic negligence in response to the Operational Stress Injuries of its members.

[15] The claim alleges a number of system-wide deficiencies in the provision of Mental Health Services, including: that the services and programs are more ostensible than actual, inadequate training of supervisors, harmful delays in diagnosis and treatment, and environmental factors that suppress the acknowledgement of mental disability.

[16] The appellants further allege that the RCMP members with Operational Stress Injuries are discriminated against in the delivery of health services when compared to those with work-related physical injuries. They claim that those with physical injuries have better access to services, are not stigmatized, have their injuries addressed in a timely manner, and are supported in their return to work.

[17] The appellants say that they do not seek damages for the Operational Stress Injuries, but for the harms caused by the "separate event" of the RCMP's systemic negligence and Charter breach.

[18] The Crown did not file a statement of defence before the certification hearing.

IV. The Reasons of the Federal Court

[19] Rule 334.16(1) of the *Federal Courts Rules*, S.O.R./98-106 sets out the test for certification of a proposed class proceeding. There are five criteria which plaintiffs must establish. The Federal Court rendered a decision on two of those criteria—whether the pleadings disclosed a reasonable cause of action (Rule 334.16(1)(*a*)) and whether there was a suitable representative plaintiff (Rule 334.16(1)(*e*)). This was sufficient to dispose of the motion.

[20] The Federal Court noted that a plaintiff will satisfy the reasonable cause of action requirement unless it is "plain and obvious" that no claim exists. Considering the elements of the tort of negligence, the Federal Court concluded that it was not "plain and obvious" that the

defendant did not owe a duty of care to ensure that Mental Health Services were implemented without negligence. It found that the statement of claim disclosed a reasonable cause of action in systemic negligence.

[21] The Federal Court described what a claimant must establish to prove a *prima facie* violation of subsection 15(1) of the Charter and concluded that the statement of claim was deficient in pleading facts on the provision of health services to the comparator group (i.e., regular members of the RCMP who sustained physical injuries in the line of duty). The Federal Court concluded that a reasonable cause of action alleging breach of subsection 15(1) of the Charter had not been established.

[22] The Federal Court then considered whether section 9 of the CLPA applied, citing the Supreme Court of Canada's decision in *Sarvanis v. Canada*, 2002 SCC 28, [2002] 1 S.C.R. 921 [*Sarvanis*] and subsequent decisions interpreting and applying section 9. In *Sarvanis*, the Supreme Court held that section 9 of the CLPA establishes Crown immunity "where the very event of death, injury, damage or loss that forms the basis of the barred claim is the event that formed the basis of a pension or compensation award" (at para. 38).

[23] The Federal Court noted that in *Greenwood v. Canada*, 2020 FC 119, aff'd 2021 FCA 186, [2021] 4 F.C.R. 635 [*Greenwood*], *Marsot v. Canada (Department of National Defence)*, 2002 FCT 226, 217 F.T.R. 232 [*Marsot*], aff'd 2003 FCA 145, 303 N.R. 282 and *Brownhall v. Canada (National Defence)* (2007), 87 O.R. (3d) 130, 2007 CanLII 31749 (S.C.J. (Div. Ct.)) [*Brownhall*], there was insufficient evidence to assess whether the pension or other

compensation arose from the same factual basis as the civil claim. The Federal Court in the present case found no such ambiguity, because the appellants had "conceded" that the systemic negligence claim of proposed Class members eligible for a disability pension was barred by section 9 of the CLPA. Finding that the subsection 15(1) Charter claim had the same factual basis as the systemic negligence claim, the Court concluded that it was similarly barred.

[24] The Federal Court also considered whether there was an adequate representative plaintiff, noting that there must be "some basis in fact" to demonstrate that this criterion is met. Having established that both the systemic negligence claim and the Charter claim were barred for proposed Class members eligible for a disability pension, and that the proposed representative plaintiffs were receiving a disability pension, the Federal Court concluded that there was no representative plaintiff to advance the interests of the Class.

[25] The Federal Court noted that further evidence would be required to establish "some basis in fact" for the remaining certification criteria in Rule 334.16(1). The certification motion was dismissed, with leave to amend the pleadings. The appellants appeal the Federal Court's order denying certification to this Court.

[26] Before the Federal Court was also the Crown's motion, pursuant to section 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, to stay the proceeding on the grounds of overlap with two previously certified class actions. Given the substantial amendments to be made to the statement of claim, the Federal Court determined that it was premature to decide the motion. The Crown did not appeal this determination.

V. Issues

[27] There are four issues in this appeal:

- Did the Federal Court err in finding that the appellants had "conceded" that all proposed Class members eligible for a disability pension are barred by section 9 of the CLPA from advancing a claim in systemic negligence?
- Did the Federal Court err in concluding that section 9 of the CLPA bars the systemic negligence claims of all proposed Class members eligible for a disability pension?
- Did the Federal Court err in concluding that the claim under subsection 15(1) of the Charter is similarly barred under section 9 of the CLPA for all proposed Class members eligible for a disability pension?
- Did the Federal Court err in determining that there was no representative plaintiff to advance the interests of the proposed Class?

VI. Standard of Review

[28] The appellate standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 apply to a decision on a motion for certification: *Greenwood* at para. 89; *Canada (Attorney General) v. Jost*, 2020 FCA 212 [*Jost*] at paras. 20-21. Questions of law are reviewable on a standard of correctness. Questions of fact and questions of mixed fact and law, absent an extricable question of law, are reviewable on the standard of palpable and overriding error.

VII. Analysis

A. *Did the Federal Court err in finding that the appellants had "conceded" that all proposed Class members eligible for a disability pension are barred by section 9 of the CLPA from advancing a claim in systemic negligence?*

[29] The Federal Court found the appellants to have "conceded" that the systemic negligence claim of proposed Class members eligible for a disability pension was barred by section 9 of the CLPA: Reasons at paras. 9, 11, 75 and 85. This is a finding of fact, reviewable on a standard of palpable and overriding error: *Insurance Corporation of British Columbia v. Dhaliwal*, 2025 BCCA 142 at paras. 59-60, citing *Dignard v. Dignard*, 2025 BCCA 43 at para. 26.

[30] The appellants say that the motion judge made a palpable and overriding error, that they did not concede that section 9 of the CLPA bars the proposed representative plaintiffs, or any proposed Class members, from commencing their claims. According to the appellants, they acknowledged at the hearing that at some point there would be a role for section 9, but that this would be at the individual assessment stage, after certification, and after a successful common issues trial. At that time, it would be determined whether an individual's claim was barred by section 9 with reference to findings of fact about the individual's receipt of or entitlement to receive a disability pension. The appellants rely on numerous passages from the Federal Court hearing transcript in support of their position: See e.g., Motions Transcript, pp. 94-95, 100-101, 125, 139, 235-236, 289-292 and 410-411.

[31] The respondent did not address these extensive excerpts from the transcript. The respondent says that the motion judge's conclusion was a fair articulation of the appellants'

position, and that the appellants' true complaint is about the outcome. They say that the motion judge recognized the appellants' concession but ultimately found that the section 9 issue could be addressed based on the evidence before him.

[32] Having reviewed the submissions of the parties at the Federal Court and the Federal Court hearing transcript, I have determined that the motion judge was mistaken.

[33] The certification hearing at the Federal Court took three days. The appellants' counsel and the motion judge had numerous exchanges as to what was being conceded, and there was some inconsistency in what the appellants' counsel said. It is therefore important to consider the entire series of exchanges and not focus on any one in isolation.

[34] Contrary to the Federal Court's finding, the appellants did not concede the issue of whether section 9 of the CLPA barred the systemic negligence claim of proposed Class members eligible for a disability pension—which would have, in effect, been a concession as to whether there was a reasonable cause of action. The transcript reflects the appellants' acknowledgement that some proposed Class members would likely have their systemic negligence claim barred by section 9 due to the overlap between the factual basis for their claim and their disability pension entitlement. However, this acknowledgement was made in reference to a determination at the individual assessment stage, with all the necessary information as to the individual's pension entitlement, and after the determination of liability at a common issues trial: Motions Transcript, pp. 289-292. The appellants' counsel stated clearly before the Federal Court that while there is a

role for the application of section 9 of the CLPA in the proceeding, it is not at the certification stage.

[35] This position is entirely consistent with the appellants' legal theory in their memorandum of fact and law for the certification hearing. The appellants submitted that determining whether section 9 applies is a fact-driven exercise and that the Federal Court had insufficient information to conclude that every proposed Class member (or the proposed representative plaintiffs) would have their claims barred. The appellants take the same position in this appeal.

[36] A formal admission of a fact or issue may result in a waiver or restriction of rights. Therefore, it must be "unequivocal" or "clear and unambiguous": *Rosenberg et al. v. Securtek Monitoring Solutions Inc.*, 2021 MBCA 100, 465 D.L.R. (4th) 201 at para. 58, citing *Canadian National Railway Co. v. Huntingdon*, 2013 MBCA 3, 288 Man. R. (2d) 245 at para. 107. Here, the alleged concession was neither, and the Federal Court erred in concluding that one had been made.

[37] The Federal Court referred to the decisions in *Greenwood*, *Marsot* and *Brownhall* and noted that in each of those cases, there was insufficient evidence to conduct the analysis required by *Sarvanis* as to whether section 9 of the CLPA applied. The Federal Court concluded that there was "[n]o similar ambiguity" in the present case because "[t]he Plaintiffs concede that the negligence claims of Class members who are eligible for a disability pension are barred by s 9 of the CLPA": Reasons at para. 75. It was on this basis that the Federal Court dispensed with the need to apply section 9 and relevant case law to the facts.

[38] The error in finding a concession cascaded into further errors, ultimately leading to the dismissal of the certification motion. After concluding that the subsection 15(1) Charter claim was premised on the same facts as the allegation of systemic negligence, the motion judge found that it was "similarly barred" by section 9: Reasons at para. 85. When considering the suitability of the proposed representative plaintiffs, the motion judge determined that because they all received a disability pension, their claims were barred and none of them could advance the interests of the Class: Reasons at paras. 83 and 85.

[39] I have concluded that the Federal Court committed a palpable and overriding error in finding there to be a concession when there was none. "Palpable" in that the error is obvious, upon review of the Federal Court hearing transcript and the appellants' submissions in that Court. "Overriding" in that the error affected the core of the outcome in this case: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46.

B. *Did the Federal Court err in concluding that section 9 of the CLPA bars the systemic negligence claims of all proposed Class members eligible for a disability pension?*

[40] For the first certification criterion, that the pleadings disclose a reasonable cause of action (Rule 334.16(1)(*a*)), the question is whether it is "plain and obvious", assuming all facts pleaded are true, that the claim has no reasonable prospect of success: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 [*Pro-Sys Consultants*] at para. 63; *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61 [*Nasogaluak*] at para. 18. The

applicable principles are the same as those on a motion to strike: *Greenwood* at para. 91; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420 at para. 14.

[41] The facts alleged in the statement of claim are presumed to be true, and generally no evidence may be considered on this issue: *Greenwood* at para. 91; *Nasogaluak* at paras. 18, 19. However, where the Crown challenges the existence of a reasonable cause of action based on section 9 of the CLPA, evidence is permitted: *Lafrenière v. Canada (Attorney General)*, 2020 FCA 110 [*Lafrenière*] at paras. 39-41; *Fowler v. Canada (Attorney General)*, 2025 FC 815 [*Fowler*] at para. 11; *Dunn v. Canada (Attorney General)*, 2025 FC 652 [*Dunn*] at paras. 27-37.

[42] Given the highly factual nature of the inquiry under section 9, evidence as to the circumstances giving rise to the pension or compensation and to the claim against the Crown is required. This Court has considered the need for evidence in the analogous situation of a motion to strike involving the application of section 9 of the CLPA: *Lafrenière* at paras. 39-41. The evidence before the Federal Court in the present matter included affidavits filed by the representative plaintiffs and the respondent.

[43] On review of a motion judge's decision on the reasonable cause of action criterion, the determination of the elements of a pleaded cause of action, or whether there is a cognizable claim, is a question of law, reviewable on a standard of correctness: *Adelberg v. Canada*, 2024 FCA 106 at para. 38, citing *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89, 482 D.L.R. (4th) 504 [*Jensen*] at paras. 32-36. The assessment of whether the pleaded facts support a cause of action is a question of mixed fact and law, reviewable on a standard of palpable and

overriding error, subject to an extricable legal error which is reviewable on a standard of correctness: *Lochan v. Binance Holdings Limited*, 2025 ONCA 221 at para. 29; *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606, 173 O.R. (3d) 682 at para. 36; *Jensen* at para. 42.

[44] The Federal Court properly identified the "plain and obvious" test, noting that the threshold is low and that claims that do not contain a "radical defect" should proceed to trial. The Federal Court correctly observed that a plaintiff should not be prevented from proceeding because of the novelty of a cause of action or the potential for a strong defence to be mounted: Reasons at paras. 37-38.

[45] The appellants claim that the Crown was systemically negligent in implementing the Mental Health Services for the proposed Class. The Federal Court correctly stated the elements of the tort of negligence and applied the legal framework to the claim. Assuming the pleaded facts to be true, the Federal Court concluded that it was not "plain and obvious" that there was no reasonable cause of action for a systemic negligence claim. I agree with this conclusion, and it is not contested. The dispute in this appeal is about the Federal Court's determination that section 9 of the CLPA barred the claim.

[46] The interpretation of section 9 of the CLPA is a question of law, reviewable for correctness. The application of section 9, absent an extricable legal error, is a question of mixed fact and law, reviewable on a standard of palpable and overriding error: *Lafrenière* at paras. 30, 47; *Bewsher v. Canada*, 2020 FCA 216 at paras. 7, 15, aff'g 2019 FC 1350 at paras. 3-4.

[47] Section 9 of the CLPA bars an action against the Crown if a pension or compensation is paid or payable out of the Consolidated Revenue Fund or any funds administered by an agency of the Crown to the claimant in respect of the death, injury, loss or damage in respect of which the claim is made. In effect, section 9 of the CLPA bars double recovery where a government scheme provides a form of compensation in relation to the death, damage, injury or loss that is relied on in the action: *Sarvanis* at para. 28. Section 9 has been interpreted to provide Crown immunity where different heads of damages are claimed than those compensated by the pension or other compensation, on the basis that they both arose from "the same factual basis" or same event: *Sarvanis* at paras. 28-29, 38; *Vancise v. Canada (Attorney General)*, 2018 ONCA 3 [*Vancise*] at para. 12; *Lafrenière* at paras. 45-46.

[48] The burden is on the Crown to establish that section 9 applies: *Flying E Ranche Ltd. v. Attorney General of Canada*, 2022 ONSC 601 at para. 496, aff'd 2024 ONCA 72 [*Flying E Ranche*]; *Brownhall* at para. 51; *Marsot* at paras. 61, 66. In my view, this holds true whether the Crown's challenge arises in the context of a motion to strike brought before trial or on a certification motion where the reasonable cause of action criterion is in issue. The inquiry is the same—whether it is "plain and obvious" that section 9 of the CLPA bars the claim such that there is no reasonable cause of action.

[49] Section 9 of the CLPA provides:

Special Provisions respecting Liability	**Dispositions spéciales concernant la responsabilité**
No proceedings lie where pension payable	**Incompatibilité entre recours et droit à une pension ou indemnité**
9 No proceedings lie against the	**9** Ni l'État ni ses préposés ne sont

Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.	susceptibles de poursuites pour toute perte — notamment décès, blessure ou dommage — ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État.

[50] In *Sarvanis*, the leading case on section 9 of the CLPA, the Supreme Court held that section 9 bars a tort claim against the Crown where a pension or other compensation is paid or payable "in respect of" or on the "same factual basis" as the death, injury, damage or loss as gives rise to the claim. Justice Iacobucci, writing for the Court, stated (at paras. 28-29):

> 28 In my view, the language in s. 9 of the *Crown Liability and Proceedings Act*, though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made.
>
> 29 This breadth is necessary to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated. That is, a suit only claiming for pain and suffering, or for loss of enjoyment of life, could not be entertained in light of a pension falling within the purview of s. 9 merely because the claimed head of damages did not match the apparent head of damages compensated for in that pension. All damages arising out of the incident which entitles the person to a pension will be subsumed under s. 9, so long as that pension or compensation is given "in respect of", or on the same basis as, the identical death, injury, damage or loss.
>
> (Emphasis in original)

[51] Section 9 of the CLPA has broad reach. As Justice Iacobucci observed, the words "in respect of" have a wide scope: "They import such meanings as 'in relation to', 'with reference

to' or 'in connection with'. The phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters": *Sarvanis* at para. 20, quoting *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at p. 39, 1983 CanLII 18 (S.C.C.).

[52] The Federal Court correctly cited the decisions in *Sarvanis*, *Greenwood*, *Marsot* and *Brownhall* regarding the "same factual basis" framework. This was relevant to whether section 9 applied to bar the systemic negligence claim on a Class-wide basis—if a disability pension was paid or payable to proposed Class members on the same factual basis (or with respect to the same factual basis) as underlay the claim. However, the Federal Court did not apply that framework, instead relying on the alleged concession to conclude that section 9 barred the systemic negligence claim of all proposed Class members entitled to a disability pension. This was in error.

[53] Putting aside the alleged concession, I do not accept that it is "plain and obvious" at this stage that section 9 operates to bar a systemic negligence claim for all proposed Class members entitled to receive a disability pension.

[54] Section 9 of the CLPA is often dealt with in non-class proceedings in the context of a motion to strike before trial or a motion for summary judgment. See, for example: *Bewsher* at paras. 12-14; *Lafrenière* at paras. 36-47; *North Bank Potato Farms Ltd. v. The Canadian Food Inspection Agency*, 2019 ABCA 344 at paras. 16-26; *Vancise* at paras. 9-17. The factual basis for the claim in the proposed proceeding is lined up against the factual basis for the plaintiff's entitlement to a government pension or compensation, applying *Sarvanis* to determine whether

they are sufficiently linked such that section 9 applies. For example, as the Court in *Brownhall* expressed (at para. 37):

> Sarvanis makes it clear that the question to be asked is whether the factual basis for the pension and the action is the same. Does the same loss or injury underlie both? If it is plain and obvious, on the facts as pleaded, that the same loss underlies both, the action is barred by s. 9 of the CLPA.

[55] There is a dearth of case law on the application of section 9 at the certification stage of class proceedings. In *Greenwood*, the Federal Court of Appeal upheld the Federal Court's conclusion that it was premature to apply section 9 at certification. Notably, this was in the context of whether there was a suitable representative plaintiff and not whether the pleadings disclosed a reasonable cause of action. Indeed, the respondent could point to no case, other than the Federal Court's decision in this proceeding, in which section 9 of the CLPA applied at certification on a class-wide basis.

[56] In applying a statutory limitations defence, a claim will not be barred for an entire class unless there is clear evidence of class-wide commonality. I consider a statutory limitations defence analogous to a section 9 bar which is also a statutory defence. Without class-wide commonality, the defence is an individual issue that requires separate adjudication after the common issues are determined: *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396, 60 B.C.L.R. (6th) 369 at para. 95, aff'd 2023 BCCA 72; *Smith v. Inco Limited*, 2011 ONCA 628, 107 O.R. (3d) 321 at paras. 164-165; *Martin v. Wright Medical Technology Canada Ltd.*, 2024 ONCA 1 at paras. 40-42.

[57] The respondent submits that there is evidence of Class-wide commonality that negates the need for individual assessment. They say that every proposed Class member has a persistent psychological injury that is connected to their RCMP service (an Operational Stress Injury). They say that "on its face" this means that a disability pension is paid or payable.

[58] I disagree. As the Federal Court acknowledged, a disability pension is only payable for formal medically diagnosed disabilities or disabling conditions, as informed by the *Diagnostic and Statistical Manual of Mental Disorders*, causing permanent impairment. This may not include every Operational Stress Injury. Although there was no evidence of a proposed Class member who was not entitled to a disability pension, there was no evidence that such a person did not exist. Thus, while each proposed Class member has an Operational Stress Injury, the respondent did not establish that every proposed Class member had a disability pension paid or payable.

[59] Further, and crucially, there was no evidence as to whether a proposed Class member would be entitled to any disability pension amount pursuant to section 32 of the RCMP Superannuation Act for or in respect of the same events that underlie the claim for systemic negligence. Section 32 provides that an award shall be granted if an injury or disease "or the aggravation of the injury or disease" resulting in the disability arose out of or was directly connected to service with the RCMP. We simply do not know if proposed Class members would be entitled to receive amounts under section 32 in respect of the events that underlie the systemic negligence claim including for "the aggravation of" an underlying injury.

[60] While the proposed representative plaintiffs were in receipt of increased pension amounts by reason of their diagnoses with mental health conditions flowing from their service with the RCMP, there was no suggestion that this included the events alleged to underly the claim for systemic negligence. There was no evidence about whether the proposed representative plaintiffs (or other members of the proposed Class) had applied for or were entitled to additional pension amounts under section 32 if they suffered damages attributable to the provision of or failure to provide Mental Health Services.

[61] In the absence of such evidence, I fail to see how the bar in section 9 of the CLPA could be found to apply at this stage to the proposed representative plaintiffs or to any putative Class member when the full scope of their entitlement to a disability pension has not been established.

[62] Also, for those proposed Class members, like the proposed representative plaintiffs, who had an Operational Stress Injury entitling them to be paid a disability pension (albeit not for the events underlying the alleged RCMP systemic negligence), the mere fact of entitlement to the pension does not provide enough information to conduct a proper section 9 analysis. An Operational Stress Injury tells us what kind of injury a Class member has, but little about the events that caused it. As noted earlier, the *Sarvanis* analysis demands information about the factual basis of the injury, damage or loss giving rise to the disability pension or compensation so that it can be lined up against the factual basis of the injury, damage or loss alleged to underlie the claim against the Crown. Then a determination can be made on whether the factual basis is the same or if the pension or compensation is paid or payable “in respect of” the death, injury, damage or loss in respect of which the claim is made.

[63] Several cases have considered the extent to which section 9 of the CLPA bars a claim for subsequent negligent treatment of the condition giving rise to the pension or other compensation entitlement: see e.g. *Lafrenière*, *Dumont v. Canada*, 2003 FCA 475, [2004] 3 F.C.R. 338 [*Dumont*] and *Gélinas v. Canada*, 2021 FC 1157. The focus of the analysis is whether there is sufficient linkage between the compensation event and the subsequent treatment. In *Lafrenière*, this Court concluded that a claim based on the harm arising from the Crown's processing of the plaintiff's complaints was barred under section 9 as it was intrinsically related to the factual basis that gave rise to the compensation payment: at paras. 64-67. This line of cases is particularly relevant here. The appellants claim they do not seek damages for the Operational Stress Injuries themselves, for which they acknowledge a disability pension may be payable, but for the losses caused by the "separate event" of the RCMP's alleged systemic negligence in delivering or failing to deliver Mental Health Services.

[64] As addressed further below, the factual basis of each proposed Class member's entitlement to a disability pension is unique and individualized. The *Sarvanis* linkage analysis is not possible in the abstract, or, in these circumstances, on a Class-wide basis. There was insufficient evidence regarding proposed Class members' entitlement or possible entitlement to a disability pension, including in respect of the events giving rise to the alleged RCMP systemic negligence. This lack of evidence meant that a proper section 9 analysis could not be started, let alone support a finding of commonality sufficient to ground the application of section 9 on a Class-wide basis. Thus, even aside from the misplaced reliance on the alleged concession, the Federal Court erred in concluding that section 9 of the CLPA applied to all proposed Class members entitled to a disability pension.

[65] I do not however rule out that section 9 of the CLPA could sometimes apply on a class-wide basis at the certification stage. It may be appropriate in circumstances where the factual basis of a claim is an identifiable loss arising from a common event for all class members and that same event gives rise to a disability pension or other compensation to them all.

[66] The Federal Court recently came to a conclusion along those lines in *Dunn*, granting a motion to strike a statement of claim in a proposed class proceeding based on section 9. The proposed class proceeding was on behalf of members of the Canadian Armed Forces who were exposed to black mould and other toxins during their military service. The claim asserted systemic negligence, breach of fiduciary duty and violations of section 7 of the Charter. The Federal Court concluded that the pension paid or payable to the plaintiff had the same factual basis as the allegations of loss or damage asserted in the claim. By striking the claim without leave to amend, the Federal Court, in effect, found there to be no reasonable cause of action for the entire class.

[67] The respondent cites *Flying E Ranche* as a "cautionary tale" about waiting until the damages assessment stage to determine whether section 9 of the CLPA bars the proceedings. In *Flying E Ranche*, a class action commenced by cattle farmers against Agriculture Canada for negligently failing to prevent "mad cow" disease was found to be barred by section 9 because the farmers had already received financial assistance covering the same losses.

[68] *Flying E Ranche* does not assist the respondent. It is distinguishable in at least two respects. Factually the context is different. In *Flying E Ranche*, there was one incident with a

commonality of loss—the detection of bovine spongiform encephalopathy (BSE) resulting in quarantining and destruction of herds of cattle—and government compensation was payable under BSE-specific programs. Those circumstances are very different from disability pension payments arising from individual events with individual consequences and the alleged failed delivery of Mental Health Services to the Class members. Further, section 9 was applied in *Flying E Ranche* only after a lengthy common issues trial, with the benefit of a significant evidentiary record.

[69] In these circumstances, it is far from "plain and obvious" that a determination could be made that section 9 of the CLPA applied based only on the pleadings and the evidence before the Federal Court. I find that the Federal Court erred in relying on the alleged concession when there was none, but also in concluding that section 9 operates as a bar to the systemic negligence claim for all proposed Class members entitled to a disability pension. There was insufficient evidence to properly conduct a section 9 analysis or find commonality to support that conclusion.

C. *Did the Federal Court err in concluding that the claim under subsection 15(1) of the Charter is similarly barred under section 9 of the CLPA for all proposed Class members eligible for a disability pension?*

[70] The standard of review for the Federal Court's determination that the subsection 15(1) Charter claim did not disclose a reasonable cause of action is the same as described above for the systemic negligence claim.

[71] To prove a violation of subsection 15(1) of the Charter, a claimant must establish that the impugned law or state action: (1) on its face or in its impact, creates a distinction based on

enumerated or analogous grounds, and (2) imposes a burden or denies a benefit in a way that reinforces, perpetuates, or exacerbates disadvantage: *Nasogaluak* at para. 77, citing *R. v. Sharma*, 2022 SCC 39, 165 O.R. (3d) 398 at para. 28; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113 at para. 27.

[72] The appellants' subsection 15(1) Charter claim alleges that the proposed Class, having work-related psychological injuries, suffered discrimination in receiving health services when compared to those RCMP members with work-related physical injuries. The appellants claimed that proposed Class members bore a disproportionate burden in accessing services and received differentiated treatment from those with physical injuries, resulting in substantive inequality and exacerbating disadvantage for individuals with mental disabilities: second fresh as amended statement of claim at paras. 81-88.

[73] The Federal Court made two findings relating to the subsection 15(1) Charter claim. First, the Federal Court concluded that the statement of claim did not plead sufficient facts about the health care treatment of the comparator group (i.e., regular members of the RCMP who sustained physical injuries in the line of duty). Accordingly, the Federal Court concluded that the statement of claim disclosed no reasonable cause of action arising from the alleged breach of subsection 15(1): Reasons at paras. 67-68.

[74] The appellants do not challenge this finding. As this Court has observed, the requirement to plead material facts is essential to the proper presentation of Charter issues: *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, 476 N.R. 219 at para. 21. The Federal

Court noted that the pleadings deficiency could be cured, and granted the appellants leave to amend.

[75] Second, the Federal Court concluded that the subsection 15(1) Charter claim of the proposed representative plaintiffs and those members of the proposed Class entitled to a disability pension was barred by section 9 of the CLPA because it arose from the "same facts" as the systemic negligence claim. The Federal Court found that both derived from the same injuries, specifically the infliction and exacerbation of Operational Stress Injuries: Reasons at paras. 76 and 83. Having concluded that the systemic negligence claim was barred by section 9 of the CLPA, it followed that the subsection 15(1) Charter claim was "similarly barred": Reasons at para. 85.

[76] The standard of review for the Federal Court's determination on the interpretation and application of section 9 of the CLPA to the Charter claim is the same as for the systemic negligence claim.

[77] I have several concerns with the Federal Court's conclusion. First, it is inconsistent to determine that the statement of claim lacks sufficient facts to support a subsection 15(1) Charter claim, grant leave to amend the statement of claim, and, at the same time, conclude that the Charter claim is based on the "same facts" as the systemic negligence claim. The determination was premature.

[78] The Federal Court's conclusion is also flawed because it rests on an alleged concession, which I have determined was not made, and the conclusion based on that error that the systemic negligence claim was barred under section 9. There is no meaningful analysis of the application of section 9 of the CLPA and relevant case law to the subsection 15(1) Charter claim.

[79] More fundamentally, I do not agree with the Federal Court's conclusion that a Charter claim premised on the same facts as a tort claim which is barred by section 9 of the CLPA will necessarily be similarly barred. The cases cited do not stand for this proposition.

[80] In *Prentice v. Canada*, 2005 FCA 395, [2006] 3 F.C.R. 135 [*Prentice*], the plaintiff member of the RCMP was entitled to compensation for injury suffered from various peace-keeping missions and sought damages from the RCMP, claiming a breach of his rights under section 7 and subsection 15(1) of the Charter. The Federal Court of Appeal granted a motion to strike the statement of claim, having determined that the plaintiff's Charter claims were, when "stripped of [their] artifices", a disguised civil action against the Crown, prohibited by sections 8 and 9 of the CLPA: *Prentice* at paras. 69, 70.

[81] Similarly, in *Lafrenière*, the appellant received disability awards relating to his service in the Canadian Armed Forces and sought further damages from the Crown, based on alleged breaches of various Charter rights. This Court confirmed that the entire claim should be struck based on section 9, and cautioned that the real nature of the action must be determined, not the characterization of the wrong by an artful pleader: *Lafrenière* at para. 60. The Court concluded

that the plaintiff's Charter complaints were completely unsupported, a disguised action in liability against the Crown, and prohibited by section 9 of the CLPA.

[82] These decisions tell us that there must be an inquiry as to whether the Charter claim is a "real" Charter claim or another type of claim, such as a tort claim, dressed up as a Charter claim. If the latter, and the claim based on its true character would be barred by section 9, then it necessarily follows that the disguised Charter claim would also be barred.

[83] While the respondent submits that the Federal Court found the Charter claim to be a disguised civil claim, I disagree. The Federal Court concluded that because the Charter claim and the systemic negligence claim were premised on the same facts, the Charter claim was also barred: Reasons at para. 83. According to the Federal Court, the nature of the claim does not matter: "[s]ection 9 of the CLPA applies to the whole fact situation": Reasons at para. 78, citing *Kift v. Canada (Attorney General)*, [2002] O.J. No. 5448 (QL/Lexis) at para. 9, 2002 CarswellOnt 8593 (WL) (S.C.J.).

[84] The cases cited by the Federal Court do not stand for this proposition either. The "same set of facts" framework, while appropriate in the context of a tort claim, does not clearly apply to determine whether a Charter claim may be barred by section 9.

[85] Uncertainty regarding the application of section 9 of the CLPA to a Charter claim was expressed in *Dumont*. This Court concluded in the context of a section 9 challenge to a claim under section 7 of the Charter, that in the event of a Charter breach "it is far from certain that

section 9 of the Act can be relied upon to exclude a fair and appropriate remedy", and that it would be up to the judge responsible to determine whether it would be appropriate to add further compensation: *Dumont* at para. 78.

[86] In *Prentice*, this Court did not opine on whether, even if there were a Charter violation, the action would be barred by Crown immunity: at para. 77. Similarly, in *Lafrenière* this Court did not conclude that section 9 bars a Charter claim as on the facts of the case, there was no real Charter claim. As the Court observed (at para. 49): "The Supreme Court of Canada, like this Court, has not yet had an opportunity to decide the substantive question as to whether the immunity provided for in section 9 of the CLPA also applies to remedies sought under the Charter."

[87] *Sherbanowski v. Canada*, 2011 ONSC 177 [*Sherbanowski*], also cited by the Federal Court, provides some support for the view that section 9 can bar a Charter claim on the same basis as a tort claim. The Ontario Superior Court determined that the plaintiff's claims of negligence, breach of fiduciary duty, breach of contract, misrepresentation and breach of Charter rights were barred by section 9 as they had the same factual basis as the plaintiff's disability pension: *Sherbanowski* at paras. 43-44. See also *Gervais c. R.*, 2019 QCCS 1087 at paras. 74-76. Two recent cases of the Federal Court relied on the motion judge's analysis here to reach a similar conclusion: *Dunn* at paras. 109-111; *Fowler* at para. 18.

[88] The unsettled state of the law regarding whether the appellants' subsection 15(1) Charter claim (assuming it were properly pleaded) would be barred by section 9 of the CLPA ought to

have been considered by the Federal Court. This alone would have weighed in favour of a determination that it was not "plain and obvious" that there was no reasonable cause of action based on subsection 15(1) of the Charter: *Nunavut Tunngavik Incorporated et al. v. The Commissioner of Nunavut et al.*, 2024 NUCA 9 at paras. 23-24; *Mohr v. National Hockey League*, 2022 FCA 145, [2021] 4 F.C.R. 465 at para. 52.

[89] The Federal Court relied on the alleged "concession" and erroneous conclusion that section 9 barred the systemic negligence claim to conclude that section 9 would also bar the subsection 15(1) Charter claim. Also, in doing so, the Federal Court failed to address the uncertainty in the law on the latter issue. Accordingly, I find that the Federal Court erred in concluding that it was "plain and obvious" that the subsection 15(1) Charter claim was barred by section 9 for all proposed Class members entitled to a disability pension.

D. *Did the Federal Court err in determining that there was no representative plaintiff to advance the interests of the proposed Class?*

[90] Having addressed the potential bar under section 9 of the CLPA to the claims of the entire putative Class entitled to a disability pension, I now turn to whether the Federal Court erred in concluding that the claims of the proposed representative plaintiffs were barred under section 9, precluding them from being suitable representative plaintiffs.

[91] Rule 334.16(1)(*e*)(*i*) requires a representative plaintiff to be a member of the proposed class who would fairly and adequately represent the interests of the class: *Jost* at paras. 103-110; *McMillan v. Canada*, 2024 FCA 199 at para. 165. A plaintiff seeking certification must adduce

evidence to establish "some basis in fact" that this requirement is met: *Greenwood* at para. 94, citing *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 25 and *Pro-Sys Consultants* at para. 99 and other authorities. This threshold is lower than the civil standard of balance of probabilities as certification is not the appropriate stage to resolve conflicts in the evidence: *Greenwood* at para. 94, citing *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 at para. 40. Where the Crown challenges this certification criterion based on section 9 of the CLPA, the inquiry will be whether section 9 applies to the proposed representative plaintiffs' claim such that there is not "some basis in fact" for the plaintiff to advance the interests of the class.

[92] The assessment of whether there is "some basis in fact" to conclude that a proposed plaintiff is suitable raises a question of mixed fact and law, involving an appreciation of the evidence: *Jost* at para. 21, citing *Canada v. John Doe*, 2016 FCA 191 at para. 29. It is therefore reviewable on a standard of palpable and overriding error, absent an extricable legal error. As the Federal Court's assessment of suitability of the proposed representative plaintiffs involved the interpretation and application of section 9 of the CLPA to their claims, the standard of review for this issue is the same as for the claims of the entire proposed Class.

[93] A representative plaintiff will be excluded from the class where clear evidence on the motion reveals that the individual's claim is barred. The earlier conclusion—that the Federal Court erred in applying section 9 of the CLPA to the claims of those proposed Class members entitled to receive a disability pension—must be revisited for the claims of each of the proposed

representative plaintiffs. There was evidence on their entitlement to a disability pension before the Federal Court, potentially providing a starting point for the required analysis under section 9.

[94] The Federal Court determined that both the systemic negligence claim and subsection 15(1) Charter claim were barred for all proposed members of the Class eligible to receive a disability pension. The Federal Court then determined that since the proposed representative plaintiffs were receiving a disability pension, their claims were barred and there was no representative plaintiff to advance the interests of the Class: Reasons at para. 85. The Federal Court provided for leave to amend the statement of claim, including a possible new Class definition that excludes members of the RCMP whose claims are barred by section 9: Reasons at para. 88.

[95] The appellants submit that the disqualification of the proposed representative plaintiffs was based on the purported concession, which they did not make. To the extent that the motion judge arrived at the conclusion based on his own determination of the role and scope of section 9 of the CLPA and the evidence before him, the appellants say he made a palpable and overriding error. They submit that the very limited evidence on the basis for the pension entitlement of each proposed representative plaintiff was insufficient to determine that section 9 would bar their claims.

[96] The respondent relies on the motion judge's conclusion and reasons, which are grounded in the premise that receipt of a disability pension by a Class member causes section 9 of the CLPA to apply. The respondent observes that there was no evidence before the motion judge of

any proposed Class member with an Operational Stress Injury to whom a disability pension was not paid or payable, but that the motion judge left it open for the appellants to amend the statement of claim and identify one.

[97] To the extent that the motion judge's conclusion on suitability of the proposed representative plaintiffs was based on the "concession" that section 9 would bar the claims of all proposed Class members eligible to receive a disability pension, for the reasons already given, it was made in error. To the extent that the motion judge arrived at this conclusion based on his own determination of the role and scope of section 9 and the evidence before him, I also conclude that he erred.

[98] Putting aside the alleged concession, the Federal Court concluded that the proposed representative plaintiffs' claims were barred under section 9 because their disability pension entitlement, the systemic negligence claim and Charter claim have "the same factual basis", arising from "the same injuries, specifically the infliction and exacerbation of [Operational Stress Injuries]": Reasons at para. 76.

[99] With respect, this conclusion, unsupported by any express examination of the facts relating to the proposed representative plaintiffs' entitlement to a disability pension or the facts pleaded in support of the claims of systemic negligence and a breach of subsection 15(1) of the Charter, falls short of what is required to determine whether section 9 applies. Further, I find that the sparse evidence on the proposed representative plaintiffs' pension entitlement was insufficient to determine that their pension entitlement arose in respect of or on the same factual

basis as the allegations giving rise to the claims. A similar conclusion regarding a lack of sufficient evidence was reached in *Greenwood* (at para. 196), *Marsot* (at paras. 56-66; aff'd 2003 FCA 145 at para. 1) and *Bewsher* (at para. 15).

[100] The evidence before the Federal Court regarding the representative plaintiffs' pension entitlement included only the VAC letters, calculation sheets and decisions. It did not include applications or written submissions, underlying medical records or medical opinions, or the questionnaires referred to in the VAC decisions. Each decision describes underlying materials as the "key evidence" for the VAC decision, but that "key evidence" was not before the Federal Court.

[101] The scant evidence reveals that since 2012, Cst. McQuade received a disability pension for her left foot injury suffered while on a training course and a major depressive disorder that was consequential to the physical injury. The amount of the pension was increased in 2013 and 2019 due to a worsening of her condition. Cst. McQuade was awarded a disability pension for PTSD in 2019, but the amount of the pension was not increased on the basis that it was not possible to separate out the effects of PTSD from the major depressive disorder.

[102] Sgt. Combden and Cst. Walsh each received a disability award for PTSD arising from events experienced during RCMP service, which for Sgt. Combden were described as life threatening incidents and which for Cst. Walsh there was no detail. Sgt. Combden received a disability pension from 2016 with one retroactive increase. Cst. Walsh received a disability pension effective from 2019.

[103] Many questions remain, the answers to which I believe are essential to determine whether section 9 applies to the proposed representative plaintiffs' claims. While the limited evidence indicates that the disability pensions were being paid at least in part for service-related PTSD (although not clearly so for Cst. McQuade), information is lacking regarding the basis for the PTSD diagnoses, the reasons for increases in awards for two of the proposed representative plaintiffs and whether there is any link between the events underlying their pension entitlement and the alleged "separate events" of the RCMP's alleged systemic negligence or Charter breach in the implementation of Mental Health Services.

[104] As already noted, no evidence was provided to the Federal Court on whether the proposed representative plaintiffs had applied to VAC for, or were entitled to, an increased disability pension on the basis that these alleged "separate events" caused "aggravation" of the existing injury or disease, for the purposes of section 32 of the RCMP Superannuation Act.

[105] The Federal Court erred when it determined that the proposed representative plaintiffs' receipt of a disability pension was sufficient to bar their claims under section 9, as this was rooted in the alleged concession which was not made. I also conclude that the evidence available to the Federal Court on the proposed representative plaintiffs' disability pensions was insufficient to determine that their claims were barred under section 9. The uncertainty in the law as to whether section 9 may bar a Charter claim is an additional reason undermining the conclusion on their subsection 15(1) Charter claim. Accordingly, I conclude that the Federal Court erred in disqualifying the proposed representative plaintiffs based on section 9 of the CLPA.

VIII. Proposed Disposition

[106] For all the foregoing reasons, I would allow the appeal and set aside the Federal Court's order dismissing the certification motion. Acknowledging that leave was granted to the appellants to amend the statement of claim, I would refer the matter back to the Federal Court for redetermination of the certification criteria for a reasonable cause of action (accepting that the test for a claim in systemic negligence is met) and the other certification criteria in Rule 334.16(1), with the exception of the existence of a suitable representative plaintiff, which I would find has been met.

[107] Neither party requested costs and in accordance with Rule 334.39(1), no costs should be awarded.

"Monica Biringer"
J.A.

"I agree.
Mary J.L. Gleason J.A."

"I agree.
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	GLEASON J.A. GOYETTE J.A.
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