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Court File No. A-

**FEDERAL COURT OF APPEAL**

**B E T W E E N :**

**HIS MAJESTY THE KING**

Appellant

- and -

**DAN THOMAS**

Respondent

**NOTICE OF APPEAL**

**TO THE RESPONDENT:**

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the appellant. The relief claimed by the appellant appears on the following page.

**THIS APPEAL** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at the Federal Court of Appeal in Toronto.

**IF YOU WISH TO OPPOSE THIS APPEAL**, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** after being served with this notice of appeal.

**IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION** of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

*(Date):*

*Issued by:*

\_\_\_\_\_ *(Registry Officer)*

Address of Local office: 180 Queen Street West  
Suite 200  
Toronto, ON M5V 3L6

TO: The Administrator  
Federal Court of Appeal  
180 Queen Street West  
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AND TO: Patrick Dudding/Raj Sahota  
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Counsel for the Respondent

## **APPEAL**

**THE APPELLANT, HIS MAJESTY THE KING, APPEALS** to the Federal Court of Appeal from the Order of the Honourable Justice Zinn (the “Motion Judge”), dated May 9, 2024, in which he granted the Respondents’ motion and ordered that this matter be certified as a Class Proceeding (the “Order”).

**THE APPELLANT ASKS** that this Honourable Court:

1. Allow the appeal and set aside the Order;
2. Dismiss the motion for certification; and
3. Grant such further and other relief as counsel may advise and this Honourable Court may permit.

**THE GROUNDS OF APPEAL** are as follows:

### **Background**

1. The Respondent (plaintiff below) is a former member of the Canadian Armed Forces (“CAF”). In the court below, he moved for an order certifying this action as a national class action brought on behalf of all current or former members of the Regular or Reserve Forces of the CAF, alive on the date that this matter is certified who were diagnosed with, or suffered from, a Mental Health Disorder while serving;
2. The Statement of Claim (the “Claim”) alleged that the CAF breached its common law duties of care, fiduciary duties and rights owed to Class members under ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* (the “Charter”), in relation to its development, implementation, operation, maintenance, and oversight of Mental Health Services in the CAF.
3. The Claim further alleged systemic discrimination, stigmatization, harassment, and abuse of persons experiencing Mental Health Disorder in the CAF.
4. The Plaintiff seeks damages and declaratory relief for breaches of duties of care, fiduciary duties and of ss. 7 and 15(1) of the *Charter*, and a declaration that s. 9 of the *Crown Liability and Proceedings Act*, (the “CLPA”) is of no force and effect.
5. On May 9, 2024, the Motion Judge certified this action as a class proceeding;
6. The Motion Judge certified the following the class definition:

All current or former CAF Members who have been diagnosed with a mental health disorder, and allege they were subjected to non-sexual and non-racial discrimination, bullying, stigmatization, harassment, and/or abuse during their CAF Service, between 1986 and the date this matter is certified as a class proceeding under the *Federal Courts Rules*.

7. The Motion Judge approved the following common questions:
- (a) To what extent does Mental Illness Stigmatization exist in the CAF?
  - (b) Does Mental Illness Stigmatization arise out of a pervasive or dominant culture in the CAF?
  - (c) Did the CAF leadership know, or should they have known, about Mental Illness Stigmatization? If so, when?
  - (d) Does Mental Illness Stigmatization cause harm? If so, do any factors or indicia tend to show that this stigmatization exists at a systemic level?
  - (e) What steps, if any, did the CAF take to eliminate or mitigate Mental Illness Stigmatization? Were those steps effective? For instance:
    - 1. What guidance, training, processes, mechanisms, systems and/or procedures did the CAF have in place in relation to eliminating or mitigating Mental Illness Stigmatization?
    - 2. What safeguards, oversight, reporting, monitoring, quality assurance, and/or supervisory mechanisms did CAF have in place in relation to eliminating or mitigating Mental Illness Stigmatization?
    - 3. Were the actions taken or systems implemented by CAF regarding Mental Illness Stigmatization consistent with and sufficient to protect Class members from harm? If not, how, and why?
  - (f) Did the CAF's acts or omissions regarding Mental Illness Stigmatization breach a common law duty or statutory duty of care owed to Class members and/or Class members rights under s. 15 of the *Charter* by discriminating against them on the basis of mental disability?
  - (g) Did the CAF engage in wilful, reckless, or bad faith conduct regarding Mental Illness Stigmatization, such that an award of aggregate or punitive damages is justified? If so,
    - 1. Can this be assessed in the aggregate, and in what amount?
    - 2. How shall any of it be distributed among members of the Class?

(h) If the Class members are entitled to damages other than or in addition to aggravated or punitive damages, can these damages or a portion thereof be determined on an aggregate basis? If so, in what amount, and how shall it be distributed among Class members?

(i) What procedures should apply to the determination of any individual questions which remain after determination of the Common Issues?

### **Errors**

8. The Motion Judge erred in law in admitting various Reports for the truth of their contents by:
  - (a) finding that the Reports filed by the plaintiff could be admitted for the truth of their contents on the motion for certification; and
  - (b) finding that the statements and opinions in the Reports established “some basis in fact” for the requirements in rule 334.16(b) to (e) in the complete absence of admissible evidence filed by the plaintiff; and by
  - (c) in the alternative in admitting the Senate reports into evidence contrary to Parliamentary privilege.
9. The Motion Judge erred in law by applying the incorrect standard of proof when assessing whether to assume jurisdiction, incorrectly applying the lower standard of some basis in fact standard instead of the required, balance of probabilities threshold. He also erred in law by applying the incorrect standard of proof “some basis in fact” when assessing the cause of action aspect of the certification test.
10. The Motion Judge erred in fact and law in concluding the internal alternative dispute resolution processes are incapable of providing effective redress.
11. The Motion Judge further erred when deciding to assume jurisdiction over the class proceeding, by:
  - (a) Failing to find the matter was barred under s.9 of the *Crown Liability and Proceedings Act*;
  - (b) misapplying the Supreme Court of Canada’s binding decision in *Vaughan*, and by failing to appreciate that the exercise of residual discretion requires a contextualized assessment, grounded in the evidence before the Court, and instead transposing the findings in *Greenwood*, a claim based in a different factual and legal matrix to this claim;
  - (c) Failing to consider the impact of horizontal precedential jurisprudence from the Federal Court which determined that the CAF grievance process can address

allegations of the same nature which underlie this claim, and in not justifying the departure from those precedents;

(d) exercising his residual discretion on a class-wide basis, in the absence of any admissible evidence that the various administrative schemes that are available to the proposed class were incapable of providing effective redress, and in considering the CAF grievance process in isolation;

(e) misapprehending the nature and scope of the comprehensive internal and external processes made available to CAF members for the resolution of workplace and harassment-related disputes; finding that the grievance process under the *National Defence Act* is not impartial, in the absence of *any* evidence;

(f) misapprehending the nature and scope of the comprehensive internal and external processes made available to CAF members for the resolution of workplace and harassment-related disputes including the availability of compensation for pre-existing conditions which are aggravated by service and by;

(g) failing to conduct any analysis of the sufficiency of the existing administrative schemes and mechanisms to address the varying and disparate types of workplace disputes and conflicts comprising the plaintiff's claims.

12. The Motion Judge erred in law by finding that the pleading disclosed a reasonable cause of action by:

(a) Incorrectly characterizing Canada's acknowledgment that a cause of action in negligence was sufficiently pled for the purposes of certification as a concession that a duty of care exists. He further erred in finding that sufficient material facts had been pled to support a reasonable cause of action in systemic negligence; and by

(b) not finding that the *Charter* claims and tort claims are concurrent or coterminous. The harms and consequences alleged to have resulted from both claims are identical and any *Charter* damages would be duplicative of the damages claimed in tort, contrary to *Ward*.

13. The Motion Judge erred in mixed fact and law in failing to find that the *Charter* (Canada and Quebec) and negligence claims were barred by s. 9 *CLPA* as they are all based on the same underlying facts for which the CAF members may receive compensation under the Pension Act and Veterans Well-being Act.

14. The Motion Judge erred in finding that there is an identifiable class, by:

(a) certifying a class definition that includes CAF members whose rights of action in respect of workplace injuries for harassment, intimidation and bullying are extinguished by section 9 of the *Crown Liability and Proceedings*

*Act* and/or section 111 of the *Pension Act* & section 92(2) of the *Veterans Well-being Act*;

(b) certifying a class definition which is merits based; and by

(c) certifying a class without due consideration of the applicable limitation period, the facts of which were before the Court and which demonstrated that reasonable limits could and should be placed on the class period to contribute to manageability;

15. The Motion Judge erred in certifying the proposed common issues by:

(a) failing to undertake any analysis as to whether determining the common issues would be a substantial ingredient in the class members' claims;

(b) failing to undertake any analysis as to whether determining the common issues would advance the claim for, or against, the class;

(c) by failing to include a question regarding the existence of a duty of care;

(d) framing the common questions so broadly that they will be incapable of resolution in any efficient or reasonable manner or avoid duplication of fact-finding or legal analysis; and by

(e) linking aggregate to punitive damages and not including a question that asks whether aggregate damages are possible.

16. The Motion Judge erred in finding that a class proceeding is the preferable procedure for the just and efficient resolution of the proposed common issues. In particular, he erred by:

(a) finding that mere allegations of systemic negligence "necessarily predominate" over individual issues. As a result of this error, the Motion Judge failed to adequately consider whether the proposed common issues will predominate over questions affecting only individual class members, as required by Rule 334.16(2)(a);

(b) finding that the internal and external processes, and compensation schemes, available to class members are less practical or less efficient than a class proceeding, as required by Rule 334.16(2)(d). Instead, he took judicial notice of such a *possibility* rather than looking to the evidentiary record to determine whether there was some basis in fact to support such a finding;

(c) finding that Veterans Affairs Canada provides no redress for individuals who experience aggravation of symptoms of mental health disorders from non-service-related injuries contrary to the *Veterans Well-being Act*, ss. 2(1) and 7 and the evidentiary record;

(d) failing to give any consideration or weight to Parliament’s intent that workplace disputes and conflicts be dealt with through the various internal and external recourse regimes, and benefit and compensation schemes which address workplace injuries;

(e) relying on opinions and statements out of their broader context in the various reports tendered by the plaintiff to find that the existence of backlogs or delay in the CAF grievance process are sufficient to assume exceptional residual jurisdiction over the class;

(f) finding that a class proceeding would mitigate the difficulties faced by class members coming forward with their claims by alleviating fears of reprisal and providing an “element of anonymity”. These findings unreasonably presume a process for the resolution of individual issues without any foundation in evidence or law; and by

(g) finding that the lack of competing proposed class actions based on the same factual underpinnings renders the class action the preferable procedure.

17. The Motion Judge erred in finding that the proposed representative plaintiff is suitable. In particular, he erred by:

(a) failing to dismiss the Plaintiff’s claim as it is barred by s. 9 of the *CLPA*;

(b) failing to dismiss the Plaintiff’s claim based on the expiry of the applicable limitation period;

(c) failing to consider whether in the circumstances of this claim, the lack of any proposed methodology to address how the Rep Plaintiff proposes to deal with individual issues which will remain following a common issues trial given the disparate and varied complaints which are said to fall within the scope of this action; and by

(d) failing to consider whether Mr. Thomas is required by section 111 of the *Pension Act* and 92(2) of the *Veterans Well-being Act* to apply for benefits pursuant to that legislation in respect of any alleged workplace injuries *before* his claim could proceed.

18. Such further grounds as counsel may advise and this Honourable Court permit.

May 21, 2024



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