

## ▶ Class Action



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# Class Actions and Systemic Conduct: What are Material Facts?

A material fact represents the factual conclusions or findings that the plaintiff will ask the Court to make at the common issues trial.<sup>i</sup> While understanding material facts sounds simple, deciphering what is and is not a material fact is difficult to do. It is not always clear what part of a pleading is a material fact versus a bald allegation, or even evidence. As the Federal Court of Appeal recently stated in *Brink v. Canada*, 2024 FCA 43:

[57] ... There is no bright line between material facts and bald allegations, nor is there a bright line between the pleading of material facts and the prohibition on the pleading of evidence. They are, rather, points on a continuum.

To add more confusion, material facts are different from particulars. For example, the Ontario Superior Court recently noted in *Napora v. Demilec*, 2023 ONSC 98:

[16] ... In the spectrum between “material facts” and “evidence” is the concept of “particulars”. Particulars are not evidence, but “additional bits of information, or data, or detail, that flesh out the ‘material facts.’”

Understanding material facts is typically done by reviewing the entire case. For example, Justice Gomery recently commented in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2022 BCSC 540:

[14] Material facts are identifiable by their importance to the case, and their generality. They represent factual conclusions or findings that the plaintiff will ask the court to come to at trial. They are the ends or objects of the factual enquiry undertaken at a trial. The evidence is the means by which the parties and the court come to their conclusions.

Importantly, there is a low threshold for stating material facts in a motion to strike. The BC Court of Appeal recently warned that “the court should read the claim generously, and accommodate inadequacies that are merely the result of drafting deficiencies: *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 22.”<sup>ii</sup>

### Class Actions

Class actions are often initiated by one or two representative plaintiffs, but brought on behalf of many individuals. In some cases, there are thousands or millions of class members. Accordingly, the nature of material facts changes in a class action context.

In a proposed class action, a representative plaintiff may not be able to plead a granular level of particularity.<sup>iii</sup> For example, in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, the Supreme Court of Canada noted that the idiosyncratic nature of class actions:

[39] ... It is not essential that the class members be identically situated vis-à-vis the opposing party. ...However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. [emphasis added]

In *B.W. v. Canada*, 2024 FC 77, the representative plaintiff alleged systemic discrimination against inmates in Federal penitentiaries. The Federal Court noted that a broad pleading allows the plaintiff to extrapolate their personal experiences to other class members:

[86] Very similar language appears in the Further Amended Statement of Claim in *Araya* (see para 89). The structure of the pleadings is broadly similar: the Amended Statement of Claim in this case pleads the material facts arising from BW's personal experience at Mission Institution, and then extrapolates these to the proposed Class.

In *Rumley v. British Columbia*, 2001 SCC 69, the Supreme Court of Canada noted that representative plaintiffs may limit their case to allegations which cover all class members, without reference to the circumstances of any individual class members:

[30] ... the respondents' argument is based on an allegation of "systemic" negligence - ... These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her own complaint of abuse

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(an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9).

The Federal Court of Appeal recently made a similar comment in *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61:

[48] ... "[w]hile individual circumstances may ultimately be relevant to the proof of individual levels of damages, they are not required for proof of a breach of the duty of care on a system-wide basis, nor are they required for determining a base level of damages applicable to all."

### Systemic Negligence Class Actions

Systemic negligence offers an example of when material facts can be pled broadly, on behalf of a disparate class.

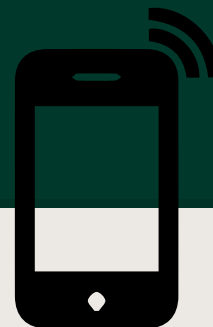
The elements of systemic negligence are the same as an individual pleading of negligence. The elements of systemic negligence include: "(i) that the defendant owed a duty of care to the claimant to avoid the kind of loss alleged; (ii) that the defendant breached that duty by failing to observe the applicable standard of care; (iii) that the claimant sustained damage; and (iv) that such damage was caused, in fact and in law, by the defendant's breach."<sup>iv</sup>

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Still, systemic negligence differs from individual negligence. In systemic negligence the material facts focus on systemic conduct. For example, in *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61, the Federal Court of Appeal reviewed claims of systemic negligence against the Royal Canadian Mounted Police (“RCMP”). The Federal Court of Appeal noted the claims do not focus on individual harm but rather, higher-level systemic conduct:

[95] ... [W]hat is alleged on behalf of the putative class is that the individual harm arose out of the systemic failings identified in the amended statement of claim. As the motion judge recognized (at paragraph 102 of her reasons):

... the claims do not ask if an RCMP officer illegally assaulted a class member, but rather whether the operations of the RCMP create a system where illegal assaults happen. After this has been established, then it can be determined whether a particular class member was a victim of this system.

In *McQuade et al v. The Attorney General of Canada*, 2023 FC 1083, Justice Fothergill noted that the RCMP’s workplace activities relate to the “practical implementation of formulated policies” or “the performance or carrying out of a policy.” This may expose the Defendant to liability in systemic negligence.<sup>v</sup> This is systemic conduct.

### Examples of Material Facts in Systemic Negligence Class Actions

In *Greenwood v. Canada*, 2020 FC 119; mostly aff’d 2021 FCA 186, the Federal Court and the Federal Court of Appeal certified claims on behalf of a disparate group of RCMP members between 1995 – 2021. This is based on a duty to prevent bullying, intimidation and harassment at RCMP workplaces, where the duty of care is considered on a class-wide basis. The duty of care is assessed class-wide despite “individual considerations that must be addressed in a workplace negligence claim.”<sup>vi</sup>

In certifying the claims, the Federal Court of Appeal reproduced the particulars of systemic negligence:


[17] Of particular relevance to this appeal are the particulars of systemic negligence. In paragraph 110 of their statement of claim...:

110. Specifically, the RCMP, through its agents, servants and employees, had a duty of care to:

- a) use reasonable care to ensure the safety and well-being of the plaintiffs and the other Class Members;
- b) provide safe workplace environments free from bullying, intimidation, and harassment;
- c) provide equal employment training and advancement opportunities to the plaintiffs and the other Class Members;
- d) establish and enforce appropriate policies, codes, guidelines, and procedures to ensure that the plaintiffs and the other Class Members would be free from bullying, intimidation, and harassment;

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- e) implement standards of conduct for the RCMP work environment and for RCMP Employees, to safeguard the plaintiffs and the other Class Members from bullying, intimidation, and harassment;
- f) educate and train RCMP Employees to promote a universal understanding amongst all RCMP Employees that bullying, intimidation, and harassment are dangerous and harmful and will not be tolerated;
- g) properly supervise the conduct of RCMP Employees so as to prevent the plaintiffs and the other Class Members from being and/or being exposed to bullying, intimidation, and harassment;
- h) investigate and adjudicate complaints of bullying, intimidation, and harassment fairly and with due diligence and make efforts to prevent retaliation;
- i) act in a timely fashion to resolve situations of bullying, intimidation, and harassment, and to work to prevent re-occurrence; and
- j) ensure that the plaintiffs and the other Class Members would not suffer from reprisals or retaliation by RCMP Employees for reporting or objecting to incidents of bullying, intimidation, harassment and other misconduct.

The Federal Court of Appeal highlighted a similar pleading in *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61, at paragraph 27.

In *Nasogaluak*, the representative plaintiff was arrested in November 2017. Still, the court certified a class of all Aboriginal persons who were assaulted while in RCMP custody or in detention in the Territories between January 1, 1928 until 2023.<sup>vii</sup> The material facts relate to a broad duty of care owed to citizens detained by the RCMP. The RCMP systemically breached their duty of care:<sup>viii</sup>

[50] That brings me to the Attorney General’s third submission — that the motion judge failed to consider the viability of the cause of action in negligence as a whole, including the elements of standard of care, breach, causation and damages. In light of the discussion above of duty of care, three elements remain to be considered: breach of the duty of care, causation, and damages.

...

[52] ... it is apparent that three elements are pleaded. Paragraph 60 of the amended statement of claim — reproduced in part above at paragraph 27 — sets out a long list of acts and omissions that are said to constitute breaches of the duty of care (as well as breaches of fiduciary duty). Paragraphs 72 to 76 both itemize the injury and damage it is alleged class members have suffered, and attribute that loss and damage to the negligence (and other misconduct) alleged. Contrary to the Attorney General’s submission, the case as pleaded is not a case of negligence “in the air” of the kind decried in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 33.

**An Outlier Case: *McMillan v. Canada*, 2023 FC 1752**

There is at least one outlier where broad pleadings were struck as failing to disclose material facts. In *McMillan v. Canada*, 2023 FC 1752,

the representative plaintiff alleged systemic negligence on behalf of individuals who work at RCMP workplaces, but are not themselves RCMP members. The representative plaintiff pled that the RCMP has a duty to provide a safe workplace, essentially replicating the duties of care pled in *Greenwood v. Canada*, 2021 FCA 186 at paragraph 17. He also pled similar breaches of duties that were pled in *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61, at paragraph 27.

Justice Fothergill held that such broad pleadings do not constitute material facts. Instead, he determined that a material fact must be based on the representative plaintiff’s personal experiences – the times he worked with the RCMP and at those specific locations. This cannot be extrapolated to other class members unless they are identically situated against the defendant. Accordingly, Justice Fothergill stated the alleged incidents “occurred only in the Kelowna operational communications centre (“OCC”), and the earliest allegation was in 2003.”<sup>ix</sup>

This decision has been appealed and is awaiting a hearing before the Federal Court of Appeal. ■

- i Ewert v. Canada (Attorney General), 2017 BCSC 279, paras. 27-30
- ii Situmorang v. Google, LLC, 2024 BCCA 9, para. 55
- iii Branch and Good, “Class Actions in Canada”, 2<sup>nd</sup> Ed, 2022, p. 4-7.
- iv Canada v. Greenwood, 2021 FCA 186, para. 154 (citing Saadati v. Moorhead, 2017 SCC 28)
- v McQuade et al v. The Attorney General of Canada, 2023 FC 1083, paras. 51-56
- vi Canada v. Greenwood, 2021 FCA 186, para. 163
- vii Nasogaluak v. Canada, 2023 FCA 61, paras. 5, 91
- viii Nasogaluak v. Canada, 2023 FCA 61, paras. 50, 52
- ix McMillan v. Canada, 2023 FC 1752, para. 48

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