

FEDERAL COURT OF APPEAL  
CLASS PROCEEDING

FORM 337 Rule 337

Court File No. ~~T-1105-20~~

A-206-23

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

Proceeding Under Part 5.1 of the *Federal Court Rules*, SOR/98-106

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appears below.

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 Law Courts Building, 1815 Upper Water Street, Halifax, Nova Scotia, B3J 1S7, Courtroom #501.

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 341A prescribed by the Federal Courts Rules and serve it on the appellant's solicitor or, if 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 341B 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.**

August 18, 2023

ORIGINAL SIGNED BY  
MICHAEL KOWALCHUK  
ORIGINAL SIGNÉ PAR

Issued by: \_\_\_\_\_  
(Registry Officer)

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**Solicitors for the Respondent**

## APPEAL

**THE APPELLANTS APPEAL** to the Federal Court of Appeal from the Order of the Honourable Justice Fothergill (the “Motion Judge”) dated August 8, 2023 (the “Order”), by which he dismissed the Plaintiffs’ motion for certification but granted leave to amend the Second Fresh as Amended Statement of Claim.

**THE APPELLANTS ASK** that this Honourable Court:

1. Allow the appeal;
2. Set aside the Motion Judge’s decision that s. 9 of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 (the “CLPA”) bars the claims of the proposed Representative Plaintiffs and all Class Members who are in receipt of or eligible for a disability pension under section 32 of the *Royal Canadian Mounted Police Superannuation Act*, RSC, 1985, c R-11 and the *Pension Act*, RSC, 1985, c P-6; 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:

1. The Motion Judge made a palpable and overriding error in relying on a purported concession by the Plaintiffs that s. 9 of the CLPA bars the systemic negligence claims of Class Members eligible for a disability pension under section 32 of the *Royal Canadian Mounted Police Superannuation Act*, RSC, 1985, c R-11 and the *Pension Act*, RSC, 1985, c P-6.
  - a. The Plaintiffs did not make such a concession. Such a concession would be unsupported by the law. This factual error forms the basis for the Motion Judge’s conclusion that there is no representative plaintiff to advance the interests of the Class.
  - b. The application of s. 9 of the CLPA to a particular Class Member’s claim is a factual inquiry, necessitating an evaluation of whether the pension entitlement is based on the same facts as are alleged to give rise to liability in the proposed class proceeding. The Motion Judge was not equipped to reach a conclusion regarding the operation of s. 9 of the CLPA based on the facts before him at a certification motion.
  - c. As the Federal Court concluded in *Greenwood v Canada*, 2020 FC 119 (“*Greenwood*”) and as upheld by the Federal Court of Appeal in *Canada v Greenwood*, 2021 FCA 186 (leave to appeal to the SCC dismissed, *Her Majesty the Queen v Geoffrey Greenwood, et al*, 2022 CanLII 19060 (SCC)), the

application of s. 9 of the CLPA requires a consideration of the relevant facts, and the Respondent can raise its application as a defence.

- d. In fact, the Plaintiffs' position regarding the application of s. 9 of the CLPA to the proposed class proceeding was to acknowledge that the provision may have application to the claims of Class Members whose operational stress injuries ("OSIs") meet the disability pension criteria, but that it is premature on a certification motion to say how it will operate.
  - e. Consistent with the jurisprudence, with respect to the operation of s. 9 of the CLPA in relation to an individual Class Member's claim, it should be appropriately addressed as a matter of individual relief, after the common issues trial.
  - f. If the Motion Judge had wished to, in light of the Respondent raising the CLPA issue, have the legal question of the interpretation of CLPA in the general context of the case addressed at the common issues trial, he could have done so. That would have been consistent with the Federal Court's decision in *Bruyea v His Majesty the King*, 2022 FC 1409. There, the Court ordered that the proper place to address the application of s. 9 of the CLPA, on a general legal level, was at the common issues trial, following resolution of the liability issues.
2. The Motion Judge erred in concluding that the *Charter* claims were barred by s. 9 of the CLPA. This error is premised on the same factual error of understanding the Plaintiffs to have conceded that s. 9 of the CLPA barred the systemic negligence claims of Class Members eligible for a disability pension.
  3. The Motion Judge makes the further error of reasoning that the *Charter* claim is premised on the same facts as the systemic negligence claim, and for that reason is barred by s. 9 of the CLPA. What is alleged is a distinct injury – breach of the *Charter*, separate from the existence of an OSI - warranting a public law remedy. The alleged unconstitutional conduct of the Respondent is a factual occurrence that is distinct from the factual occurrence of an OSI, or exacerbation thereof, for which a disability pension may be paid.
  4. The Motion Judge further erred in law by failing to consider the CLPA issue as part of the Rule 334.16(1)(a) analysis, and thus failing to apply the appropriate evidentiary standard of plain and obvious.
    - a. It is not plain and obvious that the CLPA bars the claims of the Plaintiffs, thus having the severe effect of barring the entire proposed class proceeding.
    - b. The Motion Judge failed to identify the evidentiary standard he was applying to the issue.

- c. The Motion Judge erred by appearing to consider the CLPA issue as one relating to the suitability of the Plaintiffs. Yet, he performed no Rule 334.16(1)(e) analysis. The Motion Judge provides no analysis as to how the potential for s. 9 of the CLPA to defeat the claims of the individual Plaintiffs - in other words, the strength of their individual claims - is material to the test in Rule 334.16(1)(e). The Motion Judge did not explain how the potential for the Respondent to raise the defence of s. 9 of the CLPA against the Plaintiffs undermined the ability of the Plaintiffs to fairly represent the interests of the Class, or presented a conflict with the interests of other Class Members.
  - d. It is an error of law to, in substance, conclude that potential limitations in the Plaintiffs' individual entitlements to ultimate relief would negate their common interest in the liability questions.
5. Such further and other grounds as counsel may advise and this Honourable Court may permit.

August 18, 2023



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Tel: (902) 425-7330 / Fax: (902) 422-1233  
**Solicitor for the Appellants**

I HEREBY CERTIFY that the above document is a true copy of  
the original issued out of / filed in the Court on the 18  
day of August A.D. 20 23  
Dated this 21 day of August 20 23



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**M. Kowalchuk**  
**Registry Officer**  
**Agent du greffe**