COURT OF APPEAL OF YUKON

Citation: *Sidhu v. Canada (Attorney General)*, 2024 YKCA 14

Date: 20241118
Docket: 21-YU884

Between:

Mandeep Singh Sidhu

Appellant
(Plaintiff)

And

The Attorney General (Canada)

Respondent
(Defendant)

Corrected Judgment: The text of the judgment was corrected at para. 64 on November 20, 2024.

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Smallwood
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of Yukon, dated January 27, 2022 (*Sidhu v. Attorney General (Canada)*, 2022 YKSC 4, Whitehorse Docket 14-A0118).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	W. Lu K. Cruz
Place and Date of Hearing:	Whitehorse, Yukon June 17, 2024
Place and Date of Judgment:	Whitehorse, Yukon November 18, 2024

Written Reasons by:
The Honourable Chief Justice Marchand

Concurred in by:
The Honourable Madam Justice Smallwood
The Honourable Mr. Justice Voith

Summary:

Appellant sought damages from respondent on the basis RCMP officers racially profiled him on three separate occasions. Appellant alleged two roadside stops were unlawful and violated his Charter rights. He further alleged the RCMP unlawfully arrested him and then denied him access to counsel, assaulted him, and subjected him to malicious prosecution during a third encounter. At trial, appellant sought to introduce similar fact evidence regarding 32 historical interactions he had with various RCMP officers to support a claim of systemic discrimination. The judge admitted evidence of three of these interactions. The judge then dismissed appellant's claim. On appeal, appellant submits the judge erred (1) in her understanding of systemic discrimination and the nature of his discrimination claim; (2) by refusing to admit the evidence of many of his past interactions with the RCMP; (3) by misapprehending evidence at trial; and (4) by subjecting witness credibility to uneven scrutiny. Appellant also applied to adduce fresh evidence in support of his appeal.

HELD: Application to adduce fresh evidence denied and appeal dismissed. The judge did not err in her understanding of systemic discrimination. Appellant failed to state a claim grounded in systemic discrimination or lead evidence that would sustain such a claim. His statement of claim focused on the individual wrongs done to him alone, not to a protected group and he only sought to adduce evidence of a pattern of behaviour against him as an individual. To be admissible, the proposed similar fact evidence must have been sufficiently probative of the police conduct in the three instances forming the basis of his claim so as to outweigh its prejudicial effect. With a few exceptions, the judge decided it was not. This Court owes deference to that decision and sees no basis on which to disturb it. The judge did not commit a palpable and overriding error in her apprehension of the evidence. Appellant's uneven scrutiny argument fails because the judge did not commit an error in principle in her interpretation of the evidence. Finally, appellant's request to adduce fresh evidence does not meet the Palmer test.

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Reasons for Judgment of the Honourable Chief Justice Marchand:

Introduction

[1] The appellant, Mandeep Singh Sidhu, describes himself as being of East Indian descent. Mr. Sidhu sought damages from the respondent, Attorney General of Canada [AGC], on the basis RCMP officers targeted and racially profiled him when he was arrested on December 5, 2012, as well as during two roadside stops on December 2, 2012, and June 4, 2016. Mr. Sidhu alleged the two roadside stops were unlawful and violated his *Charter* rights. He further alleged the RCMP unlawfully arrested him on December 5 and then denied him access to counsel, assaulted him, and subjected him to malicious prosecution.

[2] At trial, Mr. Sidhu sought to introduce similar fact evidence regarding historical interactions he had with various RCMP officers, many of whom were not involved in the three specific incidents at issue. The trial judge admitted evidence about roadside stops on May 16, 2012, November 24, 2012, and May 19, 2017. She refused to admit evidence of 29 additional incidents Mr. Sidhu alleged revealed the RCMP's historical pattern of discrimination against him.

[3] In reasons indexed as 2022 YKSC 4 [*RFJ*], the judge dismissed Mr. Sidhu's claim. She found the impugned actions of the RCMP officers were not motivated by racism, the check stops were lawful, and Mr. Sidhu was not racially profiled, unlawfully arrested, assaulted or maliciously prosecuted. In the judge's view, Mr. Sidhu's own problematic behavior towards members of the RCMP was at the root of his negative interactions with them.

[4] Mr. Sidhu appeals the dismissal of his claim. He submits the judge erred:

a) in her understanding of the nature of the discrimination claim he advanced and the relevance of systemic discrimination in his case;

b) by refusing to admit the evidence of many of his past interactions with the RCMP;

c) by misapprehending the evidence presented at trial; and

d) by subjecting the evidence adduced by the parties to uneven scrutiny.

[5] Mr. Sidhu also applies to adduce fresh evidence in support of his appeal.

[6] For the reasons that follow, I would deny Mr. Sidhu's application to adduce fresh evidence and dismiss his appeal.

Procedural Background

[7] The judge's analysis was constrained by Mr. Sidhu's pleadings. As his pleadings were subject to and shaped by two pre-trial motions and orders, I begin by outlining the relevant procedural background.

[8] Mr. Sidhu filed his statement of claim on November 20, 2014. He filed an amended statement of claim on May 21, 2015. In his amended statement of claim, Mr. Sidhu sought damages from the AGC as well as six named members of the RCMP for: unlawful detention; unlawful arrest; malicious prosecution; assault and battery; breach of *Charter* rights; and racial profiling and discrimination. Mr. Sidhu's claims arose out of his detention at an RCMP check stop in Whitehorse on December 2, 2012, and his arrest in Whitehorse on December 5, 2012, for uttering threats.

[9] Mr. Sidhu's amended statement of claim pleaded as "background" that he had experienced a significant number of additional negative interactions with the RCMP dating back to 2006. Several of these interactions took place when he lived in Watson Lake.

[10] On September 3, 2015, the AGC applied to strike portions of the amended statement of claim that referred to this "background". On November 17, 2015, in reasons indexed as 2015 YKSC 53 [*Gower RFJ*], Justice Gower allowed the AGC's application and struck various paragraphs and passages from the amended statement of claim. He summarized his reasons for doing so as follows:

> [15] In summary, the defendant's counsel submitted that the historical pleadings should be struck for a combination of reasons. First, the pleadings

> are unnecessary and vexatious because they cannot go to establishing the plaintiff's racial discrimination claim, nor do they advance any other claim known in law. Second, the pleadings are embarrassing and scandalous because they are irrelevant and they will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the central issues arising from the events of December 2 and 5, 2012. Third, they disclose no reasonable claim/cause of action in and of themselves. Thus, it is plain and obvious that the pleadings do not constitute allegations of fact relevant to, or necessary for, the purpose of furthering the claim of racial discrimination associated with the events of December 2012.
>
> …
>
> [17] I am largely in agreement with all of these submissions, except to say that repeated groundless detentions by police officers could give rise to a potential tort of misfeasance in public office or abuse of process. However, neither of those torts are pled here. In any event, I do agree that the plaintiff's counsel has failed to plead any material facts from which an inference can logically be drawn that the police acted in a racially discriminatory manner towards the plaintiff on December 2 or 5, 2012.

[11] On June 10, 2016, in reasons indexed as 2016 YKCA 6 [*YKCA RFJ*], this Court dismissed Mr. Sidhu's appeal from Gower J.'s order. The Court did not dismiss the appeal on the basis Mr. Sidhu "could not properly plead a cause of action based on s. 15 [of the *Charter*] arising from the history of his interactions with the police": *YKCA RFJ* at para. 9. Rather, the Court dismissed the appeal on the basis the judge had not erred in concluding Mr. Sidhu's statement of claim, as written, failed to do so: *YKCA RFJ* at paras. 9, 14, 19.

[12] On November 8, 2016, Mr. Sidhu filed a further amended statement of claim in which he pleaded he had been the subject of a disproportionate number of roadside stops (eight) leading up to and including a stop on May 16, 2012. He pleaded all eight stops were arbitrary and effected for the "sole reason… he is brown skinned and of East Indian de[s]cent." In addition to the previously pleaded stop on December 2, 2012, Mr. Sidhu pleaded particulars of stops on August 23, 2011, May 16, 2012, and June 4, 2016. He relied on all the allegedly arbitrary stops in support of his racial profiling and discrimination claim.

[13] On May 21, 2019, the AGC applied to strike portions of Mr. Sidhu's further amended statement of claim based on several of the claims being statute barred under the *Limitation of Actions Act*, R.S.Y. 2002, c. 139. On July 5, 2019, in reasons

indexed as 2019 YKSC 36 [*Vertes RFJ*], Justice Vertes held a two-year limitation period applied and dismissed all claims related to incidents prior to November 20, 2012: *Vertes RFJ* at para. 59. Justice Vertes noted, however, that evidence of earlier events might still be introduced as similar fact evidence provided the probative value of the evidence outweighed its potential prejudicial effect: *Vertes RFJ* at para. 60.

[14] On January 8, 2020, Mr. Sidhu filed a still further amended statement of claim. In addition to deleting his pleadings regarding the statute barred claims, he confined his pleadings to claim only against the AGC. He discontinued his claims against the named RCMP officers. As set out above, he claimed damages only in relation to the two roadside stops on December 2, 2012, and June 4, 2016, and his arrest on December 5, 2012.

[15] The trial of the claims advanced in Mr. Sidhu's still further amended statement of claim was heard from August 2–13, 2021. As noted, on January 27, 2022, the trial judge dismissed the action.

Summary of the Trial Judgment

Similar Fact Evidence

[16] After a brief introduction of the background and issues, the trial judge began her reasons for judgment by setting out why she largely dismissed Mr. Sidhu's application to introduce evidence of 32 alleged historical interactions between him and the RCMP.

[17] The judge considered whether the proposed similar fact evidence should be admitted to support Mr. Sidhu's claim he experienced systemic racism in his interactions with the RCMP. After citing *Radek v. Henderson Development (Canada) Ltd. (No. 3),* 2005 BCHRT 302, and *Fraser v. Canada (Attorney General),* 2020 SCC 28, she concluded systemic discrimination is unique because it is about the impact discrimination has on groups rather than individuals: *RFJ* at paras. 19, 21, 24, 33, 37.

[18] On that basis, the judge found Mr. Sidhu's claim was not one of systemic discrimination and the evidence Mr. Sidhu sought to introduce was not evidence of systemic discrimination. Rather, his claim was about alleged wrongs done to him as an individual. Therefore, the principles from *Radek* about the admissibility of similar fact evidence in cases of systemic discrimination were not applicable: *RFJ* at para. 38. Similarly, the evidence about police officers not named in the action was not probative of a pattern of discriminatory behaviour. As she put it, "[e]vidence of attitudes of some or even most RCMP officers is not probative of the attitudes of all RCMP officers": *RFJ* at paras. 39–40.

[19] The judge agreed with the AGC that evidence from three roadside stops on May 16, 2012, November 24, 2012, and May 19, 2017, was probative because some of the RCMP officers involved were also involved in the three events forming the basis of Mr. Sidhu's claim. In her view, the evidence was admissible for the purpose of determining whether these individual officers were racially biased in their treatment of Mr. Sidhu: *RFJ* at paras. 42–44.

[20] The judge further justified her decision to decline to admit much of the historical evidence on the basis that, even if the evidence was probative, the prejudice to the AGC did not warrant admitting it. Some of the incidents dated as far back as 2004. In some cases, Mr. Sidhu could not name the officer involved or provide a specific date. Even where Mr. Sidhu could provide names and dates, the RCMP officers would not "have good recollections of incidents occurring 14 or 15 years ago." In addition, in the judge's view, admitting the evidence would prolong the proceedings and sidetrack the trial away from the two check stops and the arrest: *RFJ* at paras. 46–52.

Mr. Sidhu's Credibility

[21] The judge next addressed Mr. Sidhu's credibility. She found he provided evidence that was internally inconsistent and inconsistent with independent evidence. She found he had gaps in his memory, was evasive on cross-examination, provided implausible testimony, minimized his actions, and admitted to not having been truthful

during one of the incidents at issue: *RFJ* paras. 58–72. As a result, the judge stated she would approach Mr. Sidhu's evidence with caution: *RFJ* at para. 73.

Knowledge of Mr. Sidhu within the RCMP

[22] The judge recognized an important underpinning of Mr. Sidhu's case "was what the police officers named in the statement of claim knew about Mr. Sidhu, and how they learned about him": para. 74. Although the judge concluded some of the members identified in the statement of claim had knowledge of Mr. Sidhu, he "did not occupy much of their time or their interest": *RFJ* at para. 75. However, the judge found this changed in December 2012 when, primarily due to Mr. Sidhu's own actions, "there grew a collective awareness of Mr. Sidhu, and a perception that he was harassing to members of the RCMP": *RFJ* at paras. 76, 82–101.

December 2, 2012 Roadside Stop

[23] Turning to the specific incidents at issue, the judge described what happened at the check stop on December 2, 2012. Her discussion also touched on the historical incident from May 16, 2012, involving one of the same RCMP officers.

[24] In brief, on December 2, 2012, Auxiliary Constable Brooks stopped Mr. Sidhu at a roadside check stop soon after midnight. Aux. Cst. Brooks and Constable West described the check stop as a Christmas season check stop aimed at assessing driver sobriety and road compliance. On request, Mr. Sidhu showed, but did not immediately hand, his driver's licence to Aux. Cst. Brooks. As a result, Aux. Cst. Brooks flagged over Cst. West, who waved Mr. Sidhu to a secondary area to check his driver's licence.

[25] Cst. West was concerned because Mr. Sidhu did not voluntarily produce his driver's licence to Aux. Cst. Brooks and because he recalled from a previous stop that Mr. Sidhu had a significant number of demerit points. Mr. Sidhu got out of his vehicle while waiting for the check to be completed and called another officer an offensive epithet. When Cst. West handed Mr. Sidhu's driver's licence back to him, he said to Mr. Sidhu: "You were a mayoral candidate, weren't you? You would have done a fine

job.” Mr. Sidhu replied: “Picture your wife, if you have kids, picture them too.” Mr. Sidhu then returned to his truck and left the check stop area: *RFJ* at paras. 103–117.

[26] A previous incident involving Cst. West occurred on May 16, 2012. Mr. Sidhu was working that day at his family’s laundromat. Cst. West was parked in the parking lot across the street. Cst. West testified he frequently parked there because it was a good location for spotting drivers who were not wearing their seat belts or who were using their cell phones. When Mr. Sidhu left the laundromat in his truck, Cst. West followed in his RCMP vehicle.

[27] According to Cst. West, his attention was drawn to Mr. Sidhu in part because he believed Mr. Sidhu gave him the finger. Cst. West testified he then noticed Mr. Sidhu was not wearing his seatbelt. Cst. West pulled Mr. Sidhu over and gave him a ticket. During the stop, Cst. West’s supervisor, Corporal Pollard, pulled up. Cst. West was unable to explain why Cpl. Pollard pulled up but wondered if he had texted him. Cst. West later stayed the ticket based on doubts he had about whether Mr. Sidhu was wearing a seatbelt: *RFJ* at paras. 118–124.

[28] In her analysis, the judge found there was no evidence Aux. Cst. Brooks pulled over Mr. Sidhu on December 2, 2012, because he recognized Mr. Sidhu or saw he was a person of East Indian descent. The judge therefore concluded Mr. Sidhu was pulled over “based on chance, and not on the colour of his skin.”

[29] The judge rejected the suggestion the events on May 16, 2012, demonstrated Cst. West was racially profiling Mr. Sidhu. She instead concluded Cst. West had been acting appropriately. The judge also rejected the suggestion Cst. West’s unprofessional comment to Mr. Sidhu about his failed mayoral candidacy was indicative of racial profiling. She accepted the comment “was made in the heat of the moment, out of frustration… and did not have racist intent.” The judge ultimately found the December 2, 2012 stop was brief, reasonable and lawful: *RFJ* at paras. 125–155.

December 5, 2012 Arrest

[30] After Mr. Sidhu left the check stop on December 2, 2012, he called the RCMP and said he had been verbally assaulted by an RCMP officer. Corporal Dunmall returned Mr. Sidhu's call and Mr. Sidhu went to the RCMP detachment to speak with her later that evening. Each gave a different version of their interaction: *RFJ* at paras. 156–157.

[31] Mr. Sidhu testified he filed his complaint to perhaps get a restraining order or peace bond against Cst. West. He showed Cpl. Dunmall a video he had recorded of the December 2, 2012 check stop. He was concerned the RCMP were trying to harm him. He testified he told Cpl. Dunmall: "I'm afraid there is going to be a body on the ground, and I don't carry a gun." He clarified that if there was a physical altercation, one of them (he or Cst. West) was going to get hurt, and he did not carry a gun: *RFJ* at paras. 158–159.

[32] On the other hand, the judge summarized the key aspects of Cpl. Dunmall's testimony as follows:

> [163] … [Mr. Sidhu] asked her what would occur if he punched a police officer in the face, grabbed his gun, and shot him in the face. When Cpl. Dunmall tried to clarify, Mr. Sidhu said that he was speaking in the "hypothetical". At the end of the conversation, Mr. Sidhu told her that if Andrew West pulled him over there would be a body on the ground, that she had been warned, and it would be on her.

[33] Cpl. Dunmall did not take notes during this interaction but documented the conversation after it concluded. She believed Mr. Sidhu's words met the standard for a charge of uttering threats but wondered if a higher standard applied in relation to threats against police officers. She described her interaction with Mr. Sidhu to a superior officer and sought advice from the Crown: *RFJ* at paras. 164–166.

[34] As a result of Cpl. Dunmall's meeting with Mr. Sidhu, on December 3, 2012, a security bulletin regarding Mr. Sidhu was released internally by the RCMP: *RFJ* at para. 82. On December 5, 2012, having satisfied herself there were grounds for arrest, Cpl. Dunmall drew up an information charging Mr. Sidhu. The judge ultimately

found Cpl. Dunmall had reasonable and probable grounds to do so: *RFJ* at paras. 166, 202–203.

[35] Later on December 5, 2012, four RCMP officers attended Mr. Sidhu's workplace to arrest him. He was alone with his sister. He was read his rights. He asked to speak to his lawyer but was instead transported to the courthouse by Constable Leggett for a bail hearing. At one point, Cst. Leggett stepped on the brakes and Mr. Sidhu hit his head on the partition between the front and back seats. There was a dispute between the parties as to whether Mr. Sidhu hit his head on purpose or because Cst. Leggett slammed on the brakes: *RFJ* at paras. 205, 208–216.

[36] When the police vehicle stopped in the cell block of the courthouse, Mr. Sidhu testified Cst. Leggett opened the back door, took hold of him by the bicep and dug his nails into his arm, eventually resulting in significant bruising. Cst. Leggett said he took Mr. Sidhu by the arm to help him out of the car and maintain control over him. Cst. Leggett denied pinching or holding Mr. Sidhu hard enough to cause bruising. Corporal Waldner brought Mr. Sidhu into the cells where he was given the opportunity to contact counsel. After appearing in court, Cpl. Waldner took photos of Mr. Sidhu's arm: *RFJ* at paras. 217–224.

[37] Mr. Sidhu contended his arrest was unlawful because he was arrested without reasonable and probable grounds, and because his arrest was motivated by racism. The judge rejected both contentions: *RFJ* at paras. 225–231.

[38] Mr. Sidhu also claimed the RCMP's delay in providing him the opportunity to speak with counsel breached his s. 10(b) *Charter* right to counsel. The judge disagreed. Although the judge rejected part of Cpl. Waldner's testimony, she was satisfied he reasonably delayed Mr. Sidhu's opportunity to speak with counsel because he could not provide Mr. Sidhu with a private location to exercise his right at the laundromat and because of safety concerns there: *RFJ* at paras. 232–242.

[39] Regarding the alleged assault, the judge had some issues with the evidence of Mr. Sidhu, Cst. Leggett and Cpl. Waldner. She accepted Mr. Sidhu had an injury on

his arm after his December 5, 2012 arrest, but found there was no credible evidence the injury was caused by Cst. Leggett. The judge found Mr. Sidhu had not been assaulted: *RFJ* at paras. 243–257.

June 4, 2016 Roadside Stop

[40] The judge next turned to the June 4, 2016 check stop. On that date, Cpl. Pollard radioed to his colleagues at the check stop that Mr. Sidhu was speeding and to turn their cameras on. Constable Allain, who had worked in Watson Lake from 2008 to 2010, was acquainted with Mr. Sidhu and dealt with him at the check stop. Cst. Allain gave Mr. Sidhu a speeding ticket. Mr. Sidhu initially left the check stop but returned some time later where he spent almost an hour insulting the police and accusing them of wrongdoing: *RFJ* at paras. 258–266.

[41] The judge rejected each basis advanced by Mr. Sidhu to establish he was racially profiled on June 4, 2016. Cpl. Pollard identified Mr. Sidhu by name and advised his colleagues to turn on their radios. However, the judge concluded this was not due to racism but to Mr. Sidhu's history of negative interactions with the RCMP and Cpl. Pollard's desire to ensure an accurate record. Further, the evidence of a friend of Mr. Sidhu's that he was speeding but did not receive a ticket at the check stop did not demonstrate differential treatment of Mr. Sidhu. Mr. Sidhu's friend could not identify which officer he dealt with at the check stop. Finally, the judge made nothing of Cpl. Pollard subsequently giving Mr. Sidhu a speeding ticket on May 19, 2017. Although that ticket was stayed, the stay was for procedural reasons and was not an acquittal. The judge was satisfied Cpl. Pollard and Cst. Allain both dealt with Mr. Sidhu in a professional manner: *RFJ* at paras. 267–287.

Conclusion

[42] To sum up, in the judge's view, there was no basis to conclude the police targeted Mr. Sidhu. She was satisfied the RCMP officers involved in the three incidents at issue were not motivated by racism. She found Mr. Sidhu was not unlawfully detained, arrested, assaulted or subjected to malicious prosecution.

Instead, Mr. Sidhu was treated differently because of his own problematic actions. She dismissed Mr. Sidhu's claim: *RFJ* at paras. 304–307.

Discussion

Issue one: Did the judge misunderstand the nature of Mr. Sidhu's discrimination claim?

Mr. Sidhu's Position

[43] Mr. Sidhu sought to adduce evidence of his many historical interactions with the RCMP to: (1) establish the allegedly racist origins of the RCMP's special interest in him; (2) provide context to help the judge understand his recent conduct towards the RCMP; and (3) support his diagnosis of PTSD which he claimed was caused by these interactions.

[44] Mr. Sidhu submits the judge made two interrelated errors in refusing to admit the excluded historical evidence. First, he argues she erred in concluding the evidentiary principles of systemic discrimination did not apply to his claim. Second, he says she erred in concluding the evidence was not admissible as similar fact evidence. He claims the judge's conclusions were marred by legal errors and palpable and overriding errors of fact.

[45] I will address the first of these alleged errors in this section of my judgment and will return to the second of these alleged errors in the next section.

[46] Mr. Sidhu contends the judge adopted a definition of systemic discrimination which is "wrong", misunderstood the relevance of systemic discrimination to his claim, and fundamentally mischaracterized the nature of his claims as "isolated" instances of discrimination.

[47] Mr. Sidhu argues the authorities cited by the judge, namely *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, 1987 CanLII 109 [*Action Travail*], and *Moore v. B.C. (Education)*, 2012 SCC 61, do not support her conclusion that "the essential element of systemic discrimination" is its effect "on classes of people, rather than on individuals": *RFJ* at para. 33. Rather,

he says, “[s]ystemic discrimination can and does affect individuals.” Mr. Sidhu then argues an individual claiming discrimination can draw on both individual and systemic evidence.

[48] Mr. Sidhu says the judge’s fundamental misunderstanding of systemic discrimination effectively denied him his day in court. He was prevented from establishing that his history of interactions with the RCMP was marred by racism and that this history tainted his interactions with the RCMP in the three incidents at issue.

[49] Mr. Sidhu identifies what he says are two particularly unfair aspects of the judge’s conclusion. First, he says the injustice of the judge’s refusal to admit most of the historical evidence was “amplified” by her finding there was no collective awareness of him within the RCMP, when the excluded evidence was intended to establish precisely the contrary. Second, he says it was unfair to exclude most of the historical evidence and then rely on the “uncontextualized evidence” of his unflattering conduct toward the RCMP to conclude he was not credible (an argument I return to when considering issue four related to the judge’s credibility findings).

[50] Mr. Sidhu points to academic literature that has concluded, as he puts it, “the RCMP’s institutional practices and patterned cultural behaviours collectively support and reinforce racial discrimination”: H. Frances & C. Taylor, *Racial profiling in Canada: challenge the myth of a “few bad apples”* (Toronto: University of Toronto Press, 2006), at 27–48. He maintains the RCMP “cannot cleanse the wrongdoing of one of its members by pointing to the ignorance of another.”

[51] According to Mr. Sidhu, had he been given the opportunity to demonstrate “that his status as a person of interest for the RCMP was causally linked to, or originated in, the individual discriminatory attitudes of specific RCMP members, a claim of discrimination could very well have been found to have merit”. He summarizes the nature of his systemic discrimination claim as follows:

> There is no black-and-white line to be drawn between the overt racist actions of certain police officers who put the appellant on the RCMP’s radar, versus the institutional practices and cultures of the RCMP which provided fertile ground for this seed to blossom into a lengthy history of harassment and –

> ultimately – into the avowed profiling of the appellant on the ground that he was a public safety concern.

[52] Mr. Sidhu concludes the judge's failure to understand his claim as one of systemic discrimination was an error in principle that prevented him from adducing evidence critical to his case.

What is systemic discrimination and how is it proven?

[53] Systemic discrimination is a scourge. It results when, intentionally or unintentionally, organizational structures have an unfair and disproportionately negative impact on groups or individual members of those groups based on attributed rather than actual characteristics: *Action Travail* at 1138–1139.

[54] The police have not been immune to findings of systemic discrimination: see, e.g., *Hum v. The Royal Canadian Mounted Police*, [1987] 8 C.H.R.R. 3748, 1986 CanLII 6484 (C.H.R.T.); *Luamba c. Procureur général du Québec*, 2022 QCCS 3866, aff'd in relevant part 2024 QCCA 1387; *Campbell v. Vancouver Police Board (No. 4)*, 2019 BCHRT 275 [*Vancouver Police Board (No. 4)*]; *Logan v. Ontario (Solicitor General)*, 2022 HRTO 1004.

[55] Systemic discrimination may be obvious, as when a law explicitly singles out a protected group for differential treatment: *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 81. Often, however, systemic discrimination is insidious. In some instances, seemingly neutral laws or policies may have a disproportionate impact on a protected group: *Fraser* at para. 30. In others, the practices or attitudes within an institution end up limiting persons' opportunities based on a prohibited ground: *Radek v. Henderson Development (Canada) Ltd. (No. 3),* 2005 BCHRT 302 at para. 513.

[56] The concern is not whether there was intent to discriminate but whether a law or state action had the effect of being discriminatory. As in individual discrimination claims, systemic discrimination claims turn on discriminatory impact, not intent: *Action Travail* at 1138.

[57] As both the trial judge and Mr. Sidhu point out, distinguishing between systemic and individual discrimination claims is not always necessary or helpful: *RFJ* at para. 35; *Moore* at para. 58. The two are often interrelated: individual instances of implicit bias or racial profiling are frequently the result of systemic failures in terms of organizational policies and training: see, e.g., *Vancouver Police Board (No. 4)* at para. 175; *Johnson v. Halifax Regional Police Service*, [2003] 48 C.H.R.R. 307 at para. 100, 2003 CanLII 89397 (N.S.H.R.C.). It is therefore possible to allege both individual and systemic discrimination claims stemming from the same incidents: see, e.g., *Radek* at paras. 5, 10, 454, 500.

[58] Ultimately, the court's analytical approach to discrimination claims is the same regardless of whether the discriminatory actions are individual or systemic, explicit or implicit: *Fraser* at paras. 48–50; *Moore* at para. 59. The "focus is always on whether the complainant has suffered arbitrary adverse effects based on a prohibited ground": *Moore* at para. 60.

[59] What changes, however, is the type of evidence necessary to satisfy the court's analysis. The often hidden nature of systemic discrimination can make such claims difficult to prove. Barriers and inequities based on a protected characteristic can frequently be seen only by looking at the impact of an organization's policies and practices on a protected group: *Fraser* at para. 58.

[60] To overcome this challenge, claimants have led a range of evidence to demonstrate how a law or state action unduly burdened them based on their membership in a protected group. This includes:

a) testimony from other members of the protected group about how the institution's policies or practices affected them: *Radek* at para. 22;

b) testimony from members of the organization accused of systemic discrimination about their policies (or lack thereof) and actual practices: *Vancouver Police Board (No. 4)* at paras. 118–119; *Radek* at para. 513;

c) expert testimony and secondary sources about the connection between the claimant's protected status and the specific harms being suffered: *Vancouver Police Board (No. 4)* at paras. 28, 37; *Radek* at para. 29; *Fraser* at para. 21;

d) documentary evidence of the allegedly discriminatory policies: *Radek* at paras. 126, 545; and

e) statistical evidence to demonstrate the disparate impact a supposedly neutral law or state action has on a protected group: *Fraser* at para. 58; *Chapdelaine v. Air Canada*, [1988] 9 C.H.R.R. 4449 at para. 34756, 1987 CanLII 8504.

[61] The Supreme Court has encouraged claimants, where possible, to combine evidence demonstrating the link between their protected class and certain characteristics that disadvantage members with statistical evidence of the actual disparate impact of the law or practice: *Fraser* at para. 60. At times, certain issues affecting a protected group may be under-documented, requiring heavier reliance on claimant and group member testimony rather than expert testimony and academic reports: *Fraser* at para. 57. Where statistical evidence is unavailable or unhelpful, evidence about the attitudes, policies, and practices of the respondent may help to determine whether systemic discrimination has occurred: *Radek* at para. 513; see also *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 at para. 98.

[62] Courts have recognized the difficulties in making out these claims and have been careful not to dictate rigid evidentiary requirements in systemic discrimination cases: *Radek* at para. 509; *R. v. Sharma,* 2022 SCC 39 at para. 49. They have been particularly mindful of the asymmetry between claimants and the state in accessing the type of information necessary to make out such claims: *Sharma* at para. 49.

[63] Yet this flexibility does not absolve claimants from demonstrating the law or state action disproportionality impacted them based on their membership in a

protected group: *Sharma* at para. 50. Whether by third party witness, claimant or expert testimony, statistical evidence, judicial notice, or some other means, a claimant bringing an allegation of systemic discrimination must show "that practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups… [A] systemic claim will require proof of patterns, showing trends of discrimination against a group": *British Columbia v. Crockford,* 2006 BCCA 360 at para. 49.

[64] Similarly, individual discrimination claims may be supported by systemic or "circumstantial" evidence. To address the challenges in proving a discrimination claim when no overt discriminatory conduct occurred, adjudicators have recognized "that statistical evidence of a systemic problem of discrimination may be adduced as circumstantial evidence to infer that discrimination probably occurred in a particular individual case as well": *Chopra v. Canada (Department of National Health and Welfare)*, [2002] C.L.L.C para. 230-006 at para. 207, 2001 CanLII 8492 (C.H.R.T.). In such instances, it is typically necessary for the claimant to lead evidence connecting the existence of a general practice of discrimination to the particular incident in question: *Chopra* at paras. 208–211.

[65] Mr. Sidhu is correct in stating there is no black-and-white line separating "the [allegedly] overt racist actions of certain police officers who put the appellant on the RCMP's radar, versus the institutional practices and cultures of the RCMP which [allegedly] provided fertile ground for this seed to blossom". But an evidentiary link must still be drawn connecting those alleged institutional practices to their discriminatory effects in a particular instance.

Analysis

[66] Here, Mr. Sidhu claimed to be a victim of systemic discrimination by the RCMP. He invited the judge to take judicial notice of "systemic discrimination issues" within the RCMP based on concessions made by a former commissioner of the force: RCMP, "Statement by Commissioner Brenda Lucki" (12 Jun 2020). As noted, he also

sought to introduce evidence of 32 historical interactions he had had with the RCMP based, in part, on the case law associated with proving systemic discrimination.

[67] The judge did not address Mr. Sidhu's invitation to take judicial notice of "systemic discrimination issues" within the RCMP in her reasons for judgment. Mr. Sidhu does not allege on appeal that the judge erred in failing to do so. Mr. Sidhu similarly does not challenge the judge's articulation of the law as it relates to individual discrimination claims. As I see it, the issue on this aspect of Mr. Sidhu's appeal is whether the judge erred by declining to admit most of Mr. Sidhu's proposed historical evidence to establish he was a victim of systemic discrimination. In my view, she did not.

[68] I agree with the AGC that Mr. Sidhu's arguments on this aspect of his appeal misconstrue the judge's reasons. They depend on a parsed rather than the required contextual, functional and holistic reading of them. The judge's reasons must be read as a whole in the context of both the live issues and the parties' positions at trial: *R. v. G.F.*, 2021 SCC 20 at para. 69; *R. v. Pastro*, 2021 BCCA 149 at para. 53.

[69] Mr. Sidhu points to paras. 24, 33 and 37 of the *RFJ* as disclosing legal error. In these paragraphs, the judge held:

> [24] In my opinion, what makes systemic discrimination unique is that it is focused on the impact that discrimination has on groups, rather than individuals. Because of this, Mr. Sidhu's claim does not involve systemic discrimination, and the case law about systemic discrimination is not applicable.
>
> …
>
> [33] In my opinion, the essential element of systemic discrimination is not that it is adverse effects discrimination, but, rather, it is about the effect of discrimination on classes of people, rather than on individuals. This has been implicitly recognized by the Supreme Court of Canada in [*Action Travail*] at 1118 and *Moore v British Columbia (Education)*, 2012 SCC 61 ("*Moore*") at paras. 59 and 64.
>
> …
>
> [37] Systemic discrimination, therefore, includes both direct and adverse effects discrimination. What is essential to systemic discrimination, however, is

> that it concerns the effect of discrimination on a group rather than on an individual.
>
> [Emphasis added.]

[70] Respectfully, even standing alone, these passages do not say systemic discrimination does not affect individuals. Rather, they endeavour to distinguish claims of discrimination which are systemic in nature from those that are purely individual. And, they do so in the context of the judge considering the type of evidence that might be adduced to prove each type of claim.

[71] The judge made these points clearer in the paragraphs between and following the paragraphs Mr. Sidhu has identified as problematic. For example, in the following paragraphs, the judge distinguishes systemic from individual claims of discrimination, discusses the types of evidence that might be required to prove each and applies the principles to Mr. Sidhu's claim:

> [34] The Court of Appeal for British Columbia has also differentiated systemic discrimination from individual claims of discrimination on the basis of its focus on populations of people. In *British Columbia v Crockford*, 2006 BCCA 360 ("*Crockford*"), the Court stated:
>
> > [49] A complaint of systemic discrimination is distinct from an individual claim of discrimination. Establishing systemic discrimination depends on showing that practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups: see ***Radek*** at para. 513. A claim that there has been discrimination against an individual requires that an action alleged to be discriminatory be proven to have occurred and to have constituted discrimination contrary to the ***Code***. … [emphasis in original]
>
> [35] Differentiating between individual claims of discrimination and systemic claims of discrimination is not always necessary or useful (*Moore* at paras. 59-61). However, on certain issues it is necessary to distinguish between the two. In *Moore*, for instance, the Supreme Court of Canada stated that different evidence may be required in individual claims from those of systemic discrimination claims (para. 64).
>
> [36] Similarly, in *Crockford* at para. 49, the Court stated:
>
> > … The types of evidence required for each kind of claim [systemic and individual] are not necessarily the same. Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct.
>
> …

> [38] Applying the principles to the case at bar, the evidence Mr. Sidhu seeks to introduce is about a pattern of behaviour against him as an individual and not a pattern of behaviour against a group. Because of this, the evidence he seeks to admit is not evidence of systemic discrimination. In addition, his claim is about alleged wrongs done to him alone, and so is not systemic. The principles about the admissibility of similar facts evidence to cases of systemic discrimination are therefore not applicable.
>
> [Underlining added.]

[72] Elsewhere in her reasons for judgment, the judge demonstrated her understanding of the obvious points that systemic discrimination affects individuals within an affected group, and may be both intentional and unintentional. For example, at para. 25 of the *RFJ* she cited *Action Travail* where the Supreme Court of Canada adopted the following comments from the *Report of the Commission on Equality in Employment*, vol 1. (Ottawa: Supply and Services Canada, 1984) at 2, by Judge Abella (as she then was) as describing the "essentials" of systemic discrimination:

> Discrimination... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics…
>
> [Emphasis added.]

[73] I see no factual or legal error in the judge's handling of Mr. Sidhu's argument that more or all of the excluded historical evidence ought to have been admitted to establish he was a victim of systemic discrimination.

[74] First, Mr. Sidhu failed to articulate a systemic discrimination claim. Instead, his claim was one of individual discrimination. His claim, as finally amended, is not that the RCMP's laws, policies, or practices adversely affected racial minorities. It is that, as a man of East Indian descent, he was subjected to discriminatory treatment by RCMP officers in specific instances.

[75] As I recounted earlier, this Court in *YKCA RFJ* already spoke to the deficiencies of Mr. Sidhu's earlier amended complaint. That analysis remains applicable:

> [17] … Since discriminatory conduct rooted in racial profiling can arise in many different ways, it is incumbent on a plaintiff to plead the material facts

> establishing such conduct. I share the view, expressed by Lederman J. in *Hamalengwa* and endorsed by the judge, that a bare allegation of racial profiling is insufficient. No doubt there will be circumstances where knowledge of certain material facts will be within the knowledge of the defendants, but that issue is readily addressed where appropriate, for example, by deferring the provision of particulars until after discovery.

[76] Mr. Sidhu also relied on *Radek* in arguing for the admission of the historical incidents. In *Radek*, Ms. Radek claimed a private security company contracted by a shopping mall systemically discriminated against her based on her Indigeneity and disability. The BC Human Rights Tribunal allowed Ms. Radek to lead evidence of past instances of private security guard discrimination in support of her claim: para. 59.

[77] But in that case, the BC Human Rights Tribunal had previously determined Ms. Radek's complaint made out a systemic discrimination claim against the private security company based on a policy aimed at keeping "undesirables" out of the shopping mall. Only after making this determination did the tribunal allow Ms. Radek to lead evidence with respect to both her individual and systemic claims: *Radek v. Henderson Development (Canada) Ltd.*, 2003 BCHRT 67 at para. 20.

[78] Second, the judge made no error in refusing to admit the alleged historical incidents as evidence of systemic discrimination. Even if I agreed with Mr. Sidhu that the judge misstated the law on systemic discrimination, the evidence Mr. Sidhu attempted to admit was not, standing on its own, capable of making out such a claim. Nor is it the type of systemic evidence that would provide circumstantial support for his individual discrimination claim.

[79] Rather, at the risk of repeating myself, he sought to adduce evidence of a pattern of behaviour against him as an individual: *RFJ* at para. 38.

[80] This is again dissimilar from *Radek*. There, the past discriminatory incidents were not Ms. Radek's past interactions with security guards but past interactions of other Indigenous people with security guards: para. 22. (The policies Ms. Radek claimed targeted "undesirables" were also before the tribunal: *Radek* at paras. 126, 545.)

[81] Mr. Sidhu also failed to put forward evidence of any organizational policies or practices within the RCMP that were responsible for the alleged discrimination he suffered or that would explain the connection between the initial, allegedly racially motivated, actions of the RCMP in Watson Lake and the incidents in Whitehorse that were at issue in his pleaded claims.

[82] On appeal, Mr. Sidhu points to a study on racial profiling and systemic discrimination in the RCMP to bolster his argument: *Racial profiling in Canada* at 27–48. However, as the AGC points out, this amounts to expert evidence and was not provided at trial nor subject to cross examination. And, in any event, Mr. Sidhu did not provide (or seek to provide) any evidence linking these alleged systemic failures of the RCMP to the individual instances of discrimination at issue in the trial.

[83] I recognize Mr. Sidhu has had a long and contentious history with the RCMP. I recognize the RCMP's Civilian Review and Complaints Commission has concluded the actions of certain RCMP officers during some of the historical incidents amounted to an unreasonable use of authority. And, as I noted above, I recognize the RCMP and policing services across the country are not immune to findings of systemic racism.

[84] But, read as a whole, the judge's reasons reveal she did not admit evidence of the vast majority of the historical incidents between Mr. Sidhu and the RCMP because she was understandably unable to see a sufficient nexus between those incidents and the claims pleaded by Mr. Sidhu.

[85] Mr. Sidhu's claims, as pleaded, concern two routine police check stops and one instance of being arrested after, on his own version of events, uttering arguably veiled threats towards a police officer. With the exception of the alleged assault, the facts of these incidents—which are largely undisputed or captured by video or audio recordings—are not indicative of discrimination, systemic or otherwise. (Although there were significant differences in the evidence regarding the alleged assault, as will be seen, I would dismiss Mr. Sidhu's appeal in relation to the alleged assault on

standard of review grounds. In other words, for purposes of my analysis, there was no assault.)

[86] During the December 2, 2012 check stop, there was no evidence Aux. Cst Brooks recognized Mr. Sidhu or saw he was a person of East Indian descent driving when he stopped him: *RFJ* at para. 135. During the June 4, 2016 check stop, Cpl. Pollard radioed ahead and told the officers to turn the cameras on, not off: *RFJ* at para. 262. And documentary evidence revealed Cpl. Dunmall was hesitant about charging Mr. Sidhu because she feared he would use it as an opportunity to "grandstand with the police". She proceeded with charges cautiously after seeking the advice of her superiors and a crown prosecutor: *RFJ* at paras. 196–199.

[87] If these actions are indicative of anything, it would appear to be of police officers who were on high alert about potentially being accused of impropriety and exercising care to protect themselves against such accusations.

[88] More to the point, the excluded evidence of Mr. Sidhu's historical interactions with the RCMP—discriminatory or otherwise—would not have been of much help in establishing the ways in which Mr. Sidhu experienced discrimination in the specific instances at issue, how that mistreatment was linked to his identity as someone of East Indian descent, and how that mistreatment was then related to systemic failures within the RCMP. For reasons I provide more fully in the following section, the excluded evidence failed to satisfy the most fundamental rule of evidence. Its probative value did not, in the justifiable view of the trial judge, exceed its prejudicial effect.

[89] The trial court "with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission": *Moore* at para. 64. Mr. Sidhu decided to bring this complaint before the Supreme Court of Yukon rather than the Canadian Human Rights Tribunal, as was his right. Mr. Sidhu also decided to tie his racial discrimination claim to tort claims, leading to many of those claims—and the evidence that would have come along with them—to be dismissed as statute barred. Mr. Sidhu opted not to plead the torts of misfeasance in public office or abuse of process,

despite Gower J. nodding towards these as potentially viable causes of action: *Gower RFJ* at para. 17. And, despite amending his statement of claim three times, Mr. Sidhu ultimately failed to state a claim grounded in systemic discrimination or lead (or seek to lead) evidence that would sustain such a claim.

[90] If Mr. Sidhu's proposed historical evidence was going to be admitted, it would have to be admitted under the ordinary rules for the admission of similar fact evidence, a topic I turn to next.

Issue two: Did the judge err by refusing to admit the evidence of Mr. Sidhu's past interactions with the RCMP as similar fact evidence?

Mr. Sidhu's Position

[91] Mr. Sidhu, in arguing the judge erred in failing to submit the historical incidents as similar fact evidence, continues to emphasize the judge's alleged mischaracterization of his claim as one of individual, not systemic, discrimination.

[92] Mr. Sidhu takes issue with paras. 38–40 of the *RFJ* where the judge concluded principles of admissibility for similar fact evidence in cases of systemic discrimination did not apply in his case. The judge instead understood Mr. Sidhu to be making individual, rather than systemic, discrimination claims. On that basis, the judge determined most of the purported similar fact evidence of prior interactions with the RCMP was not probative of whether specific RCMP officers discriminated against Mr. Sidhu during the three interactions at issue in the case.

[93] Mr. Sidhu characterizes the judge's conclusion as "surprising" in the sense that patterns tend to repeat themselves. Mr. Sidhu is critical of the judge for failing to appreciate the thrust of his argument, arguing she had to look at the entire history of Mr. Sidhu's interactions with the RCMP "to fully understand and grasp the end result and its causes."

[94] Mr. Sidhu maintains the judge erred in her "perfunctory analysis" of the probative value and prejudicial effect of his proposed similar fact evidence. Mr. Sidhu submits the judge's conclusion regarding its probative value "betray[ed] a

fundamental misunderstanding of the purpose to which the [e]vidence could be put." He contends the judge's "wholesale conclusion that admitting the [e]vidence would be prejudicial is unreasoned and untenable." He also attacks her conclusion of prejudice based on the passage of time as speculative.

Analysis

[95] Mr. Sidhu's continued focus on characterizing his claim as one of systemic discrimination is misplaced. As established above, he did not seek to adduce evidence of a pattern of behavior against a group of people due to a discriminatory law, policy or practice. He only sought to adduce evidence of a pattern of behavior against himself as an individual.

[96] The admissibility of the allegedly similar fact evidence had to be determined in relation to Mr. Sidhu's pleaded claims. Those claims related to police conduct when he drove through two routinely established check stops and when he was arrested after he allegedly uttered threats. As pleaded, what mattered was the conduct of specific police officers on three specific occasions. To be admissible, the similar fact evidence must have been sufficiently probative of the police conduct in those three instances so as to outweigh its prejudicial effect.

[97] With a few exceptions, the judge decided it was not. This Court owes deference to that decision and sees no basis on which to disturb it.

[98] To determine whether the judge erred in excluding evidence requires an understanding of both the legal principles of similar fact evidence and the evidence that was excluded.

[99] Similar fact evidence is usually inadmissible because of its highly prejudicial effect: *R. v. Arp*, [1998] 3 S.C.R. 339 at paras. 40–41, 1998 CanLII 769; *R. v. Handy*, 2002 SCC 56 at para. 37. Past incidents of the defendant's wrongdoing are likely to leave the judge with a negative impression of the defendant's character which may then prejudice their opinion about the defendant's culpability: *Handy* at paras. 37–40.

[100] To determine the admissibility of similar fact evidence, the Court first identifies the issue the evidence is meant to help illuminate: *Handy* at paras. 69–75. The court then considers the degree to which the similar fact evidence is connected to that issue: *Handy* at paras. 76–80. Ultimately, as the evidence becomes more focussed and specific to the issue at hand, its probative value rises and may, at times, outweigh its prejudicial effect: *Handy* at para. 48.

[101] The Supreme Court in *Handy* at paras. 82–83 provided a non-exhaustive list of factors to help assess whether the similar fact evidence is sufficiently related to the issue it is meant to clarify, including:

a) the proximity in time of the similar acts;

b) the extent to which the other acts are similar in detail to the alleged wrongful conduct;

c) the number of occurrences of the similar acts;

d) the circumstances surrounding or relating to the similar acts;

e) any distinctive feature(s) unifying the incidents;

f) intervening events; and

g) any other factor which would tend to support or rebut the underlying unity of the similar acts.

[102] The Court in *Handy* balanced these considerations against several factors for determining the prejudicial effect of the evidence, including:

a) the inflammatory nature of the similar acts;

b) whether the party can prove its point with less prejudicial evidence;

c) the potential to distract the trier of fact; and

d) the potential for the undue consumption of time.

[103] Similar fact evidence's "potential for prejudice, distraction and time consumption is very great and these disadvantages will almost always outweigh its probative value": *Handy* at para. 37. The party seeking to admit similar fact evidence carries the burden of demonstrating otherwise: *Handy* at para. 101; see also *Arp* at paras. 41–42.

[104] Mr. Sidhu sought to introduce evidence of 32 alleged past interactions with the RCMP. The incidents were alleged to have occurred between 2004 and 2017, with twenty occurring between 2004 and 2008. Twenty-three of the incidents occurred in Watson Lake. The remaining nine occurred in Whitehorse.

[105] The alleged incidents vary in terms of the nature of the encounters and the details Mr. Sidhu provided about them.

[106] Many of the historical incidents concern traffic stops at which Mr. Sidhu claimed he was treated unfairly. The traffic stops often purported to relate to issues with his vehicle's insurance and registration, noise complaints or maintenance issues related to his motorcycle or car, or speeding or reckless driving infractions. Others concern RCMP officers approaching Mr. Sidhu in various settings and, according to Mr. Sidhu, singling him out for differential treatment.

[107] Several of the historical incidents detailed by Mr. Sidhu include allegations the RCMP brought charges against him that were later stayed. It is worth noting several of the incidents were eventually investigated by the RCMP Civilian Review and Complaint's Commission ("Commission").

[108] This includes an incident from 2006 in Watson Lake where the Commission concluded a Sergeant Bennett was unreasonable in his use of authority when he directed Officers Wolfram and Wilson to tell Mr. Sidhu he was not allowed to see Angela Spicer (a white RCMP officer that Mr. Sidhu is alleged to have had a relationship with).

[109] Many of the alleged incidents lack detail. In ten of the 32 incidents, Mr. Sidhu was unable to identify any of the officers involved.

[110] As Mr. Sidhu's pleaded claim related to the conduct of specific police officers on three specific occasions, the judge identified the issue in question as the degree to which the historical incidents had "tainted" the police officers involved on these three occasions. The judge concluded the historical incidents involving officers not named in the statement of claim were not sufficiently probative of that issue: *RFJ* at paras. 39–56. Her analysis touched on several of the factors in *Handy*.

[111] The judge noted the historical incidents lacked sufficient factual connections to Mr. Sidhu's case. Namely, the officers implicated in Mr. Sidhu's statement of claim were not involved in these historical incidents. Whether or not Mr. Sidhu was subject to discrimination in those past instances would not, therefore, be probative of whether the officers in the three incidents in question behaved in a discriminatory manner: *RFJ* at paras. 39–40.

[112] The judge also determined any evidence relevant to the issue in question—the degree to which the historical incidents had tainted the named officers—could be drawn from the testimony of the officers themselves. The actual factual details as to what occurred during those historical incidents was not material to the core issue at hand: *RFJ* at para. 41. Less prejudicial means were therefore available to Mr. Sidhu to prove his point.

[113] Though not strictly necessary, the judge went on to conclude that, even if the evidence was probative, its probative value was outweighed by its prejudicial effect: *RFJ* at para. 46.

[114] The trial judge justifiably questioned the reliability of evidence for the 32 alleged historical incidents, particularly those occurring over a decade prior to the live issues before the court. The judge found the evidence would be prejudicial because many of the incidents lacked sufficient particulars—including dates of the incidents and names of officers involved—to allow the AGC to effectively respond to the evidence. Even where an officer was named, the judge sensibly concluded it would be "reasonable to assume that the police officers would not have good recollections of incidents occurring 14 or 15 years ago": *RFJ* at paras. 48–49.

[115] And the judge noted the similar fact evidence had the potential to both substantially increase the length of the trial and sidetrack proceedings from the issues at hand: *RFJ* at paras. 50—51.

[116] A trial judge's ruling on the admissibility of evidence is an exercise of discretion subject to a highly deferential standard of review: *Santelli v. Trinetti*, 2019 BCCA 319 at para. 45; *Arp* at para. 42. Such a decision is reversible only where the court misdirects itself, is so clearly wrong it amounts to an injustice or gives insufficient weight to a relevant consideration: *Santelli* at para. 45; *Kish v. Sobchak Estate*, 2016 BCCA 65 at para. 34; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.

[117] Here, the judge gave weight to relevant considerations as outlined in *Handy*. Nothing in her analysis indicates misdirection or injustice.

[118] Rather, her conclusion was practical, sensible and reasonable. Mr. Sidhu's case concerned three specific incidents. Much of what had happened during those incidents was not in dispute. It was open to the judge to conclude that allowing the trial to be extended into an exposition of over two dozen other incidents with little to no nexus to the incidents in question, some of which occurred almost two decades prior to trial, and for which there were scant details or evidence available, would be a distraction.

Issue three: Did the judge err by misapprehending the evidence?

Mr. Sidhu's Position

[119] Mr. Sidhu submits the judge misapprehended the evidence in five material ways.

[120] First, Mr. Sidhu says the judge misapprehended the evidence with respect to the timing and nature of the bruising on his arm after his arrest. In particular, he submits the judge was required, but failed, to consider what caused Mr. Sidhu to develop significant bruising on the arm Cst. Leggett grabbed. He seeks to adduce

fresh evidence, namely a medical opinion, to establish the progression of the bruising shown in the photographs of Mr. Sidhu's arm was "within the range of expected outcomes" from the type of blunt force described by Mr. Sidhu.

[121] Second, Mr. Sidhu says the judge failed to consider an audio recording of Cst. Leggett's interactions with Mr. Sidhu before, during and after his alleged assault of Mr. Sidhu. He seeks to adduce fresh evidence, namely a "denoised" version of the audio recording put forward at trial. According to Mr. Sidhu's factum, while the original recording was "muffled", the denoised version makes clear Cst. Leggett whispered, "he just came at us when I was trying to get him out" while Mr. Sidhu was still in the police vehicle.

[122] Third, Mr. Sidhu says the judge failed to notice the video recording taken by Cst. West's police cruiser on May 16, 2012, was incomplete. He challenges its authenticity and suggests a full recording would have shed light on whether Mr. Sidhu appeared to be wearing a seatbelt and any communications Cst. West had with dispatch.

[123] Fourth, Mr. Sidhu says the judge misapprehended the evidence concerning Cpl. Pollard's arrival at the scene of Mr. Sidhu's detention by Cst. West on May 16, 2012. According to Mr. Sidhu, no matter how one looks at the evidence, Cpl. Pollard "mysteriously" appearing at the scene of his detention "is damning of Cst. West's credibility" in relation to his claim that Mr. Sidhu "didn't mean anything to him" at that time. Mr. Sidhu also seeks to adduce fresh evidence that Cpl. Pollard entered a common law peace bond after being charged with trespassing on Mr. Sidhu's property on January 26, 2022. He maintains this evidence demonstrates Cpl. Pollard's knowledge of and animus towards him.

[124] Finally, Mr. Sidhu says the judge misapprehended the evidence of the widespread knowledge of him within the Yukon RCMP. He says the judge's conclusion RCMP members did not have "much if any knowledge about [him], and that he was not a topic of conversation amongst [them]" is at odds with numerous pieces of evidence.

Analysis

[125] I consider Mr. Sidhu's five claims in turn. Where relevant, I assess Mr. Sidhu's motion for leave to adduce fresh evidence alongside his argument the judge misapprehended the evidence.

[126] For the reasons that follow, I conclude the judge did not err in assessing the evidence. Moreover, I reject Mr. Sidhu's request to adduce fresh evidence as none of that evidence meets the standard set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8.

Standard of Review

[127] Whether the trial judge misapprehended the evidence is a question of fact, reviewable for palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 72. It is a highly deferential standard of review: *Benhaim v. St-Germain*, 2016 SCC 48 at paras. 38–39. A mere difference of opinion as to the weight given to certain pieces of evidence is insufficient to warrant overturning the lower court's decision: *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 38. If "the inferences drawn by the trial judge are reasonably supported by the evidence, a reviewing court cannot reweigh the evidence by substituting for it an equally, or even more, persuasive inference of its own": *Broer v. Multiguide GmbH*, 2023 BCCA 134 at para. 26.

[128] Rather, "only where there is not a proper evidentiary foundation for a finding of fact in the sense evidence has been misapprehended or there is no evidentiary foundation for the finding (a palpable error), and the error is material to the outcome (overriding), may [an appellate] Court interfere": *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 8.

Test for Admission of Fresh Evidence

[129] Whether fresh evidence should be admitted on appeal is governed by *Palmer*. The *Palmer* test applies regardless of whether the fresh evidence relates to facts that occurred before or after trial: *Barendregt v. Grebliunas,* 2022 SCC 22 at para. 27.

[130] Justice McIntyre in *Palmer* at 775 provided four factors the court may apply to determine whether admitting the evidence is in the interests of justice:

a) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial.

b) The evidence must be relevant in the sense it bears upon a decisive or potentially decisive issue in the trial.

c) The evidence must be credible in the sense it is reasonably capable of belief.

d) The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[131] In weighing these factors, a court's overarching consideration is the interests of justice: *Barendregt* at para. 3. Determining whether admitting the evidence is in the "interests of justice" requires attention to the principles of finality, efficiency in the administration of justice, and respect for the role of the trial court: *Jiang v. Shi*, 2017 BCCA 232 at para. 8. Appellate courts therefore balance two foundational principles in making such a determination: "(i) finality and order in the justice system, and (ii) reaching a just result in the context of the proceedings": *Barendregt* at para. 32.

The Timing and Nature of Bruising Observed on Mr. Sidhu's Arm

[132] The judge rested her conclusions regarding the timing and nature of the bruising on Mr. Sidhu's arm on the credibility of the witnesses. As explained below when considering issue 4, I find no palpable and overriding error in the judge's conclusions on credibility. In sum, the judge determined Mr. Sidhu lacked credibility because he exhibited lapses of memory, was evasive on the stand, and demonstrated poor judgment in his attempts to minimize his aggressive behaviour towards the RCMP: *RFJ* at paras. 60–72. The judge took particular issue with Mr. Sidhu embellishing the severity of the head injury he allegedly sustained while

being transported by Cst. Leggett: *RFJ* at paras. 71, 249–253. Conversely, the judge concluded Cst. Leggett was credible and provided clear and detailed answers: *RFJ* at para. 254.

[133] As Mr. Sidhu points out, it is no doubt suspicious "how it came to be that the appellant was injured on exactly the same arm as the one grabbed by Cst. Leggett". But so long as the inferences drawn by the trial judge are reasonably supported by evidence, such suspicion and the alternative inferences that may be drawn from them are insufficient to justify overturning a lower court's finding of fact: *Broer* at para. 26. Given Mr. Sidhu's admission he embellished the pain he felt when he hit his head in Cst. Leggett's police cruiser, it was understandable the trial judge did not accept his testimony about an injury to his arm allegedly caused by Cst. Leggett immediately after leaving the cruiser.

[134] Further, the medical report Mr. Sidhu seeks to introduce fails to meet the threshold for admission of fresh evidence. First, Mr. Sidhu admits he was in possession of this evidence at trial. Mr. Sidhu fails to provide an adequate explanation as to why it could not have been adduced then.

[135] Second, even if admitted, the medical report would not have affected the result. As the forensic pathologist states, "the specific mechanism of injury in this case… cannot be confidently established based on the photographs." Although the doctor concluded the bruising was "consistent" with Mr. Sidhu's allegation, the doctor also concluded he "cannot exclude the possibility of self-inflicted injury." Even with the benefit of this evidence, the judge would have been left in the same position: Having to weigh two plausible explanations for the existence of the bruising based on the competing credibility and testimony of Mr. Sidhu and Cst. Leggett.

Cpl. Walder's Audio Recording

[136] The original audio recording of Cpl. Walder was introduced at trial and considered by the judge: *RFJ* at para. 223. The trial judge's failure to hear what Mr. Sidhu acknowledges are muffled whispers is not a palpable and overriding error.

[137] The denoised recording Mr. Sidhu seeks to admit as fresh evidence does not help to resolve the issue. Having listened to the denoised recording myself, I am unable to hear what Mr. Sidhu purports it to contain. I therefore fail to see how it would have changed the result at trial. Mr. Sidhu himself provides two different descriptions of what the new version reveals. In his factum, he says he can now hear Cst. Leggett say "…he just came at us when I was trying to get him out". Yet in his affidavit in support of his fresh evidence application, Mr. Sidhu claims to hear him say, "just say he came at me…yeah okay".

[138] In addition, the recording was available to Mr. Sidhu yet he failed to exercise due diligence by submitting a "denoised" version at trial.

The Video Recording of May 16, 2012

[139] Mr. Sidhu fails to point to a palpable and overriding error of the judge in the judge's consideration of the video recording from Cst. West's cruiser.

[140] Mr. Sidhu claims "the court had no explanation for why such a lengthy portion of video had been recorded, but nothing prior to that." Yet eliciting such an explanation was Mr. Sidhu's, not the judge's, responsibility. As the AGC points out, Mr. Sidhu was the party that filed the video as an exhibit. He is hardly in a position to now object to its authenticity.

[141] In addition, it appears the judge at para. 148 did consider the issue as to why the recording began when it did:

> [Cst. West] was questioned about when his VICS video turned on. He said the system functioned such that the camera began recording thirty seconds before he turned on his police lights. Mr. Sidhu's counsel submitted the VICS video did not turn on 30 seconds before Cst. West turned on the lights and asks me to draw a negative inference because of this. However, the VICS video shows that thirty seconds after the video begins, Cst. West briefly turned his sirens on, then off. A little later, he turned them on again and left them on. Cst. West's testimony is not inconsistent with the video.
>
> [Emphasis added.]

[142] It is also difficult to see how the alleged error would be overriding.

[143] Mr. Sidhu argues a complete version of the video would have confirmed whether Mr. Sidhu appeared to be wearing a seatbelt and would have contained any communications between Cst. West and dispatch. This information would then help reveal whether Cst. West's actions on May 16 were marred by racism, which would in turn impact the ultimate assessment of whether Cst. West discriminated against Mr. Sidhu during the December 2, 2012 check stop.

[144] Yet the judge made a series of factual findings in determining the May 16, 2012 incident was not coloured by racial animus: Cst. West was parked in front of Mr. Sidhu's workplace because it allowed him to see drivers on their cell phones or not wearing their seatbelts; Cst. West did not know it was Mr. Sidhu who was driving the vehicle; and Cst. West noticed Mr. Sidhu's vehicle in part because he believed the driver had given him the finger: *RFJ* at paras. 144–150. The issue did not turn on whether Mr. Sidhu was wearing a seatbelt. Cst. West may have been reasonably mistaken, as the evidence indicates: *RFJ* at para. 124.

[145] As for what may have been spoken between Cst. West and dispatch during segments of the video not presented at trial, it is not for this Court to speculate as to what evidence not before the court below may have contained. I agree with the AGC that any questions about the availability and completeness of records—records Mr. Sidhu introduced as evidence—ought to have to have been raised by Mr. Sidhu during discovery.

[146] Finally, it bears repeating the May 16, 2012 incident is not directly at issue in Mr. Sidhu's claim. Rather, it was offered as one of the historical incidents aimed at shedding light on whether Cst. West acted discriminatorily during the Dec 2, 2012 check stop. The judge made a series of separate findings of fact regarding the Dec. 2, 2012 incident that led her to conclude Cst. West did not racially profile Mr. Sidhu during that encounter. These include:

a) Other vehicles were stopped at the check stop at the time Mr. Sidhu was stopped and after he was moved into the secondary screening area.

b) Aux. Cst. Brooks did not recognize Mr. Sidhu's truck or Mr. Sidhu and did not see Mr. Sidhu was a person of East Indian descent when he waved him down. Waving Mr. Sidhu down was therefore due to chance, not the colour of his skin.

c) Mr. Sidhu was moved to secondary screening due to his apparent reluctance to hand his driver's licence to Aux. Cst. Brooks and the number of demerit points he had on his licence.

[147] I fail to see how hypothetical evidence that Mr. Sidhu was wearing his seatbelt on May 16, 2012 would override the judge's findings and conclusions regarding what happened at a random check stop on December 2, 2012.

Cpl. Pollard's Intervention on May 16, 2012

[148] The judge did not make a palpable and overriding error in refraining from determining why Cpl. Pollard intervened on May 16, 2012. I agree with the AGC the "trial judge did not make an evidentiary finding on this point because that evidence was not presented at trial". As the judge states,

> [150] Cst. West testified that he did not ask for back up, but then mused that he may have texted Cpl. Pollard. This could be an indication of racial profiling, but whether he did contact Cpl. Pollard, or why, was not explored any further.
>
> [Emphasis added.]

[149] The judge cannot reasonably be called upon to make findings of fact where the parties fail to adduce the evidence or testimony supporting such a finding.

[150] In addition, determining why Cpl. Pollard intervened would not override the judge's reasoning on the material issue. As noted above, the material issue is the traffic stop of December 2, 2012, not May 16, 2012.

[151] Mr. Sidhu has also not satisfied his burden in demonstrating why the fresh evidence of Cpl. Pollard's trespass of Mr. Sidhu's property in January 2022 should be admitted on appeal. The evidence does not bear upon a decisive or potentially decisive issue at trial, nor could it be expected to have affected the trial's result. Cpl.

Pollard played a marginal role in the June 4, 2016 check stop. The material issue during that stop was whether the RCMP discriminated against Mr. Sidhu in detaining him and issuing him a speeding ticket. Cpl. Pollard was not involved in those decisions. Moreover, the fresh evidence, on its own, does not indicate race had anything to do with Cpl. Pollard's behaviour.

Knowledge of Mr. Sidhu within the Yukon RCMP

[152] Mr. Sidhu challenges the judge's conclusion "there was no collective awareness of Mr. Sidhu within the RCMP prior to December 2012". A full reading of the judge's reasons on this issue, however, indicates she considered a range of evidence and arrived at a nuanced understanding of the degree of knowledge of Mr. Sidhu within the RCMP across the period in question:

> 75. I find that, until December 2012, some of the named members in the statement of claim had some knowledge about Mr. Sidhu and his interactions in Watson Lake, but others did not. He also did not occupy much of their time or their interest.
>
> 76. However, after December 2012, there grew a collective awareness of Mr. Sidhu, and a perception that he was harassing to members of the RCMP. This was caused primarily by Mr. Sidhu's own actions.
>
> 77. All the RCMP witnesses were questioned about what they knew about Mr. Sidhu either before they interacted with him, or at the time they interacted with him. What emerged from the evidence was that some did not know Mr. Sidhu at all, or knew about him from situations unrelated to the RCMP.
>
> 78. Others had some information about him, including some of the interactions he had with the RCMP in Watson Lake. During the trial it came out that Cst. West told Cpl. Pollard during a stop on May 16, 2012, that he recognized Mr. Sidhu from warnings, and that "he was not all there". This confirms that some RCMP members did know of Mr. Sidhu. However, the thrust of the testimony of all the RCMP members was that Mr. Sidhu was simply not a frequent topic of conversation nor of great interest to them.
>
> [Emphasis added.]

[153] This analysis reveals no palpable error but instead a balancing of testimonial evidence this Court is not in a position to disturb.

[154] Moreover, an error as to the degree of knowledge of Mr. Sidhu within the Yukon RCMP prior to 2012 would not override the substantive findings of the judge. Even if Mr. Sidhu was well known within the RCMP prior to 2012, this does not mean

he was known on the basis of his race or that the RCMP actions at issue in Mr. Sidhu's pleaded claim were discriminatory.

Issue four: Did the judge err by subjecting the parties' witnesses to uneven scrutiny?

Mr. Sidhu's Position

[155] Mr. Sidhu submits it is an error of law to apply a higher degree of scrutiny when assessing the credibility or reliability of the evidence adduced by one party in comparison to the evidence of the other party. Mr. Sidhu cites the following passage from *R. v. Howe* (2005), 192 C.C.C (3d) 480, 2005 CanLII 253 (ONCA), as providing the analytical structure for approaching this issue:

> [59] To succeed in this kind of argument, the Appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the Appellant and the complainant.

[156] Mr. Sidhu argues the judge applied uneven scrutiny when making determinations about his credibility as compared to her credibility determinations about members of the RCMP. Mr. Sidhu takes issue with four of the judge's findings regarding his credibility. He submits the judge erred in holding the following adversely affected his credibility:

a) his erroneous recollection of peripheral details, such as his mistake as to whether his father was present during his December 5, 2012 arrest;

b) his lack of remorse for his aggressive behaviour towards the RCMP;

c) his correct understanding of the word "produce" when he distinguished between "producing" and "giving" his licence to Aux. Cst. Brooks under cross-examination; and

d) his admission he embellished the pain he felt from hitting his head while being transported in Cst. Leggett's RCMP cruiser (which, in his view, should "greatly <u>reinforce</u> an individual's credibility"). [Emphasis in original.]

[157] Mr. Sidhu contrasts the judge's treatment of his credibility with how she assessed the credibility of various RCMP officers.

[158] For example, Mr. Sidhu states the judge concluded Cpl. Waldner was mistaken about who was present during his arrest but this conclusion did not adversely affect her assessment of Cpl. Waldner's credibility. Mr. Sidhu states this is a clear and palpable mistake.

[159] In another instance, Mr. Sidhu states the judge concluded Cpl. Waldner could not have seen Cst. Leggett grab Mr. Sidhu. Yet, when Cpl. Waldner testified the bruising he observed on Mr. Sidhu's arm was not where Cst. Leggett grabbed him, the judge failed to make a negative credibility finding regarding Cpl. Waldner.

[160] Finally, Mr. Sidhu states the judge made a series of negative findings regarding Cpl. Dunmall's testimony. The corporal failed to answer some questions on cross-examination, was incorrect as to some facts, was contradicted by documentary evidence on relevant issues, and was unconvincing in her attempts to distance herself from problematic aspects of her evidence. Mr. Sidhu says the judge nonetheless "brushed aside all the significant concerns with Cpl. Dunmall's credibility and preferred her evidence on the basis of the general credibility concerns with [his] evidence".

[161] Mr. Sidhu also claims the judge applied uneven scrutiny in her treatment of expert evidence but provides no examples in support of this claim.

Analysis

[162] Mr. Sidhu argues the uneven application of scrutiny to witness testimony is a question of law. Although in isolation the statement is correct, it is incomplete.

[163] As the AGC notes, Mr. Sidhu provides only a partial citation from *Howe*. The full paragraph reads as follows:

> [59] This argument or some variation on it is common on appeals from conviction in judge alone trials where the evidence pits the word of the complainant against the denial of the accused and the result turns on the trial

> judge's credibility assessments. This is a difficult argument to make successfully. It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.
>
> [Emphasis added.]

[164] In *R. v. Campbell,* 2023 BCCA 19, this Court summarized the challenges surrounding this ground of appeal:

> [48] In *R. v. Roth*, 2020 BCCA 240, this Court stated that it is an error of law for a judge to subject the evidence of the defence to more rigorous scrutiny than the evidence of the Crown: at para. 47. Notably, however, in *G.F.* Justice Karakatsanis questioned whether "uneven scrutiny" is a helpful ground of appeal. Several Courts have recently observed that "uneven scrutiny" is a notoriously difficult ground to make out, its value as an analytical tool to demonstrate error in a judge's reasoning process on credibility findings is doubtful, and, if it exists, it may not amount to an independent ground of appeal: *G.F.* at paras. 99–101; *R. v. Mehari*, 2020 SKCA 37 at para. 31; *R. v. S.S.*, 2022 BCCA 392 at paras. 72–75. As Justice MacKenzie explained in *S.S.*, *Roth* does not stand for the simple proposition that "uneven scrutiny" is a free-standing ground of appeal, nor did the Court treat it as such in *Roth*. Rather, the conclusion in *Roth* was that the judge's credibility assessment of the accused was tainted by three distinct and readily identifiable errors in principle: *Roth* at para. 54; *S.S.* at paras. 73–74.
>
> [Emphasis added.]

[165] It is not the role of appellate courts to second guess the trial judge's credibility findings: *R. v. Roth*, 2020 BCCA 240 at para. 49; *R. v. Greif*, 2021 BCCA 187 at paras. 76–77. Given their advantage in hearing and seeing witnesses, trial judges' determinations of credibility are due substantial deference. An appellate court will only interfere with such findings when the judge commits a palpable and overriding error: *R. v. Wright*, 2019 BCCA 327 at paras. 23–25; *Greif* at para. 76; see also *R. v. Vuradin*, 2013 SCC 38 at para. 11.

[166] Appellate court intervention based on the trial judge's uneven scrutiny of evidence is therefore only warranted where the trial judge committed an error in

principle in their interpretation of the evidence. Such errors occur where the trial judge applied a flawed assessment methodology or improperly applied different standards of interpretation to the evidence in question: *Roth* at paras. 50–54; *Greif* at para. 77.

[167] Mr. Sidhu points to no error in principle in the judge's analysis. Further, a review of her reasons for judgment does not reveal any flawed methodology of assessment or improper application of standards of interpretation. Rather, Mr. Sidhu asks this Court to review specific instances in which the judge made determinations of credibility based on the evidence before her. Those decisions are owed deference and do not reveal any palpable and overriding errors.

[168] For example, nowhere in her reasons for judgment does the trial judge conclude Mr. Sidhu's failure to recall peripheral details, on their own, significantly affected his credibility. His memory gaps were considered alongside other credibility issues, such as his minimization of his actions, implausible and disingenuous testimony, evasiveness, and admission to having not been truthful. Taken as a whole, these concerns led the judge to approach Mr. Sidhu's evidence with caution: *RFJ* at paras. 64-73. Moreover, the judge explicitly said no issue arose where Mr. Sidhu's memory lapses concerned minor issues. Only those related to material information adversely impacted his reliability: *RFJ* at para. 63.

[169] In comparison, the judge's treatment of Cpl. Waldner's memory lapses was not, as Mr. Sidhu puts it, "lenient". In both instances where the judge found Cpl. Waldner's testimony lacked credibility, she did not take it into account in her decision: *RFJ* at paras. 238, 255. Elsewhere, the judge gave credit to Cpl. Waldner's testimony as either reasonable or uncontroverted by Mr. Sidhu: *RFJ* at paras. 239–240. It was well within her discretion to make such determinations, and I see no palpable and overriding error in her doing so. Nothing in her analysis reveals the application of differential standards or methodologies in her assessment of credibility.

[170] Similarly, I disagree with Mr. Sidhu that the judge "brushed aside all the significant concerns with Cpl. Dunmall's credibility". The judge's analysis between paras. 176–203 provides her detailed reasoning as to the credibility of Cpl. Dunmall

on various matters. Nothing in her analysis indicates palpable and overriding error but instead a careful consideration of the competing testimony as compared to other evidence submitted by the parties. More importantly, the judge on numerous occasions concluded Cpl. Dunmall's credibility was irrelevant as Mr. Sidhu's own theory of how Cpl. Dunmall came to target him was either unsupported or controverted by other evidence: *RFJ* at paras. 185, 193, 199–204.

[171] As I first alluded to when discussing issue one above, Mr. Sidhu also alleges the judge, in refusing to hear evidence of his historical interactions with the RCMP, was unable to put his aggressive conduct towards the RCMP in context. This failure, according to Mr. Sidhu, then led the judge to determine he lacked credibility as a witness, which in turn undermined his claims.

[172] I do not agree the exclusion of the historical incidents unfairly prejudiced the judge against Mr. Sidhu. First, the judge's credibility determination rested on several factors, including Mr. Sidhu's admission he embellished the pain he felt from hitting his head in the police cruiser following his arrest: *RFJ* at paras. 58–73, 249–253.

[173] Second, the judge was not as concerned with Mr. Sidhu's aggressive and hostile interactions with the RCMP as she was with his attempts to minimize and justify them. Moreover, Mr. Sidhu was given the opportunity to testify about his interactions with the RCMP surrounding the two road stops and his arrest. The judge found Mr. Sidhu's testimony was inconsistent with his counsel's claim—repeated here—that his reactions were in response to the RCMP's historical racism towards him. Rather, Mr. Sidhu believed his responses to the RCMP were suitable. The judge concluded this called into question his judgment: *RFJ* at paras. 64–67, 99–100.

[174] Finally, despite the exclusion of 29 historical incidents, Mr. Sidhu had the opportunity to testify in broad terms about his past relationship with the RCMP and about the impact of certain historical incidents on his psychological well-being. The judge was aware of this history and its affect on Mr. Sidhu when making her conclusions as to Mr. Sidhu's credibility.

[175] The other instances Mr. Sidhu puts forward as indicative of the judge's uneven scrutiny similarly reveal a misunderstanding of the standard for establishing this ground of appeal. Rather than point towards a principled error in the judge's reasons, Mr. Sidhu instead calls on this Court to "retry the case and draw inferences the trial judge was not prepared to make": *Roth* at para. 52 (internal quotation omitted). I am not prepared to do so, especially when considering the specific instances Mr. Sidhu asks us to reconsider: that the judge should have ignored his attempts to minimize or justify his aggressive behaviour towards the RCMP rather than see it as revealing of Mr. Sidhu's judgment; that his seizing on a semantic difference between "produce" and "give" was reasonable, not evasive; and that his admission he "embellished" his evidence should somehow improve, rather than damage, his credibility.

Disposition

[176] Systemic discrimination remains a blight on our society. Courts, like all institutions, have a role to play in confronting it.

[177] Yet courts are also bound by rules that help ensure fairness between parties and guide proceedings towards just determinations as to whether the law has been violated in a specific instance. These rules limit trial courts to trying only those claims that have been pleaded. Importantly, these rules also require appellate courts to treat the trier of fact's factual determinations with deference.

[178] This case is as much about these rules of procedural fairness and truth-seeking as it is about understanding the nature and scope of systemic discrimination.

[179] Mr. Sidhu has had a long and contentious relationship with the RCMP. I understand he feels wronged by the way he has been treated. Yet, the trial judge was bound to consider Mr. Sidhu's claims as pleaded and presented. In doing so, she did not err in her understanding of the nature of Mr. Sidhu's discrimination claim. Her decisions relating to the admission, apprehension and scrutiny of the evidence reveal no grounds for disturbing her decision.

[180] For these reasons, I would dismiss the appeal.

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Madam Justice Smallwood"

I AGREE:

"The Honourable Mr. Justice Voith"