

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

JANET MERLO

Plaintiff

and:

THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF
JUSTICE OF BRITISH COLUMBIA

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

**NOTICE OF APPLICATION
(CERTIFICATION)**

Name of applicant: Janet Merlo

To: The Defendants
And to: Their Solicitors

TAKE NOTICE that an application will be made by the applicant to the Honorable Madam Justice Gropper, at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on a date and time to be set, for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. certifying this action as a class proceeding;
2. defining the Class as
 - (1) All current and former female Members, Civilian Members and Public Service Employees of the Royal Canadian Mounted Police [the “Primary Class”]; and
 - (2) All persons who have a derivative claim on account of a family relationship with a person who is a member of the Primary Class [the “Derivative Class”].

3. appointing Janet Merlo as the Representative Plaintiff;
4. appointing Klein Lyons as Class Counsel;
5. certifying the following issues as common issues:
 - (1) Did Canada and its servants owe a duty of care to Primary Class Members to ensure that they could work in an environment free of gender-based discrimination and harassment?
 - (2) If the answer to common issue (1) is yes, did Canada or any of its servants breach this duty?
 - (3) If the answers to common issues (1) and (2) are yes, was there a breach of duty by individual provincial constables in the course of their duties in British Columbia?
 - (4) With respect to actions which took place in Quebec, did Canada or any its servants commit fault giving rise to extra-contractual liability to Class Members pursuant to the *Civil Code of Québec*, S.Q. 1991, c. 64, Art. 1457, and the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, ss. 1, 4, 10, 10.1 and 16?
 - (5) With respect to actions which took place in Quebec, did Canada or any of its servants commit fault giving rise to extra-provincial liability pursuant to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s.3, and the *Interpretation Act*, R.S.C. 1985, c. I-16, s. 8.1?
 - (6) Did Canada have a contractual relationship with Primary Class Members?
 - (7) If the answer to common issue (6) is yes, was it a term of the contract that Canada would provide the Primary Class Members with a work environment free of gender-based discrimination and harassment?
 - (8) If the answers to common issues (6) and (7) are yes, did Canada breach this term of the contractual relationship?
 - (9) Did Canada breach the Primary Class Members' right to be free from discrimination on the basis of sex, pursuant to s. 15 of the *Canadian Charter of Rights and Freedoms*?
 - (10) If Canada or any of its servants breached a duty of care owed to Primary Class Members, does the conduct justify punishment?
 - (11) If the answer to common issue 10 is yes, and if the aggregate compensatory damages awarded to Class Members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what amount of punitive damages should be awarded against each Defendant?

- (12) With respect to actions which took place in Quebec, did Canada or any of its servants unlawfully and intentionally interfere with the rights of Primary Class Members under the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, ss. 1, 4, 10, 10.1 and 16, thereby giving rise to the liability to pay punitive damages pursuant to the *Charter*, s. 49 and the *Civil Code of Québec*, S.Q. 1991, c. 64, Art. 1621?
- (13) If the answer to common issue (12) is yes, what amount of punitive damages should awarded against Canada?
6. stating the manner and time in which:
- (a) a Class Member who is resident in British Columbia may opt out of the proceeding;
and
- (b) a Class Member who is not a resident of British Columbia may opt in to the proceeding;
7. such further and other relief as counsel may advise and this Honourable Court may deem just.

Part 2: FACTUAL BASIS

8. This is a proposed class proceeding brought by the Plaintiff relating to discrimination against, bullying of, and harassment of female Members, Civilian Members, and Public Service Employees of the Royal Canadian Mounted Police, because they are women. The Plaintiff alleges that she and fellow class members were subject to gender-based discrimination, bullying and harassment. She further alleges that the Defendants and their servants failed to exercise the duty to women in the RCMP to ensure that they could work in an environment free of gender-based discrimination, bullying and harassment.

9. The Plaintiff, Janet Merlo, served as an RCMP Constable from March 1, 1991 to March 24, 2010. While stationed at the Nanaimo Detachment, she experienced years of bullying, harassment and discrimination at the hands of her male colleagues and superiors. Her complaints to RCMP Members were either ignored or investigated internally by the RCMP and then dismissed.

10. Ms. Merlo developed anxiety, stress and feelings of depression during her time with the RCMP. She took sick leave on many occasions because she was upset about the ongoing harassment she faced at work; she felt too physically ill to attend work. Ms. Merlo was ultimately diagnosed with posttraumatic stress disorder and major depressive disorder, both related to her service with the RCMP.

11. On her own behalf and on behalf of the Class, she pleads claims in negligence, contract, the *Civil Code of Québec*, the *Quebec Charter of Human Rights and Freedoms*, the *Canadian Charter of Rights and Freedoms*, and family compensation legislation.

12. There are currently 11,726 female employees in the RCMP, 3,755 of whom are regular Members.

13. Klein Lyons and our co-counsel, Watkins Professional Law Corporation (“Watkins Law”), have been contacted by approximately 300 women from across Canada who say that they were harassed or discriminated against during their tenure with the Royal Canadian Mounted Police. Of these, about 100 women are current Members, Civilian Members, or Public Service Employees of the Royal Canadian Mounted Police. Approximately 120 of the women who have contacted Klein Lyons and Watkins Law reside in British Columbia.

14. The litigation plan proposed for the conduct of this action is based on litigation plans that have been approved by the Court in other certified class actions. The plan proposed includes a plan for giving notice to the Class in the event that this action is certified as a class proceeding.

15. Klein Lyons has offices in Vancouver and Toronto and is one of Canada’s leading class action law firms. The firm has represented plaintiffs in over 20 certified class actions in a range of categories in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Newfoundland & Labrador. Klein Lyons has acted in a number of prominent institutional and government negligence class actions including the Woodlands School, Alberta Child Welfare, Hepatitis C Tainted Blood, Maple Ridge Flood, The Crocus Investment Fund, Newfoundland and Labrador Breast Cancer Testing, and Labrador Hospital Sterilization class actions.

16. The plaintiff, Janet Merlo, has taken a number of steps to fairly and adequately represent the interest of the class members and has agreed to take on the responsibilities of representative plaintiff in this action.

17. There is no apparent conflict of interest between the interests of the proposed representative plaintiff and the proposed class.

Part 3: LEGAL BASIS

18. This action should be certified as a class proceeding as it satisfies the requirements set out in s. 4 of the *Class Proceedings Act* and it is a case that is ideally suited for a class proceeding.

19. The first requirement for certification, as stipulated in s. 4(1)(a) of the *Class Proceedings Act*, is that the pleadings disclose a cause of action. In her Notice of Civil Claim the Plaintiff pleads causes of action in negligence, contract, the *Canadian Charter of Rights and Freedoms*, the *Civil Code of Québec*, S.Q. 1991, c. 64, Art. 1457, and the *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. The requirement has been met.

20. Section 4(1)(b) of the *Class Proceedings Act* requires that there be an identifiable class of two or more persons. The requirements of this section have been met as there are numerous potential class members in British Columbia and in other areas of Canada. The class definition has objective criteria and is sufficiently clear so that class members will be able to identify themselves.

21. Section 4(1)(c) of the *Class Proceedings Act* requires that the claims of class members raise common issues. The Plaintiff proposes common issues of fact and law that satisfy this section. These are issues that are common to all members of the class.

22. To meet the criteria in s. 4(1)(d) of the *Class Proceedings Act*, a class proceeding must be the preferable procedure for the fair and efficient resolution of the common issues. This action is well suited for class certification. The mistreatment of women by and within the RCMP presents core common issues that need to be addressed in each class member's claim. Rather than litigating these same issues over and over for each individual class member, the *Class Proceedings Act* provides a mechanism for the resolution of the common issues on behalf of the entire class in a single trial. Individual litigation of these issues would be repetitive, expensive and a waste of judicial resources. Aggregating the claims under the *Class Proceedings Act* is beneficial both to class members and to the Court.

23. Lastly, to meet s. 4(1)(e) of the *Class Proceedings Act*, a plaintiff must be put forward who adequately represents the class, does not have any conflict of interest with other class members on the common issues, and who has developed a workable plan for litigating the action and for providing notice to the class. Janet Merlo meets all three of these criteria. She demonstrates that she understands the nature of the action, that she can provide instructions to counsel, and that she will vigorously prosecute this action on behalf of the class. She does not have any conflict of interest on the common issues with other class members. Finally, the proposed litigation plan is reasonable as it shows that the plaintiff and her counsel have thought through the progression of this case and have a workable plan for pursuing that the matter through to trial of both the common and individual issues. It is also a flexible plan that provides for ongoing review by the parties and the court as the litigation proceeds.

24. Certification of this action as a class proceeding meets the goals of judicial economy, access to justice and behaviour modification as described by the Supreme Court of Canada in the seminal trilogy of class action decisions: *Rumley v. British Columbia*, 2001 SCC 69, *Hollick v. Toronto (City)*, 2001 SCC 68, and *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46.

25. For this application, the applicant relies on Rules 1-3, 8-1, 22-1 and 22-2 of the *Supreme Court Civil Rules*, and ss. 1, 2, 4, 5, 7, 8, 11, 12, 16 and 40 of the *Class Proceeding Act*, R.S.B.C. 1996, c. 50.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Janet Merlo, made May 30, 2013;
2. Affidavit #1 of Jennifer Berdahl, made May 26, 2013;
3. Affidavit #1 of Lisa Porteous, made May 29, 2013;
4. the pleadings and proceedings herein; and
5. such further and other material as counsel may advise and this Honourable Court may permit.

The applicant estimates that the application will take 3 days.

This matter is within the jurisdiction of a master.

This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: June 3, 2013



Signature of
 applicant lawyer for applicant

David A. Klein

To be completed by the court only:

Order made
 in the terms requested in paragraphs of Part 1 of this notice of application

with the following variations and additional terms:

Date:.....[dd/mmm/yyyy].....

Signature of Judge Master

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts