

Federal Court



Cour fédérale

Date: 20170113

Docket: T-1685-16

Citation: 2017 FC 51

Ottawa, Ontario, January 13, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

**JANET MERLO AND LINDA GILLIS
DAVIDSON**

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Introduction

[1] On October 6, 2016 the Commissioner of the Royal Canadian Mounted Police [RCMP], Bob Paulson, announced that a settlement agreement had been reached in the class action lawsuits filed by Janet Merlo and Linda Gillis Davidson [The Plaintiffs]. The settlement is intended to provide financial redress to females in the RCMP who have experienced gender-based discrimination and harassment. This is a motion for certification of the action as a class

proceeding to allow the parties to move forward with the implementation of this settlement agreement throughout Canada. The parties are in agreement on the terms of the certification. For the reasons that follow, the certification motion is granted.

II. Background

[2] The action for which certification is sought is the consolidation of an action filed in British Columbia in 2012 by Ms. Merlo [Merlo Action], and an action filed in Ontario in 2015 by Ms. Davidson [Davidson Action]. In their action, they make allegations of gender-based bullying, discrimination, and harassment, which both Ms. Merlo and Ms. Davidson say they experienced while they were with the RCMP. In addition, Ms. Davidson alleges discrimination on the basis of sexual orientation. The Plaintiffs allege this harassment and discrimination has impacted their careers within the RCMP, and has caused them to suffer physical and psychological damage, personal expense, and loss of income. The Plaintiffs also bring this action on behalf of those who are entitled to assert a derivative claim in accordance with the applicable family law legislation arising from a family relationship.

[3] The Plaintiffs allege that the RCMP and its management failed to fulfill its statutory, common law, and contractual duties to provide them with a work environment free of discrimination, harassment and bullying. They claim that complaints which were made, were not properly investigated by the RCMP. The Plaintiff, Ms. Davidson, filed grievances in response to the discrimination and harassment she suffered, but she says they were not adjudicated in accordance with the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10 [RCMP Act]. They also claim that they suffered from retaliatory abuse from male members of the RCMP in

response to their complaints. Both Plaintiffs have been diagnosed with medical conditions as a consequence of the harassment and discrimination they endured while with the RCMP.

[4] Although the claims are made against the RCMP as an institution, the Attorney General of Canada is the proper Defendant by virtue of the operation of section 36 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

[5] Certification as class proceedings was sought in both the Merlo Action in British Columbia and the Davidson Action in Ontario. However, both of these actions were held in abeyance when the parties engaged in settlement discussions in 2015 and into 2016. Those discussions culminated in the settlement agreement announced by Commissioner Paulson, on October 6, 2016.

[6] The Plaintiffs, Janet Merlo and Linda Gillis Davidson, seek an order certifying this action as a class proceeding for the purpose of settlement and appointing them as the representative Plaintiffs.

III. Issue

[7] The sole issue is whether this action should be certified as a class proceeding pursuant to Rule 334.16 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*].

IV. Analysis

[8] Class action legislation is remedial legislation, which is to be given a broad, liberal and purposive interpretation in order to achieve its foundational policy objectives of access to justice, judicial economy, and behaviour modification (*Hollick v Toronto (City)*, 2001 SCC 68 [*Hollick*] at paras 14-16).

[9] Certification is an initial procedural step to determine if it is appropriate for the matter to proceed as a class proceeding. The analysis at the certification stage is not a review of the merits of the claim, rather, the focus is on the form of the action and whether it can appropriately go forward as a class action (*Hollick* at para 16).

[10] The evidentiary standard on a certification motion is low. In fact, in the settlement context, such as here, courts have generally engaged in a less vigorous analysis of the certification criteria (see *Garipey v. Shell Oil Co.*, [2002] OJ No 4022 at para 27).

[11] In the *Federal Court Rules*, the criteria for certification of a class proceeding is outlined in Rule 334.16(1) as follows:

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure révèlent une cause d'action valable;

b) il existe un groupe identifiable formé d'au moins

deux personnes;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

(e) there is a representative plaintiff or applicant who

e) il existe un représentant demandeur qui :

(i) would fairly and adequately represent the interests of the class,

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

A. *Reasonable Cause of Action*

[12] For the purpose of determining if the action discloses a reasonable cause of action, it is assumed that the facts outlined in the Statement of Claim are true (*Condon v Canada*, 2015 FCA 159 at para13).

[13] Here, the Statement of Claim asserts claims in negligence, breach of contract and allegations of breach of section 15 of the *Charter*. The Statement of Claim outlines the factual events which form the foundation for these claims.

[14] Based upon the facts contained in the Statement of Claim, I am satisfied that a reasonable cause of action has been established, as required by Rule 334.16(1)(a).

B. *Identifiable Class*

[15] The purpose of a class description is to have a clear definition of those who may be entitled to relief as part of the class, and to provide objective criteria to identify possible members of the class (*Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at para 38).

[16] That said, class members are not required to have identical claims (see *Hollick* at para 21) and it is not necessary at the certification stage to be satisfied that each class member would be successful in establishing a claim (*Cloud v Canada (Attorney General)*, [2004] OJ No 4924 [*Cloud*] at para 45).

[17] Here the parties propose the class be defined as follows:

Primary Class Members: All female current and former living Regular Members, Civilian Members and Public Service Employees (who are appointed by the Commissioner of the RCMP under the delegated authority of the Public Service Commission pursuant to the *Public Service Employment Act*, R.S.C., 1985, c. P-32; amended S.C. 2003, c. 22, ss.12 and 13) who worked within the RCMP at any time during the Class Period. The Class Period is September 16, 1974, to the date the Settlement receives court approval.

For the purposes of the Settlement, "Regular Members" includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members, and Reserve Members.

For the purpose of the Settlement, "Public Service Employees" includes Temporary Civilian Employees who, prior to 2014 were appointed under the now-repealed subsection 10(2) of the *RCMP Act*, R.S.C., 1985, c. R-10.

Secondary Class Members: All persons who have a derivative Claim in accordance with applicable family law legislation arising from a family relationship with a Primary Class Member.

[18] I am satisfied that the class definition of the Primary Class Members, although potentially numbering in the thousands, is nonetheless clearly identifiable.

[19] With respect to the Secondary Class Members, family law classes have been certified in other class proceedings involving claims against government agencies (*Dolmage v Ontario*, 2010 ONSC 1726 at paras 154-155). In the circumstances, I am satisfied that it is appropriate to include a secondary class. Considering that the secondary class is a derivative of the Primary Class, as a class, it is also identifiable.

[20] The Class descriptions meet the requirement of Rule 334.16(1)(b).

C. *Common questions*

[21] The common question is the “substantial ingredient” of each Class Member’s claim (*Hollick*, at para 18). It allows the claim to proceed as a representative one and avoids duplication of fact-finding or legal analysis (*Rumley v British Columbia*, 2001 SCC 69 at para 29).

[22] In *Vivendi Canada Inc. v Dell’Aniello*, 2014 SCC 1, at para 72, the Supreme Court of Canada stated that the common questions requirement constitutes a low bar. In *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at para 108, the Supreme Court of Canada confirmed that a Court should take a purposive approach in assessing common issues. Additionally, it stated that Class members do not need to be identically situated vis-à-vis the defendant, nor is it necessary that the common issues predominate over non-common issues.

[23] Here, the parties have proposed the following as the common question: Is the Defendant liable to the Class?

[24] The Plaintiffs submit that the liability of the Defendant is the common question which applies to each member of the Class who has a claim arising out of their treatment as a female working within the RCMP. The resolution of this common question is necessary to the resolution of each Class Member’s claim. As well, the answer to this question will avoid duplication of fact-finding and legal analysis.

[25] As noted by the Ontario Court of Appeal in *Cloud*, at paras 64 – 66, even if aspects of liability and damages will have to be assessed individually, that does not remove the advantage of resolving the common issue.

[26] I am satisfied that the common question objective, as required by Rule 334.16(1)(c) is met in this case.

D. *Is a Class Proceeding the Preferable Procedure?*

[27] The preferability analysis takes into consideration the principal goals of class actions as outlined in *Hollick* as follows:

[15] First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

[28] Rule 334.16(2) of the *Federal Courts Rules* provides a list of factors that must be considered.

[29] Based upon the information provided by the RCMP, there may be as many as 20,000 females who qualify as Primary Class Members. Considering the potential size of the Primary Class, individual actions would be inefficient and uneconomic. There is no evidence that a significant number of the Class Members have expressed an interest in individually controlling

the prosecution of their own claim. Here, distribution of the costs of the litigation across a class of this size may be the Class Members' only means of achieving access to justice. Finally, there is the reality that a large number of the proposed class members remain employed within the RCMP and may fear reprisal if they pursue individual claims.

[30] These factors strongly weigh in favor certification of this matter as a class proceeding, as it achieves the objectives outlined in *Hollick* of access to justice, judicial economy, and behaviour modification.

E. *Appropriateness of the representative Plaintiffs*

[31] The parties submit that the proposed representative Plaintiffs, Ms. Merlo and Ms. Davidson, adequately represent the interests of the Class. They have both provided evidence of the gender-based discrimination and harassment they personally experienced while working within the RCMP. In their Affidavits, both Ms. Merlo and Ms. Davidson have indicated their willingness to act in this capacity and their willingness to act in the best interests of the Class. Additionally, since commencing their own actions, they have demonstrated a willingness to put forward their stories for scrutiny by the Court, the Defendant, and the public at large. They have also had communication with Class Members across Canada.

[32] I am satisfied that Ms. Merlo and Ms. Davidson meet the requirements to be considered as the representative Plaintiffs for the proposed class action, as required by Rule 334.16(1)(e).

F. *Litigation Plan*

[33] The parties have jointly provided a detailed and robust notice plan that outlines the communication plan and the steps by which the Class Members will be notified of the Certification and the proposed settlement. The plan contains a workable method of advancing the proceeding on behalf of the Class and ensuring a process is in place to allow for the independent assessment of each Class Member's claim. An Independent Assessor has been chosen by the parties who will take steps to notify Class Members of the proceeding and the settlement.

[34] To facilitate providing notice to the Class by direct mailing, the parties request an order that the RCMP, and other federal government departments or agencies that might have contact information on potential Class Members, be directed to provide that information to a designated contact with the RCMP.

[35] I am satisfied that the disclosure of this confidential information is for the benefit of the female to whom it relates and I am further satisfied that the information will be protected by requiring that it is only to be disclosed to the RCMP designated contact and to the Independent Assessor.

V. Conclusion

[36] For the reasons outlined above, I allow the motion for certification of this action as a Class proceeding.

[37] Pursuant to Rule 334.39 (1) of the *Federal Courts Rules* there will be no costs.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1685-16

STYLE OF CAUSE: JANET MERLO AND LINDA GILLIS DAVIDSON v
HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 9, 2017

ORDER AND REASONS: MCDONALD J.

DATED: JANUARY 13, 2017

APPEARANCES:

Gina Scarcella
Susanne Pereira
Victoria Yankou

FOR THE DEFENDANT

David Klein
Angela Bospflug
Won Kim
Megan McPhee

FOR THE PLAINTIFFS

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of
Canada
Toronto, Ontario

FOR THE DEFENDANT

Kim Orr Barristers P.C.
Barristers and Solicitors
Toronto, Ontario

FOR THE PLAINTIFFS

Klein Lawyer LLP
Barristers and Solicitors
Toronto, Ontario