

Court File No.

FEDERAL COURT

Between:

JILL MARIE SWANN

Applicant

And:

HER MAJESTY THE QUEEN AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA ON BEHALF OF THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS; MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA ON BEHALF OF THE ROYAL CANADIAN MOUNTED POLICE; BRENDA LUCKI, COMMISSIONER OF ROYAL CANADIAN MOUNTED POLICE; JENNIFER STRACHAN, DEPUTY COMMISSIONER AND COMMANDING OFFICER OF "E" DIVISION IN BRITISH COLUMBIA; AND INSPECTOR TIM ARSENEAULT, OPERATIONS OFFICER, GROUP 5, "E" DIVISION FEDERAL POLICING

Respondents

IN THE MATTER OF AN APPLICATION UNDER Section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 (the "*Federal Courts Act*") and Part V of the *Federal Court Rules*, SOR/98-106, as amended

**NOTICE OF APPLICATION UNDER SECTION 18.1 OF
THE FEDERAL COURTS ACT**

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at the Federal Court situated at 701 West Georgia Street, Vancouver, BC V7Y, 1B6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the Applicant's solicitor, or

where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Issued by: _____
(Registry Officer)

Address of local office: **Federal Court of Canada**
701 W Georgia Street
Vancouver, BC, V7Y 1B6

To: **Her Majesty the Queen as represented by the Attorney General of Canada,**
Department of Justice Canada, BC Regional Office
British Columbia Regional Office
900 - 800 Howe Street
Vancouver, BC, V6Z 2S9

and to: **Minister of Public Safety and Emergency Preparedness,**
House of Commons,
Ottawa, Ontario, K1A 0A6

and to: **Ministry of Public Safety and Solicitor General for British Columbia,**
501 Belleville Street,
Victoria, BC, V8V 2L8

and to: **Commissioner Brenda Lucki,**
Royal Canadian Mounted Police,
National Headquarters,
1200 Vanier Parkway
Ottawa, Ontario, K1A 0R2

and to: **Deputy Commissioner Jennifer Strachan, Commanding Officer of "E" Division**
RCMP "E" Division Headquarters
14200 - Green Timbers Way,
Surrey, BC, V3T 6P3

and to: **Inspector Tim Arseneault, Operations Officer Group 5,
RCMP, "E" Division, Federal Policing,**
RCMP "E" Division Headquarters
14200 - Green Timbers Way,
Surrey, BC, V3T 6P3

APPLICATION

This is an application for judicial review in respect of the 1 October 2020 decision of Inspector Tim Arseneault, Operations Officer, Group 5, "E" Division Federal Policing of the Royal Canadian Mounted Police (the "Decision"), the statutory delegate of the Commissioner of the Royal Canadian Mounted Police (the "Statutory Delegate"). The Decision of the Statutory Delegate rejected Corporal Jill Swann ("Cpl. Swann") as the successful applicant for promotion to the vacant position as Sergeant, Federal Policing, Major Projects in Nanaimo, BC (Position #10829) (the "Vacant Position"). The Statutory delegate erred by rejecting Corporal Swann's application for promotion to the vacant position contrary to Section 9.1(1)(d) and 9.1(2) of the *Royal Canadian Mounted Police Act*, RSC 1985, c. R-10 (the "*RCMP Act*"); section 19 of the *Commissioner's Standing Orders (Employment Requirements)*; and the settlement agreement between Cpl. Swann, dated 23 July 2018 (the "Settlement Agreement")

The Decision was communicated to the Applicant on 13 October 2020.

The Applicant makes application for:

1. A declaration that the Decision of the Statutory Delegate, dated 1 October 2020, is a breach of the Settlement Agreement between the Applicant and the Respondent and the defendants named therein (the "Defendants") to give the Applicant priority entitlement to a promotion to a vacant Sergeant's position in a non-General duty position;
2. A declaration that the Decision of the Statutory Delegate, dated 1 October 2020, is a breach of the Settlement Agreement; and Sections 9.1(1)(d) and 9.1(2) of the *RCMP Act*;
3. An order in the nature of *certiorari* quashing the Decision of the Statutory Delegate;
4. An order in the nature of *mandamus* appointing the Applicant as the successful applicant for promotion to the Vacant Position;
5. An order directing the Respondents to remove the Decision and all related records from the Applicant's employment records;
6. An order directing the Respondents to pay costs to the Applicant, forthwith; and
7. Such further orders as this Honourable Court deems just and equitable in all circumstances.

The grounds for the application are:

1. The Applicant seeks to have the Decision judicially reviewed on the following grounds:
 - (a) the Statutory Delegate erred in both fact and law in issuing the Decision, whether or not the error appears on the face of the record;
 - (b) the Statutory Delegate erred by failing to consider appropriately the express provisions of the Settlement Agreement to provide the Applicant with priority entitlement to a vacant Sergeant's position in a non-general duty position; and Sections 9.1(1)(d) and 91(2) of the *RCMP Act*; and
 - (c) the Statutory Delegate based his Decision on an erroneous finding of fact and therefore the Decision was made in a perverse or capricious manner or without regard for all of the relevant and material facts.
2. The Applicant relies on the following statutory provisions for the purpose of this application:
 - (a) Section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7; and
 - (b) Sections 9.1(1) and 9.1(2) of the *RCMP Act*.
3. The facts that led to the issuance of the Decision are summarized below.

The Parties

4. At all material times, the Applicant, Cpl. Jill Swann was and is a Sworn Member of the Royal Canadian Mounted Police (the "RCMP") with twenty-four years of service, holding the rank of Corporal. Swann is a Canadian citizen and a resident of the Province of British Columbia.
5. The RCMP is the national police force for Canada, constituted under the *RCMP Act*. The RCMP has Divisions throughout Canada, one of which is the "E" Division, which covers the Province of British Columbia.
6. The Respondent, the Attorney General of Canada (the "Attorney General"), represents the Crown and the RCMP in this proceeding pursuant to the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 (the "*Crown Liability Act*"). The Attorney General's liability arises from acts or omissions by the RCMP, including its Officers, RCMP Members, including Non-Commissioned Officers ("NCOs"), employees, including civilian employees, and agents.
7. The Respondent, the Minister of Public Safety and Solicitor General for the Province of British Columbia ("Solicitor General") is the provincial minister responsible for administering the *Police Act*, RSBC 1996, c 367 (the "*Police Act*"), pursuant to BC Order in Council 51/2012, dated 8 February 2012. The Solicitor General is a Respondent pursuant to the *RCMP Act* and section 11(1)(a) of the *Police Act*, which makes the Solicitor General jointly and severally liable for acts committed by provincial constables in the performance of their duties within the Province of British Columbia. The Solicitor General is a Respondent as a result of the acts and omission by or on behalf of the Respondents.
8. The Respondent Brenda Lucki is Commissioner of RCMP.
9. The Respondent Jennifer Strachan is the Deputy Commissioner and Commanding Officer of "E" Division in the Province of British Columbia.

10. The Respondent Inspector Tim Arseneault is the Operations Officer, Group 5, "E" Division Federal Policing and he is the Commissioner's Statutory Delegate who made the impugned Decision.

11. Cpl. Swann commenced her career in the RCMP as a Constable in September 1996, previously stationed at the Island District General Investigation Section ("IDGIS") based in Courtney, BC.

12. As set out in the Civil Claim, while stationed at IDGIS between August 2008 until June 2016, her immediate supervisor, Cpl. Collin, subjected Cpl. Swann to numerous unlawful acts of harassment and discrimination and other offensive conduct.

13. On 20 August 2015, Cpl. Swann filed an internal harassment, sexual harassment and bullying complaint against Cpl. Collin (the "Harassment Complaint"). The RCMP conducted an internal investigation into Cpl. Swann's Harassment Complaint, which was determined to be well founded.

14. On 13 October 2016, the Canadian Human Rights Commission accepted Cpl. Swann's sexual discrimination complaint ("Sexual Discrimination Complaint") under the *Canadian Human Rights Act* (the "*Human Rights Act*").¹

15. On or about 3 August 2017, Cpl. Swann commenced legal proceedings in the BC Supreme Court (Action No. S-177307) (the "Civil Claim") by filing a notice of civil claim against the Attorney General of Canada, Attorney General of British Columbia, on behalf of the Royal Canadian Mounted Police, the Attorney General of British Columbia, the Minister of Justice, then Deputy Commissioner Craig Callens, Commanding Officer "E" Division, and Cpl. Roger Collin, among others (collectively the "Defendants").

16. Swann's Civil Claim alleged unlawful conduct by individual male RCMP members contrary to Section 15 of the *Canadian Charter of Rights and Freedoms*,² including discrimination and harassment on the basis of sex, marital status, family status, physical and mental disability, and personal appearance. Cpl. Swann alleged that the Defendants' conduct was actionable at common law and constituted negligence, intentional infliction of mental suffering, negligent infliction of mental suffering, harassment, breach of statute, and misfeasance in public office.

17. On or about 23 July 2018, Cpl. Swann and the Defendants entered into the Settlement Agreement of the Civil Claim and her Sexual Harassment Complaint to the Canadian Human Rights Commission.

18. In the Settlement Agreement, the Defendants, Her Majesty the Queen as represented by the Attorney General of Canada, the Attorney General of British Columbia, the Minister of Justice and the RCMP, agreed to provide Cpl. Swann with preferential promotional entitlement to the rank of Sergeant in a vacant non-general duty position.

¹ *Canadian Human Rights Act*, RSC 1985, c H-6 (the "*Human Rights Act*"), s 7(b).

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, ch 11 (U.K.) ("the *Charter*"), Section 15.

19. The Respondents are bound by the terms of the Settlement Agreement.
20. In addition, the Settlement Agreement provided that, among other things, the RCMP would compensate Cpl. Swann at the applicable pay rate for Sergeant retroactively to 1 May 2016, upon assuming the Sergeant's position.
21. On 21 November 2018, Cpl. Swann expressed an interest in the vacant Operations Support Sergeant position in Courtney, BC, but was denied because the vacancy was going to be used for a temporary accommodation for a period of one year. Cpl. Swann was expressly advised by Insp. Mike Kurvers that the vacancy was going to be filled by a local Sergeant as a duty to accommodate on the basis of family status.
22. On 30 November 2018, Swann's legal counsel contacted the Department of Justice's legal counsel representing the RCMP ("DOJ Counsel") with respect to the terms of the Settlement Agreement to express Swann's interest in the vacant Operations Support Sergeant position.
23. On 30 November 2018, DOJ Counsel advised Cpl. Swann's legal counsel that another RCMP member on the priority entitlement list who had a "higher priority than Swann" as a result of his request to be accommodated on the basis of family status because his daughter was receiving chemotherapy treatment. However, DOJ Counsel represented to Cpl. Swann's legal counsel that, if the member being accommodated "does not return or cannot/does not remain in the position, Cpl. Swann may well be able to take that position. In any event her priority entitlement remains intact."
24. Subsequently, on 31 December 2018, DOJ Counsel advised Swann's legal counsel that the accommodation referenced in the preceding paragraph,

is not permanent and accordingly the member in issue has been approved for accommodation in this position for a 1 year term. The position does not belong to him beyond the 1 year and if he were to require further accommodation beyond that he would have to submit a fresh accommodation request which would be assessed at that time to determine if justification is made out.
25. On 1 January 2020, the temporary accommodation in the Operations Support Sergeant position expired, but Cpl. Swann was not offered the position nor was the vacancy posted. Cpl. Swann should have been given priority entitlement to the position, but the RCMP failed to do so.
26. To the best of Cpl. Swann's knowledge, the RCMP member appointed to the Operations Support Sergeant position no longer requires accommodation and the one year term for which the accommodation was granted has expired, but the Operations Support Sergeant position has not been re-posted.
27. On 2 September 2020, the RCMP invited Cpl. Swann to apply for the Vacant Position, Sergeant, Federal Serious and Organized Crimes, in Nanaimo, BC.
28. On 14 September 2020, Cpl. Swann submitted her application for the Vacant Position to the Vancouver Island District Career Development Resourcing Adviser for the Vacant Position, with the

support of her immediate supervisor who previously held a similar position in the RCMP's Federal Serious and Organized Crimes in "E" Division.

29. On 13 October 2020, Cpl. Swann received an email from Leanne Krauss ("Krauss") advising her that she was not selected as the successful applicant. Attached to Krauss' email was the written rationale for the Decision made by Inspector Arseneault.

30. Cpl. Swann alleges that the Decision is discriminatory, made in bad faith, a breach of the Settlement Agreement, and is contrary to Sections 9.1(1) and 9.1(2) of the *RCMP Act*.

This application will be supported by the following material:

1. Affidavit #1 of Jill Marie Swann

The Applicant requests that the Statutory Delegate and the Respondents produce to the Applicant and the Registry the following documents:

1. a certified true copy of the material in the record before the Statutory Delegate when he made the Decision; and
2. a certified true copy of the Applicant's Employment Record as a Member of the RCMP.

DATED at the City of Coquitlam in the Province of British Columbia on 9 November 2020.

Sebastien Anderson, Barrister & Solicitor, Counsel
for the Applicant, Cpl. Jill Swann

The Applicant's Name and Address is:

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