

Court File No.: T-972-17



**FEDERAL COURT**

PROPOSED CLASS PROCEEDING

DOUGLAS JOST

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

**STATEMENT OF CLAIM TO THE DEFENDANT**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a Statement of Defence in Form 171B prescribed by the Federal Court Rules serve it on the Plaintiffs' solicitor or, where the Plaintiffs do not have a solicitor, serve it on the Plaintiffs, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this Statement of Claim to the Defendant is served on you, if you are served in Canada.

If you are served in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court in Montreal (telephone 514-283-4820) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date JUN 30 2017

Issued by ORIGINAL SIGNED BY  
ANIL KAMAL  
A SIGNÉ L'ORIGINAL

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Local office Suite 200 bureau 200  
Toronto, Ontario Toronto, Ontario  
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TO: **Her Majesty the Queen**  
**Office of the Deputy Attorney General of Canada**  
284 Wellington Street  
Ottawa, Ontario  
K1A 0H8

**A. CLAIM**

1. The Plaintiff Douglas Jost claims on his own behalf and on behalf of class members (as defined below):

- (a) an order certifying this action as a class proceeding and appointing Douglas Jost as representative plaintiff under the *Federal Courts Rules*, SOR/98-106;
- (b) a declaration that the Defendant, Her Majesty the Queen as represented by the Attorney General of Canada, breached its contractual obligations, its duty of care, and its fiduciary duty to the Plaintiff and the class members;
- (c) general pecuniary and non-pecuniary damages for the Defendant's breaches of its contractual obligations, its duty of care, and its fiduciary duty to the class members in the amount of \$100 million or such other sum as this Honourable Court may find appropriate;
- (d) pre-judgment and post-judgment interest pursuant to the *Federal Courts Act*, R.S.C., 1985, c. F-7;
- (e) the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to Rule 334.38 of the *Federal Courts Rules*, SOR/98-106; and
- (f) such further and other Relief as to this Honourable Court may deem just.

**B. OVERVIEW**

2. Members of the Canadian Armed Forces ("CAF") earn pensions in return for their service in the CAF. The CAF maintains a pension plan for the Reserve Force and a pension plan for the Regular Force. When CAF members return to civilian life and are discharged from the CAF they take their pension entitlement with them. In some instances, the pension entitlement is payable immediately to the CAF member upon their discharge by way of an Immediate Annuity, Transfer Value, Annual

Allowance or Bridge Benefit (the "**Immediate Pension Entitlements**"). An Immediate Annuity may be payable in circumstances wherein the member is disabled.

3. Members rely on the timely payment of their Immediate Pension Entitlements to secure the basic daily necessities of life, including housing, medication, food and other necessities.

4. The members rely on Canada to calculate and pay the Immediate Pension Entitlements in a timely manner and in a manner which does not erode or jeopardize the pension value. The Immediate Pension Entitlements are essential for the transition from CAF service to civilian life and to maintain the basic livelihood veterans served their country to secure.

5. Since at least March 1, 2007, Canada has engaged in chronic, excessive and unreasonable delay in the payment of Immediate Pension Entitlements to discharged members of the CAF. Through mismanagement, Canada has forced discharged members of the CAF to wait weeks, months and in some instances years, before receiving their Immediate Pension Entitlements.

6. Canada's unreasonable delay has resulted in significant hardship to discharged members. Canada has not properly compensated discharged members for the unreasonable delay in processing, calculating and ultimately paying Immediate Pension Entitlements. As a result of Canada's delay, discharged members of the CAF have lost value in their Immediate Pension Entitlements, gone without medication,

lost shelter, were deprived of the basic necessities of life and endured pain and suffering.

7. In short, Canada's delay in paying Immediate Pension Entitlements has driven discharged members of the CAF to personal and financial crisis. Discharged members are humiliated and are not permitted to make the transition to civilian life in dignity.

8. Canada's unreasonable delay constitutes a breach of Canada's contractual obligations, duty of care and fiduciary duties owed to members of the Reserve Force and Regular Force pension plans. Canada has known about the problem of mismanagement and delay of the Reserve Force and Regular Force pension plans for years. Canada has not taken appropriate steps to rectify its conduct and ignored explicit recommendations aimed at rectifying the problem of delays.

#### **C. THE CLASS**

9. The Plaintiff wishes to institute a class action, on his own behalf and on behalf of the members forming part of the following class:

All members of the Canadian Forces - Reserve Force Pension Plan and the Canadian Forces - Regular Force Pension Plan who were entitled upon release to an Immediate Annuity, Transfer Value, Annual Allowance or Bridge Benefit, between March 1, 2007 and the present. ("Class Members" or the "Class")

#### **D. THE PLAINTIFF**

10. Douglas Jost was discharged from the CAF on June 30, 2015, with his release effective July 1, 2015. Mr. Jost, like all members of the CAF, was required to give 3

months notice of his impending discharge. Mr. Jost last served as a full-time Naval Reservist at the rank of Lieutenant. Mr. Jost was 48 at the time of his discharge with two or more years of pensionable service and a purported total of 8,969 days of qualifying service. On April 9, 2015, approximately two months prior to his release, Mr. Jost was offered an option of selecting either:

- (a) an Annual Allowance – payable at age 50, of \$2,760 per month; or
- (b) a Deferred Annuity – payable at age 60, of \$3,680 per month; or
- (c) a Transfer Value – with a total value of approximately \$859,980.

11. Mr. Jost opted for the Transfer Value option and was advised he would receive payment in 8-12 weeks.

12. Mr. Jost was then advised on August 1, 2015, approximately 1 month after his release, that his Transfer Value was in fact \$726,904.

13. Mr. Jost did not receive his Transfer Value payment within 8-12 weeks. Mr. Jost made his decision to be released and elected a Transfer Value on the understanding and representation he would receive his Transfer Value payment within 8-12 weeks, at the amount represented to him. Mr. Jost made financial plans on this representation and promise.

14. By October 16, 2015, 6.5 months from the notification of his intended discharge, or 3.5 months from his formal discharge, the internal "audited release message" was first completed by Canada. The audited release message was only the

first step to permitting the Reserve Forces Benefit Section to process Mr. Jost's entitlement. Such requirements are unilaterally imposed and controlled by Canada.

15. On October 20, 2015, Mr. Jost was advised that his Transfer Value had again decreased from \$726,904 to \$703,180. Mr. Jost was not advised why the value decreased. Similarly, on October 20, 2015, the defendant for the first time provided Mr. Jost with an "option form" to select what form of pension entitlement he wished to select. Prior to October 20, 2015 Mr. Jost had already received two pension estimates from Canada and advised of his election to receive the Transfer Value.

16. The Transfer Value payment to Mr. Jost was not made until January 20, 2016, approximately 9.5 months from the date of his notice of discharge or 6.5 months from his discharge. The payment to Mr. Jost was made 29 weeks after his discharge and not within the 8-12 weeks promised earlier. Mr. Jost was never compensated for the late payment or the reduction in the value of his Transfer Value over the course of the unreasonable delay. Mr. Jost incurred debts, late payment penalties and suffered a marked loss in the daily enjoyment of his life as a result of the financial ruin Canada's delay directly caused.

#### **E. THE PENSION PLANS**

17. The CAF have two pension plans: the Regular Force Pension Plan ("**Regular Plan**") and the Reserve Force Pension Plan ("**Reserve Plan**"), both of which are defined benefit plans (Collectively, the "**Plans**"). According to 2014 data, the

Regular Plan has 71,599 active contributors and 86,007 retired members. The Reserve Plan has 19,855 active contributors and 596 retired members.

18. The Reserve Plan was first introduced in 2007. The Regular Plan predates 2007. Both Plans are presently governed by the *Canadian Forces Superannuation Act, Canadian Forces Superannuation Regulations* and the *Reserve Force Pension Plan Regulations*. The Plans are funded from employee and employer contributions. The Defendant is responsible for providing program management and day-to-day administration of the Plans.

19. Class Members are provided common information regarding their pension entitlements. The pension promise made to Class Members is part of their terms of service. The Orientation Information Kit, which is published and provided to the Class Members states that "...the plan is designed to provide qualified members with a retirement income payable upon release from the CAF."

### **Immediate Pension Entitlements**

20. The Plans provide for 4 general types of pension entitlements upon release:

(a) **Immediate Annuity**

A member is entitled to an Immediate Annuity pursuant to the following conditions:

(a) they have completed not less than 9,131 days of Canadian Forces service;

(b) they have reached 60 years of age;



(c) they have reached 55 years of age and have to their credit not less than 30 years of pensionable service;

(d) they are disabled by reason of suffering from a physical or mental impairment that

(i) prevents the member from engaging in any employment for which the member is reasonably suited by virtue of education, training or experience, and

(ii) can reasonably be expected to last for the remainder of the member's lifetime; or

(e) they cease, otherwise than voluntarily, to be a member because of a reduction in the maximum number of officers or non-commissioned members authorized by the Governor in Council under subsection 15(4) of the National Defence Act, and

(i) they have reached 55 years of age and have to their credit not less than 10 years of pensionable service, or

(ii) they have to their credit not less than 20 years of pensionable service.

(b) **Deferred Annuity**

A member who has 2 years of pensionable service, but is not yet entitled to an Immediate Annuity, may elect to receive a Deferred Annuity upon their discharge, which commences generally once the conditions for an Immediate Annuity are met.

(c) **Transfer Value**

If a member is entitled to select a Deferred Annuity, they may elect instead to take a lump sum commuted value payment at the time of discharge in lieu of the future annuity entitlement.

(d) **Annual Allowance**

If a member is entitled to select a Deferred Annuity, but is under 60, they may elect instead to take an annual allowance which becomes payable when they reach the age of 50 at an amount that is less than the Deferred Annuity.

21. In all circumstances, by virtue of the duty of care, fiduciary duties or contractual obligations owed to the Class Members, the Immediate Pension

Entitlements are payable to the Class Members immediately following their release from the CAF.

22. An Immediate Annuity is defined by the *Canadian Forces Superannuation Act* as "an annuity that becomes payable to the contributor immediately on his becoming entitled thereto"

23. The commencement date of an Immediate Annuity according to the *Reserve Force Pension Plan Regulations* "is the day following the last day on which the member is a participant". A member ceases to be a participant once they are released from the Reserve Force. The commencement date for an Immediate Annuity is the date a Class Member is released from the CAF. Similarly, the commencement date for an Annual Allowance is the date on which the pensioner turns 50, or immediately if the pensioner is 50 years of age or older at the time of discharge.

### **Systemic Delays**

24. Since the introduction of the Reserve Plan, effective March 1, 2007, the Plans have faced unreasonable and excessive delays in processing Immediate Pension Entitlements.

25. In 2011, the Auditor General released its report on the findings from its audit on the Reserve Plan, encompassing a review of financial statements from 2007 to 2010. The Auditor General concluded that the Reserve Plan was introduced without adequate planning and that the system faced significant backlogs, specifically:

- (a) the Reserve Plan was introduced without adequate planning;
- (b) no senior official was made responsible for the introduction of the Reserve Plan;
- (c) senior management did not develop or use a master implementation plan;
- (d) lack of an overall plan to coordinate the development of policy and regulations with the start of the delivery of the Reserve Plan contributed to the subsequent weaknesses in its implementation;
- (e) management identified significant risks that were not dealt with appropriately, including:
  - (i) reservists not receiving useful information about the pension plan provisions and, as a result, not choosing the financial option best suited to their circumstances;
  - (ii) workloads increasing substantially, particularly to process pension buyback requests, when staff were still learning new business rules and system tools;
  - (iii) a lack of adequate pay and service records for reservists prior to 1999; and
  - (iv) complex regulations and business rules, making the pension plan difficult to manage and communicate to reservists.
- (f) the Department did not take measures to sufficiently mitigate these risks until after the plan came into force in March 2007, which adversely affected the delivery of pension services to reservists;
- (g) Under the legislation and regulations, National Defence was required to put in place the means necessary to operate the Reserve Plan, including resources and information systems and control procedures. These procedures needed to be in place at the time the plan came into effect, to determine member obligations and entitlements according to the authorities;
- (h) the Department did not provide sufficient lead time before the Reserve Plan came into force for hiring and training staff or for testing service delivery readiness for different scenarios that could be expected; and
- (i) management underestimated service demands and administrative costs.

26. The Department of National Defence acknowledged the Auditor General's findings and agreed with the audit recommendations.

27. At the end of fiscal year 2010-2011, only 757 of 11,090 Reserve Force service elections had been processed and it was estimated that the backlog would be fully addressed in fiscal year 2013-2014. By February 2012, only 1,321 of 12,201 Reserve Force service elections had been processed and the estimated completion date was December 2017.

28. The Veterans Ombudsman's Office and the National Defence and Canadian Forces Ombudsman have provided critical commentary in their annual reports. On April 1, 2016, the National Defence and Canadian Forces Ombudsman released a statement commenting on the pension delays. He noted his office had received 1,300 complaints since 2007. He commented that the average payment timeline for a retiring reserve force member was between 4 to 36 weeks, and 3 to 14 for regular force members. The Defence Minister Harjit Sajjan responded by calling the backlog "absolutely unacceptable".

29. On July 4, 2016, Public Services and Procurement Canada took over responsibility for processing military pensions. In February 2017, it was reported that the backlog of military pension payment files would not be addressed until the end of 2017. The backlog was estimated to be 5,264.

30. The Department of National Defence and Canadian Forces Ombudsman made recommendations that no member of the CAF be released until all of their benefits are arranged. This recommendation was ignored.

## **F. CAUSES OF ACTION**

### **i. Breach of Fiduciary Duty**

31. At all material times Canada, formerly through the Department of National Defence and now Public Services and Procurement Canada, acted as the administrator of the Plans. The timely and correct processing, calculation and payment of Immediate Pension Entitlements is crucial to the pecuniary and non-pecuniary well-being of Class Members.

32. Canada has discretion and power over the Class Members' financial and practical interests in administering and paying Immediate Pension Entitlements under the Plans. Canada can unilaterally exercise such discretion over the interests of the Class Members by virtue of their position as administrator of the Plans.

33. Canada simultaneously has discretion and power over the Class Members' terms of service and terms of discharge and release from the CAF.

34. The Class Members were entirely reliant on the skill and expertise of Canada in the implementation of the Plans and payment of Immediate Pension Entitlements. The Class Members were in a vulnerable position relative to Canada by virtue of the complete control held by Canada in the administration of the Plans. The vulnerability

of the Class Members was amplified as a result of their position as released veterans who may be suffering from long term disabilities.

35. The Plans are solely for the benefit of the Class Members and Class Members are entitled to be paid their Immediate Pension Entitlements at the time of discharge.

36. Canada breached its fiduciary duties to the Plaintiff and the Class in the administration of the Plans. The particulars of the breach include:

- (a) failing to pay Class Members their Immediate Pension Entitlements at the time the Class Members were entitled to receive such payments;
- (b) failing to appropriately calculate Immediate Pension Entitlement payments to compensate for delays in payment;
- (c) failing to provide Class Members accurate and timely financial and administrative information regarding their quantum of entitlement, options and timing of payment for the Immediate Pension Entitlements;
- (d) failing to take appropriate steps for the prevention of delays in processing and paying of Immediate Pension Entitlements which the Class Members were entitled to upon release from the CAF;
- (e) failing to take a proper and good faith interest in the administration of the Plans;
- (f) discharging members from the CAF with the knowledge that as a result of delays known to Canada the discharged member would have no pension income and no way to support their daily living needs after discharge;
- (g) discharging members from CAF whom were known to be suffering from a disability and for whom the only source of income would be the Immediate Pension Entitlements; and
- (h) failing to safeguard the physical and psychological needs of members whom were known to be medically unable to work.

37. Canada failed to ensure the best interests of the Class Members were being protected. In failing to rectify known delays and calculating deficient amounts owed to Class Members, Canada sought to maximize its own interests at the expense of the Class.

38. Canada has an ongoing financial obligation to fund and administer the Plans. Canada favoured its interests over the interests of the Class Members by paying the Class Members late and less than the Class Members were entitled to. Canada favoured its interests over the interests of the Class Members by under-resourcing the administration of the Plans.

**ii. Negligence**

39. At all material times Canada, formerly through the Department of National Defence and now Public Services and Procurement Canada, acted as the administrator of Plans. At all material times, Canada owed duties to the Plaintiff and to the Class Members which include, but are not limited to, a duty to give proper consideration to, and to take reasonable care of, the Class members' financial, physical and mental well-being.

40. At all material times, the actions of Canada as the administrator of the Plans had a direct impact on the Class members. The legislation governing the Plans grounds the duty of care owed by Canada to the Class. The harm suffered by the Class was a reasonably foreseeable consequence of Canada's acts and omissions.

41. The Defendant is responsible for the proper administrations of the Plans and ensuring the timely and accurate payment of Immediate Pension Entitlements to the Class Members. The Class Members are entirely dependent on Canada. In such circumstances, the risk of harm of the nature contemplated in this action is reasonably foreseeable.

42. There was a direct and proximate relationship and specific interaction between the Class members and Canada, including but not limited to:

- (a) the Class Members providing services to Canada in exchange for earning pension entitlements;
- (b) communications between Canada and the Class Members regarding pension obligations and entitlements;
- (c) Canada holding and investing pension funds on behalf of the Class; and
- (d) the payment of pensions from Canada to the Class Members.

43. Canada must have in place systems and procedures to determine Class Member obligations, entitlements and to ensure timely, complete and accurate pension and benefit payments.

44. The systems Canada put in place to administer the Plans were below the standard that would reasonably be required of a pension administrator, specifically:

- (a) members were not advised in a timely manner of how or when they could make an election as to the form of Immediate Pension Entitlement and the defendant did not provide members with the option to make an election in a timely manner;



- (b) Canada did not advise members that their elections would not be treated at final;
- (c) the pension processing system does not incorporate new technology applications, such as web-enabling for self-service;
- (d) the system is an old legacy pay system that does not allow customization or quick changes;
- (e) Class Member files were located in a variety of locations, often only in paper format requiring extensive manual processing of Immediate Pension Entitlements;
- (f) the processing of pensions and review of requests and files was chronically understaffed;
- (g) those responsible for delivering pension services do not have access to timely pay and pension management reports because of the limitations of the legacy system technology; and
- (h) pension processing suffered from an enormous amount of transaction errors, including data entry errors.

45. Canada negligently administered the pension plans by:

- (a) failing to pay Class Members their Immediate Pension Entitlements at the time the Class Members were entitled to receive such payments;
- (b) failing to appropriately calculate Immediate Pension Entitlement payments to compensate for delays in payment;
- (c) failing to provide Class Members accurate and timely financial and administrative information regarding their quantum of entitlement, options and timing of payment for the Immediate Pension Entitlements;
- (d) failing to take appropriate steps for the prevention of delays in processing and paying of Immediate Pension Entitlements which the Class Members were entitled to upon release from the CAF;
- (e) failing to hire staff with sufficient training and in sufficient numbers to process payments in a timely manner;
- (f) failing to keep employment records in an organized and accessible manner to permit timely processing of pensions;

- (g) failing to take a proper and good faith interest in the administration of the Plans;
- (h) discharging members from the CAF with the knowledge that as a result of delays known to Canada the discharged member would have no pension income and no way to support their daily living needs after discharge;
- (i) discharging members from CAF whom were known to be suffering from a disability and for whom the only source of income would be the Immediate Pension Entitlements; and
- (j) failing to safeguard the physical and psychological needs of members whom were known to be medically unable to work.

**iii. Breach of Contract**

46. The Class Members served the CAF for years. The Class Members served under the mutual understanding with Canada that they were earning a pension which would be payable upon their discharge. Through service in the CAF, the Class Members earned pension entitlements which crystalized upon their discharge to civilian life. Canada made common representations to the Class by way of paper brochures, orientation kits and web postings that the Immediate Pension Entitlements were payable upon discharge. Class Members continued to serve the CAF under terms of service because of the pension promise made to them by Canada. Canada continued to enjoy and use the services rendered by the Class Members.

47. By unreasonably delaying the payment of Immediate Pension Entitlements, Canada has not honoured its obligations to Class Members which were created through the years of service given by the Class to Canada.

48. Canada breached its contractual duties to the plaintiff and the Class. The particulars of the breach include:

- (a) failing to pay Class Members their Immediate Pension Entitlements at the time those entitlement were payable;
- (b) failing to appropriately calculate Immediate Pension Entitlement payments to correctly compensate for delays in payment;
- (c) failing to provide Class Members accurate and timely financial and administrative information regarding their quantum of entitlement, options and timing of payment for the Immediate Pension Entitlements;
- (d) discharging members from the CAF with the knowledge that as a result of delays known to Canada the discharged member would not have access to their earned pension income; and
- (e) discharging members from CAF whom were known to be suffering from a disability and for whom the only source of income would be the Immediate Pension Entitlements.

#### **G. DAMAGES**

49. The Class Members have suffered the following damages:

- (a) the payments of the Immediate Pension Entitlements do not properly or adequately compensate for the value of the unreasonable delay in payment, including but not limited to:
  - (i) interest from the date of electing an option to the date of payment of the Immediate Pension Entitlement;
- (b) the value of the Immediate Pension Entitlements has decreased over the period of delay from the date of entitlement to the date of payment, including but not limited to:
  - (i) a decrease in the commuted value of Transfer Values between the date of discharge to the date of payment; and

- (ii) a decrease in the value of Immediate Annuities, Deferred Annuities and Annual Allowances between the date of discharge to the date of payment.
- (c) the Class Members were discharged prematurely and gave up active employment income on the representations made by Canada that Immediate Pension Entitlements would be paid in a prompt and timely manner after discharge;
- (d) the Class Members were required to take on unnecessary debts, loans, late payment penalties and interest payments; and
- (e) pain, suffering and the loss of enjoyment of life, including but not limited to, the inability to secure the necessities of life such as shelter, food and medication which the pension income was intended to secure.

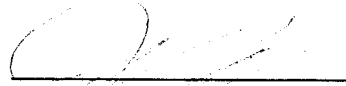
## **H. STATUTES**

50. The Plaintiffs plead and rely upon the following statutes and regulations:

- (a) *Crown Liability and Proceedings Act*, RSC 1985, c. C-50;
- (b) *Federal Courts Act*, RSC 1985, c. F-7;
- (c) *Federal Courts Rules*, SOR 98/106;
- (d) *Canadian Forces Superannuation Act*, R.S.C., 1985, c. C-17;
- (e) *Canadian Forces Superannuation Regulations*, C.R.C., c. 396;
- (f) *Reserve Force Pension Plan Regulations*, SOR/2007-32;
- (g) *Financial Administration Act*, R.S.C., 1985, c. F-11;
- (h) *Pension Benefits Standards Regulations*, 1985, SOR/87-19; and
- (i) *Pension Benefits Standards Act*, 1985, RSC 1985, c 32.

51. The Plaintiffs propose that this action be tried in the City of Toronto.

June 30, 2017



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Lawyers for the Plaintiff

Court File No.

**FEDERAL COURT**

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B E T W E E N :

DOUGLAS JOST

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

PROPOSED CLASS PROCEEDING

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**STATEMENT OF CLAIM**

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