Federal Court  Cour fédérale

Date: 20191125

Dockets: T-2111-16
T-460-17

Citation: 2019 FC 1477

Docket: T-2111-16

BETWEEN:

SHERRY HEYDER,
AMY GRAHAM AND
NADINE SCHULTZ-NIELSEN

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-460-17

AND BETWEEN:

LARRY BEATTIE

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDERS

FOTHERGILL J.

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I. Overview

[1] The Plaintiffs have brought motions for an order: (a) consolidating these actions for settlement purposes; (b) certifying these actions as class proceedings for settlement purposes; (c) approving the Final Settlement Agreement [Settlement Agreement] between the parties; (d) approving notice of the Settlement Agreement and notice of the opt out and claims periods; and (e) addressing other ancillary matters.

[2] These proposed class proceedings were commenced following the External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces by former Supreme Court of Canada Justice Marie Deschamps. One of the key findings of the External Review was that:

> […] there is an underlying sexualized culture in the [Canadian Armed Forces] that is hostile to women and LGTBQ members, and conducive to more serious incidents of sexual harassment and assault. Cultural change is therefore key. It is not enough to simply revise policies or to repeat the mantra of "zero tolerance". Leaders must acknowledge that sexual misconduct is a real and serious problem for the organization, one that requires their own direct and sustained attention.

[3] The proceedings and Settlement Agreement encompass two classes consisting of women and men who experienced sexual misconduct while serving in the Canadian Armed Forces [CAF], the Department of National Defence [DND], and as Staff of the Non-Public Funds, Canadian Forces [SNPF]. The first class includes current and former CAF members [CAF Class], and the second includes both current and former DND and SNPF employees [DND/SNPF Class]. I will refer to members of both classes as Class Members.

[4] Six overlapping class proceedings were commenced in late 2016 and early 2017 in different jurisdictions throughout Canada. In September 2017, the Plaintiffs in these proceedings entered into a consortium agreement with the Plaintiffs in the four other related class actions [Consortium Agreement]. The four other actions subject to the Consortium Agreement are: *Graham et al v Attorney General of Canada* (Court File No 13-80853-CP) commenced in the Ontario Superior Court of Justice; *Rogers v The Attorney General of Canada* (Court File No 457658) commenced in the Supreme Court of Nova Scotia; *Alexandre Tessier c Procureur General du Canada* (Court File No 200-06-000209-174) commenced in the Superior Court of Quebec; and *Peffers v The Attorney General of Canada* (Court File No S165018) commenced in the Supreme Court of British Columbia [collectively, the Provincial Actions].

[5] The parties to the Consortium Agreement agreed that the proceedings in this Court would be pursued on behalf of national classes and the Provincial Actions would be held in abeyance.

[6] The Settlement Agreement provides financial compensation in an aggregate amount of up to $900 million through an efficient and non-adversarial claims process. The Settlement Agreement also contemplates numerous systemic changes and programs, specifically:

(a) a restorative engagement program to give interested Class Members an opportunity to communicate their experiences of sexual misconduct in the workplace to senior CAF or DND representatives, with the intention of restoring the relationship between Class Members and the military, and promoting culture change;

(b) a five-year external review to assess the progress made by the CAF in addressing sexual misconduct, policy effectiveness, sexual misconduct-related procedures and programs, and to provide objective, fair, and results-based recommendations and practical advice to the Chief of Defence Staff and Deputy Minister of Defence;

(c) amending the definition of "harassment" in the Defence Administrative Order and Directive 5012-0—the overarching order that applies to all CAF members and DND employees regarding harassment—with the intention of modernizing the CAF's approach to sexual misconduct;

(d) consultations with Class Members and subject matter experts concerning the CAF's plans to enhance its recourse and support programs for those who have experienced sexual misconduct;

(e) consultations with Class Members and subject matter experts about increasing gender representation and diversity in the CAF;

(f) operational changes to Veterans Affairs Canada [VAC], in particular:

i. establishing a dedicated unit to receive and process applications for VAC disability benefits from those seeking compensation under Category "C" of the settlement compensation scheme, explained below;

ii. updated VAC policies governing eligibility for VAC disability benefits to clarify the revised approach to be taken when adjudicating applications involving claims of sexual assault and harassment;

iii. provision of notice to Class Members of updates to VAC policies;

iv. updated VAC policies in relation to review and reconsideration, as well as feedback to VAC on claims arising from sexual assault and sexual harassment; and

v. continued support training for VAC decision-makers.

[7] The certification and settlement approval motions took place in Ottawa on September 19 and 20, and October 3, 2019. The Court heard from approximately 50 Class Members, the vast majority of whom spoke in favour of the Settlement Agreement.

[8] The named Plaintiffs in the proposed class proceedings say that the Settlement Agreement, including both its monetary and non-monetary aspects, is fair, reasonable, and in the best interests of the class. The Attorney General agrees that the Settlement Agreement should be approved.

[9] For the reasons that follow, the proposed proceedings are certified as class actions, and the Settlement Agreement, including the fees and disbursements payable to class counsel, is approved.

II. Background

[10] The motions to certify the proposed class proceedings were served on May 12, 2017. On May 30, 2017, the Court set a timetable for completion of the steps leading to the motions for certification, and scheduled the motions for July 2018.

[11] The Attorney General served its responding Motion Records in December 2017. The Attorney General also moved to strike the proposed class proceedings.

[12] The Plaintiffs delivered their Reply Motion Records in February 2018. Cross-examinations on affidavits were scheduled to take place between February 9 and March 28, 2018.

[13] In early February 2018, reports appeared in the media of the Attorney General's motions to strike the proposed class proceedings. Criticism focused on the Attorney General's denial of a private law duty of care owed to members of the CAF and DND to provide a safe and harassment-free environment for military personnel, or to create policies to prevent sexual harassment or sexual assault. The Prime Minister of Canada was reported to say that these arguments did not align with his beliefs, or those of his government, and he had directed his Attorney General to intervene personally.

[14] Shortly after the Prime Minister's public comments, the Attorney General proposed to the Plaintiffs that the cross-examinations on affidavits be postponed to permit preliminary

discussions regarding the possibility of a negotiated resolution. The Attorney General also withdrew the motions to strike.

[15] On March 1, 2018, at the parties' request, the Court ordered a revised timetable and scheduled the certification motions for February 25 to March 1, 2019.

[16] Between April 2018 and March 2019, counsel for the parties participated in more than 30 meetings and conference calls to discuss the possibility of settlement. The topics of discussion included:

(a) existing CAF and DND initiatives to address sexual misconduct, such as Operation Honour, the Sexual Misconduct Response Centre, the integrated harassment process, and the military justice system;

(b) the definition of the classes;

(c) estimates of the classes' population size and incidence rates, including actuarial analysis;

(d) policy measures that could benefit Class Members, including reform of VAC policies, revisions to the CAF harassment policy, and improvements in gender representation and support measures;

(e) a restorative engagement program;

(f) a comprehensive external review to take place five years after the settlement;

(g) compensation to Class Members, eligibility for compensation, and the establishment of compensation thresholds;

(h) an aggregate cap and structure for making the funds available for individual compensation;

(i) VAC compensation and benefits under the *Pension Act*, RSC, 1985, c P-6 and *Veterans Well-being Act*, SC 2005, c 21 [VWA], and their availability to Class Members, as well as reconsideration of previous VAC decisions;

(j) the structure of a settlement;

(k) legal issues, including the pension bar found in s 9 of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 [CLPA], limitations, and causation;

(l) claims advanced on behalf of estates of Class Members;

(m) the claims process and verification;

(n) funding for awareness and culture change initiatives; and

(o) notice, notice publication, assessment of claims, and administration of the settlement.

[17] The parties retained the Honourable George W. Adams as mediator. A mediation was conducted over five days in August and September 2018. Settlement discussions continued after the mediation, but no agreement was reached.

[18] The parties decided to proceed with the cross-examinations on the affidavits filed in the certification motions. The first cross-examination was scheduled to begin on March 1, 2019, but was abruptly halted when the Attorney General asked to resume settlement discussions.

[19] On March 15, 2019, the parties reached an Agreement in Principle [AIP]. The Court was advised of this development on April 3, 2019, and was asked to maintain the confidentiality of the AIP, pending motions to approve the form of notice of the proposed settlement to members of the class.

[20] Following the AIP's conclusion, counsel for the parties participated in more than 15 additional meetings and conference calls, and exchanged extensive correspondence, to refine the details of the topics previously discussed and negotiated, together with a number of additional matters. In particular:

(a) the inclusion of civilian DND and SNPF employees in the settlement, and related questions of jurisdiction, class size estimates, incidence rates, and union support;

(b) administration of the individual compensation process;

(c) verification of individual claims;

(d) terms of the release to be provided by the classes;

(e) notice and administration;

(f) policy measures to benefit Class Members; and

(g) the dispute resolution process.

[21] The parties concluded the Settlement Agreement on July 10, 2019. Motions to approve the form of notice of the Settlement Agreement to be provided to Class Members were heard on July 17, 2019, and granted the following day (*Heyder v Canada (Attorney General)*, 2019 FC 956).

[22] Notice was provided to the proposed classes in accordance with the plan approved by the Court. The deadline for filing objections was August 30, 2019. A compilation of all objections was submitted to the Court in advance of the settlement approval motions that were heard in September and October 2019.

III. Issues

[23] The relief sought is uncontentious insofar as it relates to consolidation, notice of the Settlement Agreement, notice of the opt out and claims periods, and ancillary matters. The issues addressed in these Reasons for Order are as follows:

A. Should the proposed class proceedings be certified?

B. Should the Settlement Agreement be approved?

C. Should the payment of honoraria to the representative Plaintiffs be approved?

D. Should the fees and disbursements of class counsel be approved?

IV. Analysis

A. Should the proposed class proceedings be certified?

[24] Where the parties have negotiated a settlement agreement in a proposed class action and jointly move to have the action certified and the agreement approved on consent, the threshold for certification is lower and the Court may apply a less rigorous approach (*Buote Estate v Canada*, 2014 FC 773 [*Buote*] at para 8; and *Merlo v Canada*, 2017 FC 51 [*Merlo*] at para 10).

[25] The focus of the analysis at the certification stage is not on the merits of the claims, but rather on whether the claims may appropriately be advanced as a class action. The criteria for certifying a class action are found in Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [Rules]:

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	**334.16 (1)** Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
(a) the pleadings disclose a	

reasonable cause of action;

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

(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;

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

(e) there is a representative plaintiff or applicant who

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

(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,

(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

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

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

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

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

e) il existe un représentant demandeur qui :

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

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

(1) Reasonable causes of action

[26] In determining whether a proposed class proceeding discloses reasonable causes of action, the Court assumes that the facts outlined in the statements of claim are true or capable of proof. For the purposes of this certification, the representative Plaintiffs rely only on the asserted claims of negligence, breach of fiduciary duty, and breach of ss 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[27] The Plaintiffs allege that the Crown negligently permitted an environment conducive to sexual assault, sexual harassment, and discrimination based on gender and sexual orientation, causing Class Members to suffer physical and psychological harm. A successful action in negligence requires a plaintiff to satisfy the following elements: (a) the defendant owed the plaintiff a duty of care; (b) the defendant's behaviour breached the standard of care; (c) the plaintiff sustained damage; and (d) the damage was caused, in fact and in law, by the defendant's breach (*Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at para 3). The material facts in support of each of these elements are sufficiently pleaded in the Statements of Claim.

[28] The Plaintiffs also allege that the acts and omissions of the Crown constituted a breach of its fiduciary duty to Class Members. A successful action in breach of fiduciary duty requires a plaintiff to satisfy the following elements: (a) the fiduciary has scope for the exercise of some discretion or power; (b) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (c) the beneficiary is peculiarly vulnerable

to or at the mercy of the fiduciary holding the discretion or power (*Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 27). The material facts in support of each of these elements are sufficiently pleaded in the Statements of Claim.

[29] In addition, the Plaintiffs allege that the acts and omissions of the Crown breached the *Charter* rights of Class Members. Section 7 of the *Charter* states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Subsection 15(1) of the *Charter* states that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The Plaintiffs say that the breach of the Class Members' *Charter* rights is not "prescribed by law", and cannot be justified under s 1 of the *Charter*. The material facts in support of each of these allegations are sufficiently pleaded in the Statements of Claim.

(2) Identifiable classes

[30] The class description must provide a clear definition of those who may be entitled to relief as part of the class, and objective criteria to identify possible members of the class. Class members need not have identical claims, and it is unnecessary at the certification stage to be satisfied that each class member would succeed in establishing a claim.

[31] The Plaintiffs propose that the classes be defined as follows:

> CAF Class: All current or former CAF Members who experienced Sexual Misconduct up to and including the Approval Date, who have not Opted Out of the Heyder or Beattie Class Actions.
>
> DND/SNPF Class: All current and former employees of DND and of the Staff of the Non-Public Funds, Canadian Forces, who experienced Sexual Misconduct up to and including the Approval Date, who have not Opted Out of the Heyder or Beattie Class Actions.

[32] These classes are clearly identifiable based on objective criteria, and meet the requirement of Rule 334.16(1)(b).

(3) Common issues

[33] The common question must be a "substantial ingredient" of each class member's claim. It allows the claim to proceed as a representative one and avoids duplication of fact-finding or legal analysis. The common questions requirement constitutes a low bar (*Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para 72). The Court should adopt a purposive approach in assessing common issues. Class members need not be identically situated *vis-a-vis* the defendant, nor is it necessary that the common issues predominate over non-common issues (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 108).

[34] The parties propose a simple common question: is the Defendant liable to the Class Members? They note that the same common issue was certified on consent in advance of settlement approval in *Merlo* (at paras 23-26), a class proceeding seeking damages on behalf of women in the Royal Canadian Mounted Police for sexual harassment and sexual assault.

[35] The question of the Defendant's liability is common to each Class Member with a claim arising from her or his treatment while working within the CAF, DND, or SNPF. This common question underlies each Class Member's claim. The answer to the question will avoid duplication of fact-finding and legal analysis, and meets the requirement of Rule 334.16(1)(c).

(4) Preferable procedure

[36] The question of whether a class action is the preferable procedure requires the Court to consider the principal goals of class proceedings, as described by Chief Justice Beverly McLachlin in *Hollick v Toronto (City)*, 2001 SCC 68:

> [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.

[37] Litigation of claims such as the ones raised in these proceedings is complex and expensive. Distributing the litigation costs across the classes may be the only mechanism for Class Members to achieve access to justice. A class proceeding also promotes judicial economy, avoids inconsistent findings on common issues, and promotes behaviour modification. These factors weigh strongly in favour of certification.

[38] Furthermore, certification of these proceedings is intended to implement a national settlement. It is a necessary precondition to resolving the claims in accordance with the Settlement Agreement.

(5) Representative plaintiffs

[39] The proposed representative Plaintiffs, Ms. Heyder, Ms. Schultz-Nielsen, Ms. Graham, and Mr. Beattie, fairly and adequately represent the Class Members' interests. They each provided evidence of sexual harassment or sexual assault that they personally experienced while serving in the CAF. They each swore affidavits confirming their willingness and availability to act in the best interests of the respective class. There is nothing to indicate that they have a conflict of interest on the common questions of law or fact with other Class Members, and they have provided details of their agreements with class counsel respecting fees and disbursements.

[40] The parties have jointly prepared a detailed and robust plan that outlines the steps whereby Class Members will be notified of the certification and proposed settlement of these actions. The notice plan contains all of the elements of the plan previously approved by the Court to provide notice of the certification and settlement approval hearing. In addition, the plan provides for insertions in newspapers and the inclusion of the notice in widely-circulated magazines such as *Maclean's*, *L'actualité*, and *Chatelaine* (English and French), and 2,400 radio spots on 24 radio stations across Canada.

(6) Conclusion on certification

[41] All of the requirements of Rule 334.16(1) are met. The proposed class proceedings should therefore be certified.

B. Should the Settlement Agreement be approved?

(1) Overview of the Settlement Agreement

[42] The Settlement Agreement provides for the following:

(a) combined aggregate individual compensation for CAF Class members and DND/SNPF Class members who experienced sexual misconduct in a total amount not exceeding $900 million, with the range of individual compensation for most Class Members between $5,000 and $50,000. Some Class Members who experienced exceptional harm such as post-traumatic stress disorder [PTSD] may be eligible for up to an additional $100,000;

(b) a claims process that is paper-based, non-adversarial, and intended to be restorative in nature, to the extent possible;

(c) the option of participating in a restorative engagement program for Class Members to share their experiences of sexual misconduct with senior CAF or DND representatives;

(d) changes to policies and other measures addressing sexual misconduct in the CAF, including consultation regarding increasing gender representation and diversity in the CAF, and enhancing resources and support programs for those who have experienced sexual misconduct;

(e) a comprehensive external review to assess the progress of Operation Honour and the Sexual Misconduct Response Centre, five years after the settlement is approved;

(f) improvements to VAC policies concerning eligibility for disability payments, and reconsideration of claims by a dedicated unit of employees established for this purpose;

(g) a comprehensive release of Canada from all proceedings, actions, and claims based on the matters asserted, or which could have been asserted, in relation to any aspect of the class actions;

(h) a written request by the Defendant to Employment and Social Development Canada and the Canada Revenue Agency that Class Members' entitlement to federal social benefits or social assistance not be negatively affected; and

(i) a written request by the Defendant to provincial and territorial governments that receipt of compensation under the Settlement Agreement not affect the receipt of social benefits.

[43] The Settlement Agreement encompasses two classes. As previously mentioned, the CAF Class is defined as follows:

> All current or former CAF Members who experienced Sexual Misconduct up to and including the Approval Date, who have not Opted Out of the Heyder or Beattie Class Actions.

[44] The DND/SNPF Class is defined as follows:

> All current and former employees of DND and of the Staff of the Non-Public Funds, Canadian Forces, who experienced Sexual Misconduct up to and including the Approval Date, who have not Opted Out of the Heyder or Beattie Class Actions.

[45] Compensation will be available for all Class Members who were alive on March 15, 2019, the date the AIP was signed, and who meet the eligibility criteria under the Settlement Agreement. The Settlement Agreement provides that eligible Class Members may receive compensation under Category A, Category B1 or B2, and Category C, provided they meet the criteria for each category:

Category	**Compensation Amount/ Harm Level**	
A. Sexual harassment, gender based or LGBTQ2+ based discrimination.	$5,000.00	
B1. Targeted or ongoing or severe sexual harassment and/or sexual assault in the form of unwanted sexual touching.	Low Harm	$5,000.00
	Medium Harm	$10,000.00
	High Harm	$20,000.00
B2. Sexual assault in the form of sexual attack or sexual activity where the Member did not consent or was unable to consent.	Low Harm	$30,000.00
	Medium Harm	$40,000.00
	High Harm	$50,000.00
C. Enhanced Payment — Class Members who suffer or suffered from PTSD or other diagnosed mental injuries, or physical injuries directly arising from sexual assault or sexual harassment.	Low Harm	$50,000.00
	Medium Harm	$75,000.00
	High Harm	$100,000.00

[46] Class Members cannot receive compensation under Category C unless they applied for VAC disability benefits for harm arising from sexual misconduct, and were denied on or after April 3, 2017, when VAC's polices regarding these kinds of applications changed. Claimants who are members of both the CAF Class and DND/SNPF Class may receive only one payment at the highest level to which they are entitled.

[47] The Settlement Agreement also contains terms to prevent double recovery where Class Members have been compensated for the same incident or injury in another proceeding, including those who have received or are eligible to receive compensation in the "LGBT Purge" Class Action (*Ross, Roy and Satalic v Her Majesty the Queen*, Federal Court No T-370-17). If a Class Member receives compensation under Category C and subsequently qualifies for a pension, award, or similar monetary benefit from VAC or under the *Government Employees Compensation Act*, RSC, 1985, c G-5 [GECA] in respect of the same incident or injury, an amount that is equivalent to the amount paid under Category C must be deducted from the pension or award.

[48] The Settlement Agreement provides for an aggregate cap for the compensation amounts for each class, as well as the circumstances in which unused funds may be redistributed to other class members. Any further residue, up to a maximum of $23 million, may be applied to a fund to promote awareness and cultural change in the CAF.

[49] The total amount payable in respect of the CAF Class cannot exceed $800 million, and the total amount payable in respect of the DND/SNPF Class cannot exceed $100 million. If the

amounts are insufficient to pay the prescribed compensation to each eligible Class Member, then all amounts payable shall be divided on a *pro rata* basis among eligible Class Members so that the total payments do not exceed these limits. The funds for one class may be redistributed to the other class if one exceeds the limit and the other does not.

[50] Canada will also provide $2 million towards awareness and culture change, regardless of whether or not the limits are exceeded for either class.

[51] The Settlement Agreement provides for a paper-based, non-adversarial, and confidential claims process. Class Members will not be required to undergo an interview. However, they may request an interview in certain circumstances. For example, an interview may be requested as a form of reasonable accommodation, in order to respond to a request for additional information from the claims administrator or assessor(s), or in connection with an application for reconsideration. No claimant is required to testify in a court or undergo cross-examination or any questioning by an adverse party.

[52] The claims process is intended to prevent re-traumatization of Class Members who experienced sexual misconduct, by forgoing the need for oral testimony or cross-examination. As Justice Warren Winkler stated in *Parsons v Canadian Red Cross Society*, [2000] OJ No 2374 (Ont SC), which concerned a proposed settlement of the "tainted blood" litigation:

> [17] This contrasts favourably with many class proceedings where, despite a global settlement, class members are still required to engage in extensive legal proceedings to obtain the benefits. The relative ease of access to compensation is an important feature. It provides some certainty as to the quantum of compensation that class members will receive at each level, but more so, it

> demonstrates the thoroughness of class counsel in fashioning a satisfactory settlement.

[53] To make a claim for compensation, a Class Member need only complete an application form with the following information:

(a) confirmation that the claimant is a current or former member of the CAF or employee of the DND or SNPF who experienced sexual assault, sexual harassment, or discrimination based on sex, gender, gender identity, or sexual orientation while serving or employed;

(b) basic biographical information (*e.g.*, name, date of birth, social insurance number, contact information, details of CAF membership or DND/SNPF employment);

(c) information regarding whether the claimant has already been compensated for any event or injury for which claims are made under the Settlement Agreement, including through VAC or a similar benefit program;

(d) for Compensation Category A, a short description of the harm sustained;

(e) for Compensation Category B, a description of the incidents and harm sustained;

(f) for Compensation Category C, copies of medical records demonstrating that the claimant suffered a diagnosed mental or physical injury, supported by additional information as needed; and

(g) certification and a witness signature.

[54] According to the Plaintiffs, Class Members often say they do not want to become involved in litigation because they fear the trauma associated with cross-examination and retribution from alleged perpetrators. They appreciate the confidential nature of the process, and would otherwise be very reluctant to describe their experiences.

[55] Amounts paid under the Settlement Agreement are intended to be structured as non-taxable income. The Defendant has agreed to write letters to Employment and Social Development Canada and the Canada Revenue Agency requesting that Class Members' entitlement to federal social benefits or social assistance not be adversely affected, and to provincial and territorial governments requesting that receipt of compensation under the Settlement Agreement not affect the receipt of social benefits.

[56] Key features of the claims administration process include the following:

(a) the claims process is meant to be non-adversarial and restorative, to the extent possible;

(b) claimants are presumed to be acting honestly and in good faith in completing their claim forms;

(c) claimants have 18 months to prepare and submit their claim forms, with a possible 60-day extension in exceptional circumstances;

(d) claimants are expected to provide details of their complaint and relevant biographical information, and are encouraged to provide all relevant documentation;

(e) claimants seeking compensation under Category C must provide medical records in support of the level of harm claimed, and indicate whether they have made claims under the GECA or to VAC in respect of the same incident or injury;

(f) claimants seeking compensation must certify that the information in their application is true;

(g) the administrator, assessor(s), and Canada shall establish service standards regarding the administration of claims that may be adjusted from time to time, with a view to deciding all claims no later than 14 months after the claims deadline;

(h) the administrator must initially verify the identity of the claimant, that the information provided is complete, and whether the claimant has opted out;

(i) Canada must verify a claimant's military service or employment, retrieve and review relevant records, and provide a response to the claim if it chooses;

(j) if Canada provides a response to the claim, the claimant will be notified and provided with access to the response and an opportunity to reply;

(k) the administrator and assessor(s) shall review the claim and information available, and render a decision on eligibility and level of compensation;

(l) the administrator shall then inform the claimant of the decision;

(m) the administrator shall pay $5,000 to each Class Member who is eligible for a Category A payment, as soon as reasonably practicable following verification that she or he qualifies for compensation;

(n) to request reconsideration by the lead assessor, claimants may submit a reconsideration form and any new relevant information;

(o) the administrator shall then provide Canada with access to any such new information, and Canada may provide any new relevant information;

(p) the lead assessor shall then issue a decision and inform the claimant;

(q) the decisions of the administrator and assessor(s) and any reconsideration decisions are final and binding without recourse to the Court or another tribunal;

(r) Canada shall have the right to randomly audit the claims process; and

(s) the administrator and the assessor(s) will provide monthly reports to counsel.

[57] The Settlement Agreement establishes an Oversight Committee that will identify and choose the measures to promote awareness and culture change. Those measures may be implemented by Canada and/or a third party. The Oversight Committee consists of seven members:

(a) a representative of the CAF Class;

(b) a representative of the DND/SNPF Class;

(c) a representative of class counsel who participated in the discussions preceding the Settlement Agreement;

(d) a representative of the CAF;

(e) a representative of the DND/SNPF;

(f) a representative of Canada's legal counsel who participated in the discussions preceding the Settlement Agreement; and

(g) the lead assessor.

[58] The role of the Oversight Committee is also to monitor the work of the notice provider, administrator, and assessor(s); consider and determine disputes relating to the interpretation of the Settlement Agreement, except in relation to sections 5, 6, and 8 and related Schedules;

provide guidance and direction on the interpretation and application of the Settlement; and consider and determine any matter not expressly addressed by the Settlement Agreement.

(2) General principles of settlement approval

[59] The test to be applied by the Court in approving settlement of a class proceeding is "whether the settlement is fair and reasonable and in the best interests of the class as a whole" (*Merlo* at para 16). The factors to be considered include, but are not limited to, the following (*Châteauneuf v Canada*, 2006 FC 286 [*Châteauneuf*] at para 5; *Parsons v Canada Red Cross Society*, [1999] OJ No 3572 (Ont SC) [*Parsons 1*] at para 71; and *Sayers v Shaw Cablesystems Ltd*, 2011 ONSC 962 at para 28):

(a) the likelihood of success or recovery with continued litigation;

(b) the amount and nature of discovery evidence or investigation;

(c) the settlement terms and conditions;

(d) the recommendations and experience of counsel involved;

(e) the future expense and likely duration of contested litigation;

(f) the number and nature of any objections;

(g) the presence of good faith and the absence of collusion;

(h) the dynamics of, and positions taken during, the negotiations; and

(i) the risks of not unconditionally approving the settlement.

[60] A settlement need not be perfect, but must fall within the "zone of reasonableness" (*Ford v F Hoffmann-La Roche Ltd*, [2005] OJ No 1118 (Ont SC) at para 115). As Justice Danièle Tremblay-Lamer stated in *Châteauneuf*:

> [7] The Court with a class action settlement before it does not expect perfection, but rather that the settlement be reasonable, a good compromise between the two parties. The purpose of a settlement is to avoid the risks of a trial. Even if it is not perfect, the settlement may be in the best interests of those affected by it, particularly when the risks and the costs of a trial are considered. It is always necessary to consider that a proposed settlement represents the parties' desire to settle the matter out of court without any admission by either party regarding the facts or regarding the law.

[61] The zone of reasonableness test acknowledges that a number of settlement possibilities may be in the best interests of the class when compared to the alternative of continued litigation (*Dabbs v Sun Life Assurance Co of Canada*, [1998] OJ No 2811 (Ont Gen Div) at para 30). The Court must show deference to the process underlying the negotiated settlement (*Fontaine v Canada (Attorney General)*, 2006 NUCJ 24 at para 38).

[62] The Court has no discretion to rewrite the substantive terms of the agreement. Nor is it permissible to place the interests of some class members over the interests of the class as a

whole. The Court "has no authority to alter a settlement reached by the parties or to impose its own terms upon them. The Court is limited to either approving or rejecting a settlement in its entirety" (*Manuge v Canada*, 2013 FC 341 [*Manuge*] at para 19).

[63] The Court must be alive to the risk that, if a settlement is not accepted, the negotiations may unravel and the parties may return to litigation (*Manuge* at para 6):

> It will always be a particular concern of the Court that an arms-length settlement negotiated in good faith not be too readily rejected. The parties are, after all best placed to assess the risks and costs (financial and human) associated with taking complex class litigation to its conclusion. The rejection of a multi-faceted settlement like the one negotiated here also carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost.

[64] When the settlement is negotiated at arm's length and recommended by experienced counsel, there is a "strong initial presumption of fairness" (*Serhan v Johnson & Johnson*, 2011 ONSC 128 at para 55):

> Where the parties are represented – as they are in this case – by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

[65] The Court must be sensitive to the risk that rejection of the Settlement Agreement may put Class Members back in the position of having to pursue novel, uncertain, and untimely remedies, *i.e.*, the position they were in before the Settlement Agreement was reached (*Semple v Canada*, 2006 MBQB 285, at para 3).

(3) Considerations favouring settlement approval

[66] The following factors militate in favour of approving the Settlement Agreement:

(a) the significant compensation fund with a simple paper-based claims process;

(b) the non-monetary benefits to the class, including restorative engagement, policy changes, and other systemic measures in the CAF;

(c) the litigation risks faced by the Plaintiffs in a common issues trial;

(d) the jurisdictional defences available to the Crown;

(e) the statutory defences available to the Crown; and

(f) the avoidance of individual assessments following a trial or motion for judgments respecting damages.

[67] Prosecuting the proposed class actions through certification, discoveries, motions, and eventually a common issues trial, followed by appeals, is fraught with risk:

(a) a national certification order may not be granted;

(b) the parties will engage in prolonged litigation;

(c) the Court may conclude that it lacks jurisdiction over some or all Class Members;

(d) the claims may be barred by s 9 of the CLPA, stayed under s 92 of the VWA, or barred by s 12 of the GECA;

(e) the asserted causes of action may be found not to be viable, including negligence, breach of fiduciary duty, and claims under the *Charter*;

(f) liability may not be established;

(g) statutory limitation periods may bar many of the Class Members' claims;

(h) an aggregate damages award may be denied by the Court, forcing Class Members through lengthy and protracted individual assessments;

(i) proven damages may be similar to or much less than the settlement amounts; and

(j) systemic change, reconciliation, commemorative, and healing initiatives are likely outside the jurisdiction of any court to order.

[68] The Plaintiffs estimate that all of the required litigation steps, including trial, judgment, and all appeals, could take another seven years. They note that the proceedings were commenced three years ago and relate to events that occurred, for some Class Members, decades ago.

[69] Many Class Members are of advanced age. Where historical events form part of the litigation, courts have recognized that timely settlement provides a uniquely important benefit (*McKillop and Bechard v HMQ*, 2014 ONSC 1282):

> [28] There is no doubt that without a settlement, the proceedings will be protracted, the outcome uncertain and (even if successful) the class members will not receive compensation for years. There is no assurance that at the end of this process they will receive any more than they will get under these Settlement Agreements. Given the advanced age of class members and the historical nature of this litigation, the benefits of an immediate and certain settlement cannot be overstated.

[70] In the absence of a settlement, a number of potentially strong defences are available to the Crown if these cases proceed to trial. The primary claims advanced on behalf of the Class Members are negligence and *Charter* breaches.

[71] In response to the negligence claim, the Crown could assert that:

(a) it did not owe a duty of care to individual Class Members to provide a safe and harassment-free environment, or to create policies to prevent sexual harassment or sexual assault which are already prohibited by the *Canadian Human Rights Act*, RSC, 1985, c H-6 [CHRA] and the *Criminal Code of Canada*, RSC, 1985, c C-46 (while the Crown withdrew its motion to strike following the Prime Minister's intervention, this would not prevent the Crown from asserting this defence at trial);

(b) the claims do not establish sufficient proximity between the Class Members and the Crown; and

(c) even if a duty of care existed, it was negated by policy considerations.

[72] With respect to the *Charter* claims, the Crown could argue that:

(a) the *Charter* came into force in 1982 (excepting s 15 which came into force in 1985), and the Plaintiffs therefore have no *Charter*-based cause of action for anything that occurred before its provisions came into force;

(b) section 7 of the *Charter* does not create a positive right or obligation to a particular program or policy within a workplace or the military; and

(c) the facts alleged in support of the claim under s 15 of the *Charter* do not establish or identify any particular government action or inaction that could constitute a distinction or result in differential treatment on the basis of the ground of sex, nor do they support a claim that the alleged action or inaction constitutes discrimination.

[73] For current and former CAF members, the Crown could argue that s 9 of the CLPA precludes all claims by Class Members to whom the provision applies. This provision bars a person from suing the Crown for an injury, damage, or loss if a pension has been paid or is payable for the same injury, damage, or loss.

[74] The Crown could also argue that any claim not covered by s 9 should nevertheless be stayed until an application for disability benefits pursuant to s 92 of the VWA has been made. Similarly, for current and former DND or SNPF employees, s 12 of the GECA precludes a

government employee who is entitled to compensation arising from an accident at work from pursuing a claim in court.

[75] These bars have previously been found to preclude actions for damages arising from sexual harassment and sexual assault against the Crown (*e.g.*, *Brownhall v Canada (Ministry of National Defence)*, [2007] OJ No 3035 (Ont Div Ct)). Given the individual analysis that may be required for the application of these provisions, the Crown could take the position that the proposed proceedings are incapable of being certified as class actions.

[76] The proposed proceedings could also encounter jurisdictional hurdles. The Crown could argue that this Court does not have jurisdiction over claims based on discrimination and harassment. In *Seneca College of Applied Arts & Technology v Bhadauria*, [1981] 2 SCR 18 (SCC) [*Bhadauria*], the Supreme Court of Canada rejected a common law cause of action for discrimination. *Bhadauria* has since been applied to civil claims involving allegations of sexual harassment, including in the context of class actions (*Rivers v Waterloo Regional Police Services Board*, 2018 ONSC 4307).

[77] In addition, the Crown could argue that the Court should decline jurisdiction over the claims of sexual harassment and discrimination in favour of the comprehensive internal resolution processes available to Class Members. The CAF, DND, and SNPF all have grievance and dispute resolution processes that may offer a complete and comprehensive code for individuals to report and seek redress and protection from sexual harassment and discrimination. The Crown could take the position that Class Members are required to submit grievances or

complaints under the CHRA and exhaust internal recourse processes, before seeking relief in the Courts.

[78] The Crown could argue that, for DND and SNPF employees, employment relations are governed by the grievance and adjudication regime under the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [FPSLRA]. This could serve as a complete bar to the claims advanced on behalf of the DND and SNPF Class members. A workplace dispute that falls within the prescribed grievance process cannot usually be litigated in the courts (*Weber v Ontario Hydro*, [1995] 2 SCR 929 (SCC) at para 63).

[79] Even if the Plaintiffs were to succeed on liability, an award of aggregate damages may prove elusive. Rule 334.27 states:

334.27 In the case of an action, if, after determining common questions of law or fact in favour of a class or subclass, a judge determines that the defendant's liability to individual class members cannot be determined without proof by those individual class members, rule 334.26 applies to the determination of the defendant's liability to those class members.	**334.27** Dans une action, si le juge, après avoir statué sur les points de droit ou de fait communs en faveur du groupe ou d'un sous-groupe, estime que la responsabilité du défendeur à l'égard de membres du groupe ou du sous-groupe ne peut être déterminée sans que ceux-ci fournissent des éléments de preuve, la règle 334.26 s'applique pour établir la responsabilité du défendeur.

[80] The Plaintiffs could offer expert evidence that harm may be reasonably calculated on the basis of a common entitlement by all the Class Members. However, given the significant issues of causation and the unique nature of individual harms, an assessment of aggregate damages may not be feasible. The Court could find that the approach to damages quantification contemplated by the Settlement Agreement lacks a sufficient scientific or precedential basis. The Plaintiffs

would then have to engage in an individual assessment process, which would be cumbersome, intrusive, time-consuming, and expensive.

[81] Limitation periods present another potential obstacle if the proposed actions proceed to trial. While many provinces have eliminated limitation periods for claims of sexual misconduct, New Brunswick, Manitoba, Saskatchewan, Newfoundland and Labrador, Yukon, Northwest Territories, and Nunavut limit the exception to claims for sexual assault. Accordingly, the claims for sexual harassment and discrimination could be statute-barred. Quebec has a ten-year limitation period for claims of sexual assault, and a 30-year limitation period if the injury results from sexual aggression or violent behaviour. Prince Edward Island imposes a two-year limitation period after the cause of action arose.

[82] The fact that the Settlement Agreement was negotiated at arm's length and is recommended by experienced counsel also weighs heavily in favour of approval. Class counsel are recognized experts in their fields, and have successfully litigated numerous class actions across Canada. They have considerable experience in settlement mechanics and imperatives, damages methodologies, and the assessment of risks associated with complex and historic litigation.

(4) Objections to settlement approval

[83] A total of 709 Class members submitted Participation Forms in response to the notice of the certification and settlement hearing that was disseminated pursuant to the Court's order dated

July 18, 2019. Approximately 96% of participating Class Members (680 of 709) indicated their support for the Settlement Agreement, and approximately 97% (573 of 590) of those who commented on the fees and disbursements sought by class counsel expressed support for that aspect of the proposed settlement.

[84] Only 29 Class Members, roughly 5% of the total, objected to the Settlement Agreement in whole or in part.

[85] The Court heard from nearly 50 Class Members who expressed support for, and occasionally opposition to, the Settlement Agreement. Despite the Court's insistence that this was not necessary, many Class Members disclosed deeply personal and painful accounts of their experiences as members of the CAF or DND/SNPF. As Justice Michael Phelan explained in *McLean v Canada*, 2019 FC 1075 [*McLean*] at para 20, it is "not the function of the settlement hearing to delve into the personal 'truths' of Class Members". Ultimately, the Settlement Agreement and its claims process provides a better opportunity for Class Members to share their individual experiences in a confidential and supportive setting. Nevertheless, the personal accounts of Class Members provided the Court with valuable insight into their reasons for supporting or opposing the Settlement Agreement.

[86] The reasons for supporting the Settlement Agreement most frequently expressed by Class Members are the following:

(a) the settlement will help prevent future sexual misconduct;

(b) the settlement will help to heal Class Members' injuries, pain and suffering;

(c) the settlement will provide a voice to those who have lived in fear and silence for so long;

(d) the settlement will vindicate Class Members who are able to share their stories and experiences;

(e) the settlement will ensure a healthier work environment in the future;

(f) the settlement will provide help and support to those who have suffered trauma from sexual misconduct;

(g) the settlement will provide peace and closure to Class Members, allowing them to recover from the trauma of sexual misconduct; and

(h) the settlement will expedite changes to policies and the culture in the CAF.

[87] The Plaintiffs emphasize the following additional comments by Class Members in support of the Settlement Agreement:

(a) it gives those who are otherwise unable or unwilling to publicly come forward a sense of justice;

(b) the settlement terms are Class Member-focused;

(c) it acknowledges that there have been wrongdoings on a large scale;

(d) it sends a solid message to other institutions that sexual misconduct will not be tolerated;

(e) it acknowledges military sexual trauma as a unique problem;

(f) it allows Class Members to be a part of changing behaviour in the CAF;

(g) it allows for retribution and reconciliation of past wrongs;

(h) it allows Class Members to be part of a restorative process;

(i) the settlement provides for assistance to Class Members throughout the claims process;

(j) the compensation process is clear and is not intrusive for Class Members; and

(k) it sends the message that the Federal Government is dedicated to remediating sexual misconduct.

[88] In *Parsons 1*, Justice Winkler noted that class members have an enhanced element of control where a settlement is reached prior to the expiry of an opt-out period (at para 79):

> The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The [Ontario *Class Proceedings Act, 1992*, SO 1992, c 6] mandates that class members retain, for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining settlement or judgment that is tailored more to the individual's circumstances.

[89] A settlement is inevitably a compromise, and is unlikely to give all parties precisely what they want. However, "objectors need not be bound by the perceived failings of the Settlement Agreement. They may opt out and pursue in the normal fashion the claims they assert, bearing in mind the obstacles" (*Bosum c Canada (Attorney General),* 2006 QCCS 5794 at para 13).

[90] In *Quatell v Attorney General of Canada*, 2006 BCSC 1840, Chief Justice Donald Brenner said the following regarding the proposed settlement of the Indian Residential Schools litigation:

> [6] Many of the objectors had concerns with the proposed settlement. Others supported it. Yet others spoke of being torn between the advantage of accepting the proposed settlement and their concerns with a number of the provisions of the Settlement Agreement.
>
> [7] This settlement represents a compromise of disputed claims. For that reason it is undoubtedly the case that claimants will not be happy with every provision of the settlement. Some might well choose to reject it. However, those members of the class who decide that the disadvantages of the Settlement Agreement outweigh its advantages are free to opt out of the provisions of the *Class Proceedings Act* and pursue their individual claims against the defendants. If they choose to opt out, nothing in this class proceeding will affect them or any actions they may choose to bring. In my view, the opt out right supports approval of the agreement.

[91] The principal objections to the Settlement Agreement, and the responses of class counsel, may be summarized as follows:

(a) Cadets are not included: The Cadets program is for youths aged 12 to 18. Cadets are not members of the CAF. The claims of cadets are therefore distinct, as are Canada's potential defences. Given the lack of commonality, it is not feasible to advance Cadets' claims together with those of Class Members.

(b) Compensation should be permitted for events that occurred prior to 1985: Compensation pursuant to Categories B and C is available for events that took place before 1985. While Category A is restricted to post-1985 events, this category is intended primarily to reflect a *Charter* claim, and s 15 of the *Charter* was not enacted until 1985.

(c) The settlement does not include dependants who were abused: Given that family members and other dependents were not employed by the CAF, DND, or SNPF, these claims necessarily fall outside the scope of the proposed class proceedings.

(d) Individual compensation is insufficient: The reasonableness of the compensation must be considered in light of the alternative of pursuing the litigation to trial. The Plaintiffs note that damages have never before been awarded to members of the CAF, DND, or SNPF for sexual misconduct in any contested litigation. The robust defences available to the Crown are described above. The Settlement Agreement provides individual compensation of up to $155,000, and also contemplates a range

of policy and systemic changes which will be costly to implement. Canada must also pay for the settlement's administration and legal fees, without any deduction from Class Members' compensation. The process is paper-based, non-adversarial, and expedited, which compares favourably to the protracted and traumatizing process of litigation.

(e) Compensation amounts for Category A are too low: This category provides compensation for harm of a modest nature arising from sexual jokes, inappropriate comments about the claimant's sex life, *etc*. These forms of offence may not be compensable in a civil action. If an individual has been subjected to more serious affronts, or has suffered more significant harm, then additional compensation is available pursuant to Categories B and C.

(f) The amounts of compensation are low when compared to the RCMP settlement: The claims process in the RCMP settlement is different. In that settlement, each claimant is interviewed and examined by the claims assessor, who is a former judge. Pursuant to the Settlement Agreement at issue here, the claims process is non-adversarial, paper-based, and restorative, and there is a presumption that claimants are acting honestly. The restorative aspects of the Settlement Agreement are also distinct. In the RCMP settlement, additional legal fees are deducted from the compensation paid to Class Members, thereby reducing the amount of total compensation.

(g) The settlement should be uncapped: The caps are based on expert evidence, supported by data regarding the prevalence of sexual misconduct in the military, and

the allotted funds should therefore be sufficient. Uncapped settlements typically involve an adversarial process with personal interviews or cross-examination and rigorous thresholds for proof (*e.g.*, the RCMP and Indian Residential Schools settlements). Here, claimants participate in a non-adversarial, paper-based process that is streamlined and intended to avoid further trauma.

(h) The Settlement Agreement's definition of sexual misconduct is not broad enough: The kinds of sexual misconduct that qualify for compensation are broader than the current definition of sexual harassment in CAF policies, which will be amended under the Settlement Agreement. The claims administrator and class counsel are available to guide Class Members in preparing their claims.

(i) Compensation should be independent of VAC benefits: Compensation under Categories A and B is independent of VAC payments or entitlements. While Category C is restricted to those who have been denied VAC benefits, the Settlement Agreement clarifies former VAC policies and the process governing eligibility for disability benefits arising from sexual misconduct. The VAC process also offers ongoing and flexible benefits and support.

(j) The settlement does not provide compensation for discrimination against women in the provision of healthcare in the CAF: It is possible that this form of discrimination will qualify for compensation under the Settlement Agreement. The claims administrator will interpret what is and is not included.

(k) The settlement does not protect ongoing VAC benefits: The Plaintiffs cannot fetter the discretion of future governments or the tribunal that adjudicates VAC applications. Nevertheless, the Settlement Agreement seeks to improve existing VAC policies governing eligibility for disability benefits arising from sexual misconduct.

(l) Class Members should be permitted to opt out of parts of the settlement: This would be contrary to the Rules, which permit class members to be included in a class action or to opt out, but not both. It is not feasible for Class Members to opt in to some aspects of the settlement, but not others.

(m) The claims period is too short: The claims period is 18 months, which should be sufficient time for claims to be made and processed. The claims period must have an end date to permit the calculation and payment of individual compensation amounts.

(n) Class Members should retain their rights to make complaints under the CHRA: Class Members who prefer to pursue individual human rights complaints or other civil claims may opt out of the settlement. The settlement preserves Class Members' rights to pursue internal harassment complaints.

(o) Canada should acknowledge liability and apologize: While the Settlement Agreement does not contain an acknowledgement of liability, it recognizes the harm caused by sexual misconduct and seeks systemic change to improve the culture of the CAF, DND, and SNPF. An apology cannot be obtained through litigation.

[92] A further objection was raised by the Attorney General of British Columbia [AGBC], who complained that no waiver had been sought of potential claims for health care costs incurred by provinces in relation to the claims advanced in these actions. Counsel for the parties subsequently requested the position of all provincial and territorial attorneys general regarding any potential claims for the recovery of health care costs. On October 21, 2019, class counsel submitted affidavit evidence that all provincial and territorial attorneys general, including the AGBC, had confirmed that they approve the Settlement Agreement, do not oppose the Settlement Agreement, will not pursue recovery, or waive any rights they may have with respect to these actions.

(5) Conclusion on settlement approval

[93] The overwhelming majority of Class Members who provided comments, either in Participation Forms or in oral submissions before the Court, support the Settlement Agreement and want it to be approved. Class counsel have provided reasonable responses to the few objections that Class Members raised. The potential objections of provincial and territorial attorneys general have been resolved.

[94] None of the objections, individually or collectively, are sufficient to take the proposed settlement outside the zone of reasonableness. If a Class Member does not want to participate in the settlement, he or she may opt out and pursue an individual action.

[95] For all of these reasons, the Settlement Agreement should be approved.

C. Should the payment of honoraria to the representative Plaintiffs be approved?

[96] The Settlement Agreement provides for honoraria in the amount of $10,000 to be paid to each of the representative Plaintiffs in these proceedings, and to the representative Plaintiffs in the Provincial Actions who were signatories to the Settlement Agreement.

[97] Honoraria are intended to recognize the additional contributions and sacrifices made by representative plaintiffs in advancing the litigation on behalf of the class. Representative plaintiffs may be asked to forfeit their privacy, and to participate in media events and community outreach (*Merlo* at paras 68-74). Nevertheless, honoraria are to be awarded sparingly, as representative plaintiffs should not benefit from class proceedings more than other class members (*McLean* at para 57).

[98] Ordinarily, honoraria may be paid only to representative plaintiffs in class proceedings that are included in the Court's certification order. However, exceptions may be made in unusual cases, such as these, where the named Plaintiffs in the related Provincial Actions also made significant contributions to advancing the claims across multiple jurisdictions (*McLean* at para 58).

[99] The honoraria have been agreed to by the Attorney General, and are relatively modest. There is no reason why they should not be approved.

D. Should the fees and disbursements of class counsel be approved?

[100] The Settlement Agreement provides for legal fees to be paid to class counsel in the amount of $26.56 million, plus disbursements and applicable taxes.

[101] According to class counsel, the proposed fees amount to approximately 2.95% of the total compensation payable to Class Members. If the total value of the settlement is taken into account, including compensation, administration, notice, policy measures, external reviews, and the restorative engagement program, then the legal fees represent approximately 2.5%.

[102] Class counsel assert that the proposed legal fees are considerably less than what was contemplated in their retainer agreements with the representative Plaintiffs (25%), or what has been awarded in other comparable class proceedings. The fees are to be paid by Canada directly, and will not reduce the compensation available to Class Members.

[103] Very few Class Members expressed a view on the legal fees sought by Class counsel. Of those who did, the vast majority support the proposed fees as fair compensation for the results achieved in complex and risky litigation.

[104] The fees sought by class counsel were negotiated as part of an arm's length, good faith negotiation separate from the Settlement Agreement. This may be an important factor in considering fee approval (*McLean* at paras 22-24).

[105] However, in response to questions from the Court, counsel representing the Attorney General were not prepared to say that their agreement to the proposed fees supports the inference

that the Crown considers them to be fair and reasonable. Counsel explained that many factors influence a settlement, including the need for certainty, finality, and timely resolution. While this is undoubtedly true, the refusal of the Attorney General to take any position regarding the fees sought by class counsel has made this Court's task more difficult.

[106] The fees payable to class counsel under the Settlement Agreement include the provision of future legal services to Class Members. No additional fees may be charged by other counsel without the prior approval of this Court:

> **17.03 Provision of Legal Services to the Class**
>
> Class Counsel further agree to provide reasonable assistance to Class Members throughout the claims process at no additional charge. […]
>
> **17.05 Pre-Approval of Fees Required**
>
> The Parties will request that the Court order that no fee may be charged to Class Members in relation to claims under this FSA by counsel not listed on Schedule "R" without prior approval of the Court.

[107] The prohibition against other counsel charging fees for providing assistance in the claims process is intended to alleviate concerns arising from the implementation of the Indian Residential Schools settlement, where some lawyers hired for the claims process were alleged to have charged exorbitant fees.

[108] The Court may consider a broad range of factors in determining whether the fees sought by class counsel are fair and reasonable. These include: risk undertaken, results achieved, complexity of the issues, quality and skill of counsel, expectations of the plaintiffs, time

expended, and fees in similar cases (*McLean* at para 25; *Condon v Canada*, 2018 FC 522 [*Condon*] at para 82; *Merlo* at paras 78-98; *Manuge* at para 28). The factors are not exhaustive and will be weighed differently in different cases. Risk and result remain the critical factors (*Condon* at para 83).

(1) *Risk, complexity, skill of counsel, and results achieved*

[109] The legal and practical risks incurred by class counsel in this litigation are described above. They are significant. The consortium of law firms representing the Class Members demonstrated considerable skill in preparing the pleadings, coordinating the proceedings in multiple jurisdictions, ensuring carriage of two national class actions in this Court while holding the Provincial Actions in abeyance, resisting the Crown's motion to strike, negotiating the numerous provisions of the complex Settlement Agreement, including the non-monetary aspects, and expanding the Class Members to include civilian employees of the DND and SNPF. Given the challenging legal and political context, the results obtained by class counsel may be fairly described as excellent.

[110] As Justice Phelan wrote in *McLean,* which concerned a class action brought on behalf of those who attended Indian Day Schools:

> When Class Counsel took on the mandate, they accepted it without any assurance that politically the case would settle and certainly not achieve this result. Cases with public policy elements have their own unique risk of being caught up in the political debates.

[111] Justice Phelan's observation is particularly apt in the present case, where political considerations were pivotal in bringing about the negotiations that eventually led to the Settlement Agreement. Class counsel readily acknowledge that the Attorney General's denial of a "private law duty of care" owed to those serving in the military was, and continues to be, a defence to these actions. This well-established principle of law is frequently invoked in disputes relating to public sector employment. The Prime Minister's public disavowal of the Defendant's legal position was undoubtedly a turning point in these proceedings.

[112] Class counsel describe these actions as "true collective pioneer litigation, the first of their kind on behalf of members of the CAF anywhere in the country." When they were commenced, no court in Canada had adjudicated the merits of novel claims such as those advanced in these proceedings. The class action against the RCMP for sexual misconduct (*Merlo*) had not yet produced a settlement.

[113] But class counsel would certainly have been aware that they were advancing claims on behalf of representative Plaintiffs who were likely to win the sympathy of the media and the government. As similar proceedings against the Crown are commenced and prompt early settlement discussions, the question will inevitably arise whether class actions on behalf of public servants who have experienced sexual or other misconduct in the course of their employment may continue to be described as "high-risk" litigation.

[114] I am nevertheless satisfied that these proceedings may be fairly characterized as complex and risky, and the results achieved as impressive. The Settlement Agreement provides substantial

compensation to those who experienced sexual misconduct in the CAF, DND, and SNPF through an efficient and non-adversarial claims process. It also provides programs to promote reconciliation and systemic change. The combined aggregate compensation of up to $900 million compares very favourably to the risks of a contested motion for national certification, a motion for summary judgment, a trial of common issues, and attendant appeals or individual assessments.

[115] The non-monetary aspects of the Settlement Agreement advance a central policy objective of class proceedings, namely behaviour modification. It is doubtful that these initiatives could be achieved through contested litigation (*Rideout v Health Labrador Corp*, 2007 NLTD 150 at para 70). As this Court held in *Merlo*, these features and benefits go well beyond what the Plaintiffs may have been awarded after a trial (at para 2).

(2) *Expectations of the Plaintiffs*

[116] The Plaintiffs say that the Settlement Agreement as an important step in mending the relationship between those who experienced sexual misconduct and the Crown, and in bringing about systemic, lasting change. While it is possible for Class Members to pursue their claims individually, as some have opted or may opt to do, this is not a viable choice for most, who may lack the financial resources and stamina to pursue novel and untested claims to trial and beyond.

[117] The fees payable to class counsel under the Settlement Agreement are to be paid directly by Canada, and do not affect the compensation and other benefits available to Class Members.

The fees compare very favourably to the 25% contingency arrangement contained in the retainer agreements between class counsel and the representative Plaintiffs.

(3) *Time expended*

[118] Class counsel report that, as of September 17, 2019, the consortium of law firms had expended 9,878.15 hours and recorded fees of $4,951,526.87. Their estimate of the fees incurred to the conclusion of the certification and approval is more than $5 million.

[119] In addition, class counsel will have to devote many hours over the next 12 to 18 months to implement the Settlement Agreement by:

(a) reviewing, revising, and approving notice materials;

(b) ensuring that notice is given in accordance with the approved plan;

(c) communicating with Class Members who contact class counsel with questions;

(d) communicating with the representative Plaintiffs;

(e) monitoring settlement implementation to ensure the processes are followed;

(f) addressing any questions or issues raised by the lead assessor or administrator in the administration of claims;

(g) reviewing updates from the lead assessor and administrator;

(h) reviewing the final distribution of compensation;

(i) participating in the Oversight Committee; and

(j) attending to any other matter that may be raised during settlement implementation that requires class counsel's attention.

[120] Class counsel estimate that in order to implement the settlement and assist Class Members through the claims process, they will expend between 4,000 and 5,000 hours with a value in the range of $2 million to $2.5 million. According to class counsel, the total time expended to date and the estimated future work amounts to between $7 million and $7.5 million in total fees.

[121] In *McLean*, Justice Phelan approved fees that represented a multiplier of five times the docketed time. However, Justice Phelan noted (at paras 36-37):

> […] the use of a multiplier as the basis for approving the fee is not appropriate. As commented upon in *Condon* and in *Manuge*, the multiplier may reward the inefficient and punish the efficient.
>
> Nevertheless, it serves as a useful check but nothing more – a factor but not a key one.

[122] In this case, the proposed fees of $26.56 million represent a multiplier of less than four times the estimated value of the time expended, including for future legal services. Like Justice Phelan, I consider this a useful check but nothing more; a factor but not a key one.

(4) *Fees in similar cases*

[123] The most common method of determining whether legal fees in high-value class actions are fair and reasonable is to assess the fees as a percentage of the total amount payable to the class. As Justice Kenneth Smith observed in *Endean v CRCS*; *Mitchell v CRCS*, 2000 BCSC 971 at paragraph 38, the use of percentage fees in "common fund" cases shifts the emphasis from the fair value of the time expended by counsel, or what one would refer to as a *quantum meruit* fee, to a fair percentage of the recovery. This approach tends to reward success and promote early settlement (*Manuge* at para 47).

[124] In *McLean*, Justice Phelan approved legal fees in the amount of $55 million, or 3% of the settlement fund:

> [54] In summary, the legal fees will be in the 3% range.
>
> [55] In my view, this range is consistent with other mega-fund type settlements such as "Hep C" (*Parsons* and related cases at $52.5 million on $1.5 billion settlement, approximately 3.5%), "Hep C – Pre/Post" (*Adrian* and related cases at $37.2 million on $1 billion settlement, approximately 3.7%), "IRRS" (*Baxter* and related cases at approximately 4.5%), "60's Scoop" (*Riddle v Canada*, 2018 FC 641, 296 ACWS (3d) 36, and *Brown v Canada (Attorney General)*, 2018 ONSC 5456, 298 ACWS (3d) 704, at $75 million on $625-875 million, at its lowest approximately 4.6%), and *Manuge* at 3.9% (paid by the Class).

[125] The legal fees sought by class counsel amount to approximately 2.95% of the total compensation payable to Class Members. If the total value of the settlement is taken into account, including compensation, administration, notice, policy measures, external reviews, and

the restorative engagement program, then the legal fees represent approximately 2.5%. This compares favourably to the fees awarded in similar cases.

(5) *Conclusion on legal fees*

[126] Measured against the jurisprudence, and having regard to all of the pertinent factors discussed above, the legal fees sought by class counsel are fair and reasonable, and should be approved.

V. Order

[127] For the foregoing reasons, an Order shall issue: (a) consolidating these actions for settlement purposes; (b) certifying these actions as class proceedings for settlement purposes; (c) approving the Settlement Agreement; (d) approving notice of the Settlement Agreement and notice of the opt out and claims periods; and (e) addressing other ancillary matters.

"Simon Fothergill"
Judge

Ottawa, Ontario
November 25, 2019

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2111-16 AND T-460-17
DOCKET:	T-2111-16
STYLE OF CAUSE:	SHERRY HEYDER, AMY GRAHAM AND NADINE SCHULTZ-NIELSEN v THE ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-460-17
STYLE OF CAUSE:	LARRY BEATTIE v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATES OF HEARING:	SEPTEMBER 19, 2019, SEPTEMBER 20, 2019, OCTOBER 3, 2019
REASONS FOR ORDERS:	FOTHERGILL J.
DATED:	NOVEMBER 25, 2019

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