Federal Court Cour fédérale

Date: 20250213

Docket: T-2158-16

Citation: 2025 FC 282

Ottawa, Ontario, February 13, 2025

PRESENT: Madam Justice McDonald

CLASS PROCEEDING

BETWEEN:

A.B. AND JEAN-PIERRE ROBILLARD

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

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REASONS FOR ORDER

[1] On this Motion, the Plaintiffs ask that this matter be certified as a class proceeding for members and former members of the Canadian Armed Forces (CAF) who suffered racial discrimination and/or racial harassment in connection with their military service since April 17, 1985. The Plaintiffs also ask that the Court approve the Final Settlement Agreement entered into on June 6, 2024.

[2] The Final Settlement Agreement provides for settlement funds of $150,000,000, for the payment of individual Common Experience Payments of $5,000 to each class member and an additional payment of up to $30,000 to class members who provide a narrative of their experience. The Final Settlement Agreement also includes Systemic Relief Measures, a Restorative Engagement Process, and a personalized apology letter from the Chief of Defence Staff.

[3] This Motion was heard in Halifax, Nova Scotia on July 16 and 17, 2024. Members of CAF attended the hearing in person and virtually. The Court also received over 600 written Participation Forms submitted by potential class members explaining their personal experiences with racial slurs, harassment, and discrimination. They explained that the discrimination they experienced was not confined to isolated incidents, but was repetitive, long-lasting, and in some cases career-altering. Those who oppose the proposed settlement argue that the settlement amount is too low, and that it does not reflect the lasting impact of discrimination. They also note that the perpetrators of the discriminatory conduct are not being held accountable. Many emphasized that CAF requires structural changes to address discrimination.

[4] These objections fail to recognize the significant non-monetary features of the Final Settlement Agreement, specifically the Systemic Relief Measures and the Restorative Engagement Process. These measures are specifically designed to target internal structural changes within CAF to address the systemic nature of racial discrimination and/or racial harassment.

[5] The Defendant consents to the Motion for certification and approval of the Final Settlement Agreement.

[6] On a Motion for certification and approval of the Final Settlement Agreement, the Court is limited to determining: (1) if this matter should be certified as a class proceeding; and (2) whether the proposed settlement is fair and reasonable. The Court cannot amend the provisions of the proposed settlement – it can only approve or reject the settlement.

[7] Below I outline the reasons for certifying this as a class proceeding and for approving the Final Settlement Agreement on the terms negotiated. I am satisfied that the Final Settlement Agreement is fair, reasonable, and in the best interests of the class as a whole. I also approve the payments of honorarium and the payment of legal fees of class counsel.

I. Background

[8] The Statement of Claim in this matter was filed on December 14, 2016, as a proposed class proceeding relating to systemic racial discrimination and harassment within the CAF. Although the Statement of Claim has been amended, the core claims remain unchanged.

[9] In December 2017, in response to the Statement of Claim, the Defendant filed a Motion to strike the Statement Claim on various grounds including: that there was no cause of action in negligence as the CAF does not own a duty of care to members; that there are CAF internal dispute resolution processes; that section 9 of the *Crown Liability and Proceedings Act* acts as a bar to the claim; and that section 92 of the *Canadian Forces Members and Veterans Re-establishment Compensation Act* acts as a pension bar.

[10] The Defendant's Motion to strike was withdrawn in February 2018 when the parties agreed to discuss a potential resolution of the claim.

[11] In August 2019, the parties entered into an agreement in principle to settle the proceeding and they worked toward the terms of the Final Settlement Agreement. As part of that process, the parties engaged independent subject matter experts to advise on the settlement-related matters including the Monetary Assessment Scheme (MAS), Systemic Relief Measures (SRM), mental health supports for class members, and developing a trauma-informed and culturally competent approach to the claims process.

[12] The Court was advised that a settlement had been reached and the parties requested a Motion for the approval of the Notice Plan to class members. On April 2, 2024, I approved the Notice Plan (2024 FC 505).

[13] The parties undertook the task of providing Notice by various means to potential class members of the CAF and recipients of Veterans Affairs Canada benefits. Notice was

disseminated via social media, the intranet, veterans' organizations, and veterans' publications. Class Counsel for the Plaintiffs also posted the Notice Forms on their website.

[14] The Notice advised of the dates for the hearing of the Motion to certify the matter as a class proceeding and to approve the settlement. Class members were asked to complete Participation Forms indicating if they approved or objected to the proposed settlement. At the hearing of the Approval Motion, the Court was provided with the Participation Forms that had been received by Class Counsel.

A. *Evidence on this Motion*

[15] In support of this Motion for certification and settlement approval, the following evidence was filed:

> Affidavit of Representative Plaintiff A.B., affirmed June 17, 2024.
>
> Affidavit of Representative Plaintiff Jean-Pierre Robillard, affirmed June 18, 2024.
>
> Affidavit of Lydia S. Bugden, K.C., affirmed June 19, 2024. Ms. Bugden is the Chief Executive Officer and managing partner of Stewart McKelvey, who acts as Class Counsel.
>
> Affidavit of Etienne Vincent, sworn June 12, 2024. Vincent was a Defence Scientist within the Director General Military Personnel Research and Analysis (DGMPRA). Vincent summarizes the data reviewed and the methodology developed by DGMPRA to estimate of the number of current or surviving CAF members who had served since April 17, 1985 and had identified as Indigenous or as members of a visible minority group, as of December 31, 2020.
>
> Affidavit of Genevieve Svab affirmed on July 5, 2024. Ms. Svab is a legal assistant with Class Counsel and was directly involved in

the collection, review and redaction of the Participate Forms from potential class members.

II. Issues

[16] The issues are:

A. Certification as a class proceeding

B. Approval of the Final Settlement Agreement

C. Approval of Class Counsel Fees

D. Payment of Honoraria

E. Appointment of Claims Administrator

III. Analysis

A. *Certification as a class proceeding*

[17] Rule 334.16 of the *Federal Courts Rules*, SOR/98-106 outlines the considerations for certifying a class proceeding. The Rule is to be given a broad, liberal, and purposive interpretation in order to achieve its foundational policy objectives of access to justice, judicial economy, and behaviour modification (*Merlo v Canada*, 2017 FC 51 at para 8 [*Merlo*]).

[18] The focus 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" (*Heyder v Canada (Attorney General)*, 2019 FC 1477 at para 25 [*Heyder*]).

[19] Where, as here, there is a negotiated settlement of the proposed class action and a joint motion to certify the action and settlement on consent, "the threshold for certification is lower and the Court may apply a less rigorous approach" (*Heyder* at para 24).

[20] Against these considerations, I will now turn to consider the relevant individual considerations of Rule 334.16.

(1) Reasonable Cause of Action

[21] In assessing if a reasonable cause of action is made out, the Court is to assume that the facts plead in the Statement of Claim are true (*Merlo* at para 12).

[22] Here in the Amended Statement of Claim, the Representative Plaintiffs, A.B. and Jean-Pierre Robillard detail their experiences of racial discrimination and racial harassment in the CAF. They detail the personal, professional, physical and psychological impacts of this treatment. They make claims for vicarious liability for systemic negligence and breach of section 15(1) of the *Canadian Charter of Rights and Freedoms*.

[23] The Plaintiffs claim CAF is vicariously liable for systemic negligence and in breach of its duty of care for:

a) making derogatory comments about the Plaintiffs' and Class Members' race, which suggested the Plaintiffs and Class Members were less worthy and less competent because of their race;

b) harassing the Plaintiffs and Class Members because of their race, national or ethnic origin, and colour;

c) failing to intervene when derogatory racial comments and harassing misconduct were observed and to hold accountable those Crown Servants who so commented and harassed in a racist fashion;

d) perpetuating a workplace culture where racism was considered acceptable;

e) failing to have in place and/or implement policies, procedures and guidelines to proactively or adequately address, investigate, and remedy complaints of racial discrimination;

f) failing to adequately investigate complaints of racial discrimination in a thorough, timely, impartial and effective manner;

g) depriving the Plaintiffs and Class Members of opportunities within the Canadian Forces because of their race;

h) ignoring and/or improperly interfering with reports from the Ombudsman highlighting the systemic problem of racial discrimination in the Canadian Forces and the absence of adequate policies, procedures or guidelines to effectively respond thereto;

i) interfering in complaints without authority to do so; and

j) effectively punishing the Plaintiffs and Class Members for making complaints, thereby further isolating these individuals from their peers in the Canadian Forces.

[24] Systemic negligence claims have been found to support a reasonable cause of action by this Court in *BW v Canada (Attorney General*), 2024 FC 77 at paragraph 87 and *Thomas v Attorney General*, 2024 FC 655 at paragraph 79.

[25] The Plaintiffs also allege their section 15 *Charter* right to be free from discrimination on the basis of race, national or ethnic origin and/or colour, were infringed by CAF in:

a) permitting and/or failing to prevent differential negative treatment of the Plaintiffs and Class Members on the basis of their race; and

b) perpetuating racial stereotypes.

[26] Section 15(1) is *prima facie* breached where actions are (a) on its face or in its impact, creates a distinction based on enumerated or analogous grounds, and (b) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27).

[27] Section 15(1) claims have been found to be reasonable causes of action in *Merlo* and *Heyder*.

[28] Accepting the facts pled in the Statement of Claim as true, I am satisfied that the Plaintiffs have established reasonable causes of action pursuant to Rule 334.16(1)(a).

(2) Identifiable class

[29] On the four criteria for certification - identifiable class, common questions, preferable procedure and character of the representative plaintiff - the Plaintiffs bear the burden of adducing evidence to show "some basis in fact" in support of these criteria (*Canada v. Greenwood*, 2021 FCA 186 at para 94).

[30] The purpose of a class definition is to identify the class and to have a clear definition of those who may be entitled to relief, and to provide objective criteria to identify possible members of the class (*Merlo* at para 15).

[31] In this case the proposed class definition is:

> All persons who are or who have been enrolled as CAF Members at any time from April 17, 1985, and for any duration up to and including the Approval Date, and who assert that they have been subjected to Racial Discrimination and/or Racial Harassment.

[32] The proposed class definition here is clear and potential class members can easily identify if they fall within the definition. I note that there is the potential for there to be a large number of potential class members. Class Counsel indicates they have been contacted by over 1,000 potential class members asserting unresolved issues of racial discrimination and harassment within the CAF. Further, in his Affidavit, Etienne Vincent, a Defence Scientist at Defence Research and Development Canada estimated a potential class size of 45,842 (Vincent Affidavit at para 21).

[33] On these facts, I am satisfied that the Plaintiffs have provided some basis in fact to support the proposed class definition. The definition clearly identifies the class and meets the requirements of Rule 334.16(1)(b).

(3) Common question

[34] The proposed common question here is: Is the Defendant liable to the class members?

[35] The question of the "liability" of the Defendant as proposed is the common question that applies to each member of the Class who has a claim arising out of racial harassment or discrimination they experienced while a member of CAF.

[36] The threshold that must be met to find that there are common questions is a low one (*Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para 72 [*Vivendi*]). The Court is to take a purposive approach in assessing common issues (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 108). However, there must be some evidentiary basis or "some basis in fact" demonstrating that common issues exist beyond a bare assertion in the pleadings (*Hollick v Toronto (City), 2001 SCC 68* at para 25).

[37] The common question is the “substantial ingredient” of each class member’s claim, and it allows the claim to proceed as a representative one and avoids duplication of fact-finding or legal analysis (*Merlo* at para 21). In this case, even though there will be individual assessments of claims beyond the common experience payment, the answer to the question of the Defendants liability to each class member is a question that is common to each class member (*Merlo* at para 25, citing *Cloud v Canada (Attorney General)*, 2004 CanLII 45444 (ON CA), [2004] OJ No 4924 at paras 64–66 [*Cloud*]).

[38] Considering the low bar to satisfy the common question criteria, and considering the parties have reached a settlement, I am satisfied that the common question posed meets the objectives of Rule 334.16(1)(c).

(4) Preferable procedure

[39] On this criteria, the question is if a class proceeding is the preferable method to bring forward the claim. As noted in *Heyder* at para 37, a class proceeding may be the preferable procedure in cases where:

> 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.

[40] Here there are a number of factors that favor a class proceeding such as: the systemic nature of claims; the potential size of the Class; fear of reprisal for CAF members; and the ability to distribute the litigation costs across the class.

[41] In these circumstances I am satisfied that a class proceeding is the preferable procedure to advance these claims.

(5) Representative Plaintiffs

[42] Rule 334.16(1)(e) requires the Court to consider if the representative Plaintiffs:

> **(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.

[43] At the opening of the hearing of this Motion, one of the named representative Plaintiffs, Wallace Fowler, asked to be removed from the action as he has chosen to pursue his own claim. The request was granted, and the Claim was amended to reflect this change. However, Mr. Fowler had previously been actively engaged in this litigation.

[44] In their Affidavits, the remaining representative Plaintiffs, A.B. and Mr. Robillard, outline their personal experiences of racial discrimination and harassment while serving in the CAF. They explain their involvement in this litigation and the settlement process which took years. They detail their involvement in meetings, conference calls, and email exchanges with lawyers, both prior to settlement negotiations and while negotiations were ongoing. They have been actively involved in the litigation and have provided instructions to Class Counsel. Representative Plaintiffs A.B., Wallace Fowler, and Jean-Pierre Robillard were cross-examined on their Affidavits in preparation for the Motion to strike.

[45] In November 2016, the representative Plaintiffs signed Contingency Fee Agreements (attached to their Affidavits) with Class Counsel. They also entered a Litigation Plan with Class Counsel and executed on a detailed Notice Program. They have confirmed they are not aware of any conflicts of interest with other class members and no such conflicts have been raised.

[46] Overall, I am satisfied that the representative Plaintiffs, who have been fully engaged in this litigation for many years, have fairly and adequately represented the interests of the class and will continue to do so.

(6) Conclusion on certification

[47] The Motion, brought on consent, for the certification of this matter as a class proceeding is granted.

B. *Approval of the Final Settlement Agreement*

(1) Legal test

[48] In approving the Final Settlement Agreement, the Court must assess if the proposed settlement is "fair, reasonable, and in the interests of a class as a whole". The Court cannot modify or alter the Final Settlement Agreement. It may only approve or reject it and the standard is reasonableness and not perfection (*Merlo v Canada*, 2017 FC 533 at paras 16–18 [*Merlo Settlement*]).

[49] The Court must show deference to the process that resulted in the negotiated settlement and there is a presumption of fairness when the settlement is negotiated at arm's length with experienced counsel (*Heyder* at paras 61 and 64).

[50] The factors to be considered when asked to approve a settlement have been outlined in number of cases and are addressed below.

(2) Key terms of the Final Settlement Agreement

[51] In considering the reasonableness of the proposed settlement I will highlight some of the key features of the FSA.

[52] On June 6, 2024, the FSA was signed by the parties. The preamble to the FSA states:

> The Plaintiffs and the Defendant (together, the "Parties") recognize and acknowledge that racial discrimination and racial harassment have no place in the CAF, and further recognize and acknowledge the harm suffered by class members who have experienced racial discrimination and racial harassment in the CAF.
>
> The Parties further acknowledge that experiencing racial harassment and/or discrimination undermines the very camaraderie necessary to a cohesive and effective military, and that racial harassment and/or discrimination in the CAF has unique consequences given the military climate and feelings of betrayal experienced by racialized CAF members who are often called upon to live and work around the clock with the perpetrators of racial harassment and/or discrimination, such as in basic training, on CAF bases, deployments, or ships.

[53] The proposed Class is defined as follows:

> All persons who are or who have been enrolled as CAF Members at any time from April 17, 1985, and for any duration up to and including the Approval Date, and who assert that they have been subjected to Racial Discrimination and/or Racial Harassment.

[54] Racial discrimination is defined to mean:

> any unfair treatment, adverse differentiation or bias occurring in connection with military service and involving military members (CAF or foreign), DND employees, Staff of the Non-Public Funds employees, or CAF/DND contractors, and that is based on an individual's race, ethnicity, colour and/or Indigeneity.

[55] Racial harassment is defined to mean:

> any conduct that is based on another individual's race, ethnicity, colour and/or Indigeneity that is known or should reasonably be known to be offensive or cause harm – including objectionable act(s), comment(s), or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat - occurring in connection with military service and

> involving military members (CAF or foreign), DND employees, Staff of the Non-Public Funds employees, or CAF/DND contractors. Harassment may be a series of incidents or one incident which has a lasting impact on the individual.

[56] The word “compensation” is intentionally not used within the FSA in recognition that money cannot make someone whole again.

[57] Under the Monetary Assessment Scheme of the FAS, class members are entitled to Common Experience Payment of $5,000 and may claim an additional payment if they provide a narrative of their experiences of racial discrimination and or racial harassment. The narratives are assessed by independent assessors who will determine the level of additional compensation based upon the duration and severity of the discrimination based on an assessment grid - Level A $10,000, Level B $ 20,000, or Level C $30,000.

[58] The Monetary Assessment Scheme payments to class members of between $5,000 and $35,000 may be subject to a pro rata increase or decrease depending on the number of class members who make a claim. That is a function of the fact that the total sum of money available to settle all claims is capped at $150,000,000. The FSA outlines the formula that will be applied and the Notice explained the potential increase or decrease as follows:

> The individual payments to Class Members, as assessed by the Independent Assessors, may need to be reduced on a *pro rata* basis so that the total amount of payments to Class Members does not exceed $150 million.
>
> If the total amount of individual payments to Class Members is less than $100 million, the individual payments to Class Members may be increased by a maximum of 20%.

[59] The potential for an increase or decrease in payments to class members applies equally to all class members depending on the size of the class.

[60] The Monetary Assessment Scheme payments will be assessed in a trauma-informed manner "that accepts that racialized persons within the CAF have experienced racism and engages in a process of healing rather than subjects them to onerous investigation."

[61] The CAF has also agreed to provide a personal letter of apology to any class member who requests one, on the condition that it will not be admissible in any civil, criminal or administrative proceeding or arbitration as evidence of fault or liability.

[62] In addition to the individual monetary compensation, the FSA also dedicates funds to Systemic Relief Measures (SRM) intended to improve CAF organizational culture and systems with the objective of addressing and eliminating racial discrimination and racial harassment. The stated purpose of the SRM is:

> To eliminate Racial Discrimination and Racial Harassment by responding to, addressing, and removing Systemic Barriers in the CAF that restrict building a workplace that is characterized by trust, free from Racial Discrimination and Racial Harassment and where every person is treated with dignity and respect.

[63] The SRM is intended to build on and implement the recommendations of (1) the Report released in the Spring of 2022 by the Minister of National Defence Advisory Panel on Systemic Racism and Discrimination with a focus on Anti-Indigenous and Anti-Black Racism, 2SLGBTQ2IA+ Prejudice, Gender Bias, and White Supremacy; and (2) the apology and report delivered on July 9, 2022 by the Prime Minister and the Minister of National Defence to

descendants of the Number 2 Construction Battalion, recognizing the legacy of Systemic Racism and Discrimination that denied the men of this all-Black battalion fighting role, support and care, and later recognition and commemoration. The apology was accompanied by a report of the Number 2 Construction Battalion National Apology Advisory Committee.

[64] There is a four-year timeline to fulfill the SRM with details around consultations and reporting requirements and benchmarks outlined in the FSA. The cost of this program is covered by CAF.

[65] The SRM will allow class members the option of participating in a restorative engagement process to communicate their experiences of racial discrimination and/or racial harassment with senior CAF leadership with the assistance of qualified and trained restorative practitioners.

[66] The parties engaged subject matter experts to advise on all aspects of the FSA including the Monetary Assessment Scheme (MAS) and the Systemic Relief Measures (SRM) to ensure there are mental health supports for class members, and to create a trauma-informed and culturally competent approach to the claims process.

[67] The FSA provides for an honoraria payment of $30,000.00 to the three representative Plaintiffs. Further if Class Counsel fees are approved, the FSA provides that Class Counsel will pay an additional $20,000.00 to each of the named representative Plaintiffs and $30,000.00 to Rubin Coward.

[68] For legal fees, the FSA provides that the Defendant will pay $5,000,000.00 plus applicable tax within 60 days of the implementation date. No amount is to be deducted from the payments made to class members on account of legal fees. The Defendant is also to pay within 60 days the disbursements incurred by Class Counsel up to the Approval Date, provided there are detailed invoices and receipts. Class Counsel will provide supporting invoices and receipts to the Defendant at least 15 days prior to the Approval Hearing. Class Counsel also agreed to provide reasonable assistance to class members throughout the claims process at no additional charge.

[69] The provision of the FSA relating to the payment of the honoraria (Article 14.01) and legal Fees (Article 17.02) are severable from the FSA, meaning that even if the Court were not to approve these payments, the other terms of the FSA remain in effect.

[70] The claims process is designed to be trauma-informed to reduce the need of class members to share past trauma and there is no requirement to provide corroborative evidence. Class members will be provided with trauma-informed supports and legal supports at no cost. It is an important consideration of the proposed settlement that it is a non-adversarial, paper-based process that is streamlined and intended to avoid further trauma.

[71] The Defendant has also agreed to waive the usual restriction on double recovery, such that members will be entitled to monetary reward even if they have received payments or damages in another process. Further, class members who have received, or are eligible to receive VAC benefits are not excluded from this class proceeding.

[72] In my view, the non-monetary aspects of the FSA achieve one of the "central policy objective of class proceedings, namely behaviour modification" (*Heyder* at para 115).

(3) Likelihood of recovery or success

[73] One of the criteria that informs the reasonableness of the proposed settlement is the likelihood of recovery or success if the litigation continued. This is considered in relation to the nature of the claims made and the potential defences available to the Defendant. This class proceeding has been ongoing since 2016 when the Statement of Claim was filed. In 2017, the Plaintiffs served their Certification Motion and in response, in December 2017, the Defendant filed a Motion to Strike the statement of claim.

[74] In their Motion to strike, the Defendant raised a number of defences including: alleging that there is no cause of action in negligence as the CAF does not own a duty of care to members; that there are CAF internal dispute resolution processes; that section 9 of the *Crown Liability and Proceedings Act* acts as a bar to the claim; and that section 92 of the *Canadian Forces Members and Veterans Re-establishment Compensation Act* acts as a bar to recovery.

[75] If the Court does not approve this settlement, there is no guarantee that the parties will go back to the negotiating table, rather there is a risk that the Defendant may choose to move forward with the litigation and aggressively defend the action. If so, the Defendant may be successful on some or all of the defences. If the Defendant were successful with some defences, there may be no recovery for some or all members of the class. For example, given the historical

nature of many of these claims, there is also a real risk that the Defendant would have valid limitation defences absent the negotiated settlement.

[76] This is a complex claim spanning many years involving thousands of potential class members across all levels of the CAF. As noted by Class Counsel, even assuming the proceeding got certified, success on the merits was not guaranteed and a common issues trial would be years away.

[77] The alternative to a class proceeding would be individual claims where members would have to fund their own litigation and face multiple barriers to recovery including the claims barred by limitation periods, jurisdictional arguments, and the re-traumatization of proving claims based on personal and traumatizing experiences.

[78] These factors strongly support the reasonableness of the negotiated settlement.

(4) Likely duration of litigation

[79] The Plaintiffs accept that this litigation would likely have continued for many years if a settlement had not been negotiated. For example, a contested motion for certification would have taken multiple days, require additional evidence with potential cross-examination. Any common issues trial would likely not have been completed for several years. Multiple individual proceedings could ensue if certification is not successful and appeals would be inevitable.

[80] Given the historical nature of many of the claims, Courts have recognized the unique benefits of a timely settlement for historical events (*Gallant v The Roman Catholic Episcopal Corporation of Halifax*, 2022 NSSC 347 at para 19).

(5) Legal work undertaken

[81] The question on this criterion is if Class Counsel "developed a complete understanding of underlying facts and circumstances of the claims" (*Merlo Settlement* at para 23). In this case, Class Counsel has been involved in this matter since 2016 when the Claim was filed. Legal counsel prepared Certification materials and prepared to respond to the Defendant's Motion to strike. Following which, the parties engaged in years of settlement discussions and undoubtedly came to understand the complexities of advancing the case, the potential barriers to recovery, and the risks involved.

[82] As noted in the Affidavit of Ms. Budgen, K.C., Class Counsel has undertaken significant work on this proceeding including the following: filing the Statement of Claim in December 2016; preparing certification materials; preparing a response to the Defendant's certification record; preparing a response to the Defendant's motion to strike; preparing the Plaintiffs for cross-examination on their certification affidavits in January 2018; negotiating the Agreement in Principle; developing the Monetary Assessment Scheme and Systemic Relief Measures, working with the Defendant and with the subject matter experts; negotiating and drafting the Final Settlement Agreement; preparing materials and attending the hearing of the motion to approve notice of the certification and settlement approval hearing; implementing the resulting Notice Plan; preparing materials in support of a motion to amend the Statement of Claim and to permit

A.B. to proceed by use of pseudonym initials going forward; and bringing the matter to a certification and settlement approval hearing.

[83] I am satisfied that Class Counsel has developed a complete understanding of the underlying facts and circumstances of the claims.

(6) Recommendations of Class Counsel

[84] Having been involved in this claim since 2016 and having spent the past 6 years involved in negotiations, Class Counsel fully recommends the settlement.

(7) Communications with class members

[85] Class Counsel has outlined their communications with the representative Plaintiffs and Mr. Coward. The Representative Plaintiffs have also had many communications with potential class members.

[86] The Notice period began on May 1, 2024, when potential class members were advised of the terms of the proposed settlement and asked to complete a Participation Form indicating if they object or support the settlement terms and the proposed fees and disbursements of Class Counsel. As of the date of the Motion, over 1,000 potential class members contacted Class Counsel and over 600 Participation forms were received.

[87] I am satisfied that Class Counsel executed the Notice Plan and potential class members have been appropriately advised and updated on the progress of this class proceeding.

(8) Support for the Settlement

[88] Both representative Plaintiffs, A.B. and Mr. Robillard express their support of the proposed settlement in their Affidavits. As their reasons are similar, I will refer to the following from the Affidavit of A.B.:

> 60. I have carefully reviewed and considered the Final Settlement Agreement, and I have also discussed it with my lawyers. I believe that the Final Settlement Agreement is fair, reasonable, and in the best interests of the Class.
>
> 61. I say this for the following reasons.
>
> 62. First, the settlement is the result of extensive negotiation over the course of approximately 6 years. During these negotiations, the Parties have engaged several independent experts who advised on the Monetary Assessment Scheme and the Systemic Relief Measures.
>
> 63. Second, Class Members may choose to receive a personalized letter of apology from the Chief of the Defence Staff. For me personally, this is a critical component of the settlement.
>
> 64. Third, the Defendant has committed itself to extensive Systemic Relief Measures and institutional change. For me, this has been an essential priority and goal throughout the settlement negotiations. The implementation of these measures will hopefully go a long way toward the elimination of racism within the Canadian Forces, and lead to a stronger and more enriching environment for generations to come.
>
> 65. Fourth, Class Members may choose to participate in the Restorative Engagement Processes, which are focused on healing and closure, and which will allow Class Members to share their experiences with senior leadership in the Canadian Forces and the Department of National Defence.
>
> 66. Fifth, the Parties (and their counsel) have committed themselves to a trauma-informed approach in the implementation of the settlement. This includes a claims process in which:

(a) Class Members will be entitled to a Common Experience Payment, without having to share any details about past trauma or experience.

(b) Class Members may provide a narrative about their experiences with racism in the Canadian Forces, if they wish to have their claim assessed for an additional amount under the Monetary Assessment Scheme. In doing so, Class Members will be taken at their word and will not have to submit corroborating evidence or medical diagnoses in support of their claim.

(c) Class Members will have access to trauma-oriented supports through the Claims Administrator during the claims process, at no cost.

(d) Class Members will also have access to legal supports from Class Counsel throughout the claims process, at no cost.

67. Sixth, the Defendant has agreed to expand the scope of Class Member participation back to April 1985. As my lawyers explained to me, this means that many Class Members will be entitled to a monetary award under the settlement despite the expiry of any statutory limitation periods.

68. Seventh, my lawyers have explained to me that the Defendant has also agreed to waive its usual restriction on prevention of double recovery. I understand that this means Class Members will be entitled to a monetary award under the settlement even if they have received payment or damages through another settlement process, through a court decision or human rights complaint, or through another court or administrative proceeding.

69. As a final reason for my support of the Final Settlement Agreement, my lawyers have advised me of the risks and timelines associated with a contested certification motion and a common issues trial. Even if liability was ultimately found against the Defendant at the end of a common issues trial, I further understand that individual issues could remain open for adjudication and that the Court would be limited in terms of the relief it could ultimately order and award against the Defendant. To give a few examples, I understand it is unlikely that the Court would (or could) impose upon the Defendant:

(a) an apology;

(b) the Systemic Relief Measures; and

(c) the Restorative Engagement Processes.

[89] Class Counsel provided the Court with copies of 690 Participation Forms received from class members (with personal information redacted) attached to the Affidavit of Genevieve Svab. As noted by Ms. Svab, 630 of 690 of those Forms express support for the proposed settlement. The following are some of the reasons noted in the Participation Forms for supporting the settlement:

- Expediated resolution,
- Settlement will provide a smoother unbiased resolution rather than protracted litigation.
- Guaranteed outcome under proposed terms.
- Scaled outcomes based on individual experiences.
- I hope this settlement can at least bring awareness to this problem.

(9) Objections to the settlement

[90] Wallace Fowler was a named Representative Plaintiff in this action but has since decided to file his own action. He objects to the settlement because of the amount of the settlement, and he alleges collusion between the lawyers and military officials. I accept that Mr. Fowler does not support this settlement, however he has not provided any evidence of the alleged “collusion” and I take that statement to be grounded on his opinion that the settlement is not appropriate - rather than a reference to any inappropriate conduct.

[91] In the Participation Forms some class members stated their objections to the proposed settlement. At the hearing of the Motion several objections were voiced as well. Those who spoke provided disturbing accounts of the discrimination they experienced – the lasting impact of their experiences was palpable.

[92] The Court heard repeatedly that racism is not a one-time experience, and that many were exposed to racism on a constant basis. The common themes included (i) the settlement amount is too low; (ii) CAF requires structural changes; (iii) CAF perpetrators of racism are not held to account; and (iv) inadequate communications to French class members. I will address these below:

> (i) The settlement amount is too low: Some describe the settlement proposed as a slap in the face or woefully inadequate. The settlement amount was described as a license fee to discriminate. Some explained that based on their years of service the compensation amounted to pennies per day. Many repeated that there is no amount of money that can compensate for the discrimination that has been suffered. Still others explained that they lost income and lost the opportunity for career advancement.

[93] I understand these objections. However, a negotiated settlement is by its very nature a compromise. It is possible that some plaintiffs might get more compensation after a trial – but it is equally possible that some may get less compensation or no compensation if some or all of the defences raised by Canada are successful. As well, if this settlement is not approved, any trial may be years away. Finally, for those who are fully opposed to this settlement, there is the

option for class members to opt out of this litigation and bring their own claim at their own expense.

> (ii) CAF requires structural changes: CAF was described as an institution for white people and an organization that needs cultural change through the full chain of command. Some say that the chain of command supports racism. Others said that you need to brace yourself if you are racial minority in the CAF. Black female CAF members said they suffered a double whammy of being black and female. Many said those in the chain of command who witnessed racism did nothing about it.

[94] In response to these objections, I would note that it was obvious that some of those who raise these objections had not fully understood or appreciated the terms of the Final Settlement Agreement specifically designed to address CAF organizational culture and systems with the objective of addressing and eliminating racial discrimination and racial harassment. The Final Settlement Agreement dedicates funds and efforts to Systemic Relief Measures. These measures build on the recommendations in a Report released in the Spring of 2022 by the Minister of National Defence Advisory Panel on Systemic Racism and Discrimination and the apology delivered on July 9, 2022, by the Prime Minister and the Minister of National Defence with the report of the Number 2 Construction Battalion National Apology Advisory Committee.

> (iii)CAF perpetrators of racism are not held to account: several objections to the settlement related to the fact that there is no mechanism to hold to account those who were responsible for the racial harassment and discrimination. The lack of

> consequences for perpetrators and no sanctions was a common theme. Related to this is the commonly expressed experience that racialized members were not believed when they complained.

[95] Firstly, it is true that the Final Settlement Agreement does not provide any such remedy. Secondly however, there is no claim made for this type of relief in the Claim and it is relief that is beyond the jurisdiction of the court. Finally, and in any event, the systemic relief measures, while not designed to hold people to account, will create an atmosphere at CAF where this conduct will not be tolerated in future.

> (iv)Inadequate communications to French class members: Some Francophone class members raised objections to the fact that a full copy of the final settlement agreement was not available in French with the Notice Plan until days before they were required to file participation forms. Their point was that the deadline was too short to make meaningful submissions.

[96] This is not really an objection to the settlement but more of a complaint about the Notice Plan process. That said, the Court accommodated all of those who wished to speak to the settlement in person or virtually, even if they had not completed a Participation Form by the deadline.

[97] Overall, despite the objections raised, I am not satisfied that the objections "take the proposed settlement outside the zone of reasonableness" (*Heyder* at para 94). Further the objections to the monetary amounts must be weighed against the risks of contested and continued

litigation. Finally, for class members who disapprove of the settlement they can Opt Out in accordance with Section 3.05 of the FSA.

(10) Good faith negotiations and absence of collusion

[98] There is a presumption of fairness when a settlement has been negotiated at arm's length and is recommended by experienced counsel (*Heyder* at para 64). I would add that in this case that the involvement of subject matter experts is a further factor supporting the "good faith" nature of the negotiations. There is no evidence of collusion. The lengthy negotiations were conducted in good faith with the intention of reaching a resolution.

(11) Conclusion on approval of the Final Settlement Agreement

[99] Having outlined and considered the factors above, I conclude that the proposed Final Settlement Agreement is fair, reasonable and in the best interests of the class as a whole. The Final Settlement Agreement is therefore approved.

C. *Approval of Class Counsel legal fees*

[100] The FSA provides for the amount of $5,000,000.00 plus taxes to be paid by the Defendant to Class Counsel for legal fees. An important consideration on the approval of legal fees is that here the fees are not deducted from the amounts payable to Class Members.

[101] In approving Class counsel legal fees, the Court considers if they are "fair and reasonable" in all the circumstances considering the following factors: the risks undertaken; the

results achieved; the complexity of the issues; the importance of the litigation to the plaintiffs; the degree of responsibility assumed by counsel; the quality and skill of counsel; the expectation of the class; the ability of the class to pay; the time expended; and fees in similar cases.(*Heyder* at para 108).

(1) Risks, results & responsibility assumed by class counsel

[102] There can be no question that class counsel assumed significant risk in taking on this class proceeding. Success was far from certain and there were real risks in relation to the viability of some of the claims made. There were evidentiary challenges in trying to prove systemic harms. As noted in *Merlo Settlement*, and equally applicable here, the fact that no other law firm filed parallel class actions is an indication that these claims were perceived as complex and unlikely to succeed. I also note that class counsel solely assumed the risk on this claim as there is no consortium of other lawyers with whom the risk was shared (*Merlo Settlement* at para 84).

[103] The terms of the FSA are very favourable considering that class Members can make a claim for discrimination going back as far as April 17, 1985. These claims would otherwise be time-barred. Further the Common Experience Payment of $5,000 is available to all class members without having to tell their story with additional payments of up to $30,000 available if they provide narrative evidence. There are also meaningful non-monetary features of the Final settlement agreement as described above.

[104] The experience of Class Counsel is detailed in the Affidavit of Ms. Bugden K.C. who notes the firm has expertise in class action litigation and Mr. Campbell has acted as counsel of record in many class proceedings over the past 18 years.

(2) Complexity of the proceeding

[105] This claim raised complex and novel issues by advancing a claim for vicarious liability for systemic negligence and breach of section 15(1) of the *Charter*. Such a claim presents complex legal and evidentiary issues given the difficulty of proving systemic misconduct and racial discrimination under the *Charter* (AB Affidavit at paras 33-42; Robillard Affidavit at paras 29-32). Furthermore, the Defendant had numerous viable defences as noted in their Motion to Strike.

(3) Importance to Plaintiffs

[106] As explained in the Affidavit of AB at paragraph 64, central to this settlement are the Systemic Relief Measures to promote institutional change. This focus reflects the importance of the litigation to the Plaintiffs, whose mental health, dignity and self-worth were seriously impacted by the racism they experienced in CAF. For the Plaintiffs, this case is not only about compensation but also about achieving meaningful change to address the harm they endured and to prevent future discrimination.

(4) Expectation of class and ability of class to pay legal fees

[107] The representative Plaintiffs entered into a Contingency Fee Agreement with Class Counsel providing that Class Counsel would not be entitled to recover legal fees, costs, disbursements in the event of no success. Upon success, the Agreement provided for a contingency fee payment of between 27% -33%.

[108] Based on the terms of the FSA, class counsel fees are $5 million which represents 3.33% of the settlement amount as opposed to the amount Counsel would be entitled to based upon the terms of the Contingency Fee Agreement.

[109] The representative Plaintiffs note that they would not have been able to advance this litigation unless Class Counsel acted on a contingency basis.

(5) Time expended by Class Counsel

[110] In her Affidavit, Ms. Bugden details the legal work undertaken over the life this proceeding including: preparing the pleadings and certification materials; preparing to respond to Canada's motion to strike; preparing for cross-examination of certification affidavits; work on the terms of the Agreement in Principle; working with subject matter experts to developing the terms of the MAS, SRM, and FSA; communications with representative Plaintiffs; preparing materials for the certification and settlement approval motion; preparing Motion to amend the Statement of Claim.

[111] The Court can consider dockets or what Class Counsel's hourly rate would have been to ensure fees are reasonable (*Heyder* at para120). Class Counsel advises that it recorded 4,656 hours, equating to about $1.7 million in fees. Class Counsel estimates it will incur an additional $500,000 in legal services to class members.

(6) Fees in similar cases

[112] The proposed amount of $5 million for legal fees represents 3.33% of the total settlement under the FSA. The following cases are comparable:

- *Heyder* at para 123– 2.95% of settlement amount (paid by Canada)
- *Manuge v Canada*, 2013 FC 341, at para 51 – 8% of settlement amount (paid by the Class)
- *Manuge v Canada*, 2024 FC 68, at para 96 – 15.24% of settlement amount (paid by the Class)
- *McLean v Canada*, 2019 FC 1077, at para 47– 3% of settlement amount (paid by Canada)
- *Merlo Settlement* at para 75 – 15% of settlement amount (paid by the Class)

[113] Class Counsel fees of 3.33% of the total settlement compare favourably to fees awarded in similar cases. The fees are not being taken from the settlement fund but are being paid directly by the Defendant. Finally these fees are significantly less than those that would otherwise be payable pursuant to the terms of the Contingency Fee Agreement. Class Counsel fees are therefore reasonable.

(7) Conclusion on Class Counsel fees

[114] Class Counsel legal fees and disbursements are approved in accordance with Article 15 of the Final Settlement Agreement.

D. *Payment of Honoraria*

[115] The Final Settlement Agreement provides for the payment of honoraria to the named representative Plaintiffs, and Rubin Coward. Article 14.01 of the FSA provides:

> Within sixty days of the Implementation Date, the Defendant shall pay to Class Counsel in trust the sum of thirty thousand dollars ($30,000) for contribution to the payment of honoraria in equal measure to each of the three Plaintiffs in this Proceeding.
>
> From the amount of Class Counsel legal fees as set forth at Section 15.01, if and as approved by the Court, Class Counsel will seek Court approval to provide: (a) an additional $20,000 honorarium to each of the three Plaintiffs in this Proceeding; and (b) a $30,000 honorarium to Rubin Coward.

[116] For clarity, if approved, each of the three representative Plaintiffs and Rubin Coward would be paid a $30,000 honorarium in recognition of their efforts on behalf of the Class. The payment of the honoraria are not being made from the settlement funds so there is no depletion from the funds available to class members.

[117] In *Merlo Settlement* I noted the following factors to assess if honoraria should be granted:

> (a) active involvement in the initiation of the litigation and retainer of counsel;
>
> (b) exposure to a real risk of costs;

> (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation;
>
> (d) time spent and activities undertaken in advancing the litigation;
>
> (e) communication and interaction with other class members; and
>
> (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.
>
> (*Merlo Settlement* at para 72)

[118] Honoraria are to be awarded sparingly as representative Plaintiffs should not benefit from class proceedings more than other class members (*McLean* at para 57). However, the factor outlined above are relevant in considering if the circumstances merit the payment requested.

[119] Here the representative Plaintiffs made extraordinary efforts to advance this case, all while navigating personal difficulties and re-traumatization. So onerous was the task of acting as Representative Plaintiffs that they had to, at times, step away from the litigation for their own mental well being.

[120] The honoraria payments are intended recognize the extraordinary efforts of these individuals who had to constantly relive their own deeply personal traumas to advance the litigation for the benefit of other class members. They were fully engaged in this litigation throughout and were in constant contact with Class Counsel at all steps of the proceeding.

[121] In the case of Mr. Coward, although he is not a named Representative Plaintiff, he is described as having been instrumental in this litigation and actively engaged in the proceeding from the outset until the notice approval motion in March 2024. He attended meetings with Class

Counsel to ensure that settlement negotiations continued even when the named Plaintiffs had to step away to focus on their personal health and wellbeing.

[122] The payment of an honoraria to a class member who is not named as a representative plaintiff—in this case, Mr. Coward— was addressed in *McLean v Canada*, 2019 FC 1077 [*McLean*] at para 58:

> The case law cited before the Court only discussed awarding honorariums to representative plaintiffs, meaning those plaintiffs confirmed as representative plaintiffs in the certification order. However, this is a unique case where all named plaintiffs made that extra effort in advancing the claim and essentially took on the role of representative plaintiffs in their instructions to counsel and communication with Class Members.

[123] In the circumstances, I am satisfied that the Representative Plaintiffs and Mr. Coward suffered significant personal hardship in connection with the prosecution of this claim, and they spent significant time and took active steps to advance the claim and participated at various stages including the very lengthy settlement negotiations and communications with class members. Accordingly, I approve the payment of honoraria as requested.

E. *Appointment of Claims Administrator*

[124] Deloitte LLP was selected as the Claims Administrator for their commitment to trauma-informed approach and experience in acting on other large-scale institutional class actions (Bugden Affidavit at para 38(kk)). The Claims process is outlined in articles 8 and 9 of the FSA.

[125] I approve the appointment of Deloitte LLP as the Claims Administrator.

ORDER IN T-2158-16

THIS COURT ORDERS that:

1. The Motion to certify this as a class proceeding is granted.

2. The Class is defined as: "All persons who are or who have been enrolled as Canadian Armed Forces (CAF) Members at any time from April 17, 1985, and for any duration up to and including the Approval Date, and who assert that they have been subjected to Racial Discrimination and/or Racial Harassment."

3. The Final Settlement Agreement dated June 6, 2024, is fair and reasonable and in the best interests of the Class and is approved pursuant to Rule 334.29 of the *Federal Courts Rules*, SOR/98-106, and shall be implemented in accordance with its terms.

4. Deloitte LLP is appointed as Claims Administrator.

5. Payments of honoraria as set out in Article 14 of the Final Settlement Agreement are approved.

6. Class Counsel legal fees and disbursements are approved and shall be paid in accordance with Article 15 of the Final Settlement Agreement.

7. There will be no costs of this motion.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2158-16
STYLE OF CAUSE:	AB AND JEAN-PIERRE ROBILLARD V HIS MAJESTY THE KING
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JULY 16 AND 17, 2024
REASONS FOR ORDER:	MCDONALD J.
DATED:	FEBRUARY 13, 2025

APPEARANCES:

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