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	July 09, 2021 09 juillet 2021
<b>Court File</b>	<b>No. T-1673-17</b> Frank Fedorak
VAN	104

**FEDERAL COURT**

**CLASS PROCEEDING**

Between:

**CHERYL TILLER, MARY-ELLEN COPLAND  
AND DAYNA ROACH**

Plaintiffs

and:

**HER MAJESTY THE QUEEN**

Defendant

Brought pursuant to the *Federal Courts Rules*, SOR/98-106

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**WRITTEN REPRESENTATIONS  
OF THE REPRESENTATIVE PLAINTIFFS  
IN REPLY**

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**OVERVIEW**

1. In reply to the Defendant's response, the Representative Plaintiffs agree that the classification, Auxiliary Constable, was included in the Merlo-Davidson Settlement as a Primary Class Member.<sup>1</sup> The issue brought before this Honourable Court is that the wording used in the Tiller Primary Class Member definition has had the unforeseeable result of the denial of a remedy for some women who experienced gender based or sexual orientation based harassment during their Volunteer role with the RCMP.

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<sup>1</sup> *Merlo v. Canada* 2017 FC 533 [Merlo-Davidson Settlement]

## **A. The Wording in the Tiller Settlement has created an Unforeseeable Result**

2. More specifically, a Volunteer (a Primary Class Member in the Tiller Settlement) who is also an Auxiliary Constable (a Primary Class Member in the Merlo-Davidson Settlement) must find, review, and understand the definition of Primary Class Member in a prior settlement agreement. The Representative Plaintiffs submit that this is not a reasonable expectation, and it was not anticipated at the time the definition was drafted.

3. The Representative Plaintiffs agree with the accuracy of the Defendant's summary of the definitions in both the Merlo-Davidson and Tiller Settlement Agreements. The Representative Plaintiffs submit that, without specific knowledge of what it means to be "an individual who are primary class members in Merlo and Davidson...", it is unreasonable to require a Volunteer to infer that an Auxiliary Constable is a classification in that exception.

4. Retrospectively, it is clear that because a classification included in the Tiller Primary Class definition is synonymous to a classification in Merlo-Davidson Settlement, the resulting confusion has created an unfair and unanticipated denial of claims. This result is contrary to the intention of the parties as articulated in the apologies and stated purpose of the two settlements.<sup>2</sup>

## **B. This Court has the Jurisdiction to Make the Proposed Order**

5. The Representative Plaintiffs submit that because this result was unforeseeable, this Honourable Court has authority to remedy this result. This does not require a re-opening and rewriting of the Certification Order or the Settlement Agreement. Rather it requires a reading of the Agreement with consideration of the spirit of the Agreement expressed by the RCMP Commissioners in their apologies and the motivations of the Parties in reaching the settlements in the Merlo-Davidson and Tiller actions. As stated by Justice Abella in *JW v. Canada (Attorney General)*:

[31] While the parties do not have a broad right to judicial intervention, they do have a right to the implementation of the terms of the settlement they bargained for. Judicial supervision plays a critical role in ensuring that the claimants receive

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<sup>2</sup> Affidavit of G. Santos, Exhibits A and C, PMR Tab 2 at p.16 and pp. 21-23.

the benefits that they were promised. The obligations in the Agreement must be read in light of the Agreement’s spirit — to address the “damage inflicted by, or as a result of, [Canada’s] long-standing [Residential Schools] policy” (*Baxter*, at para. 2).<sup>3</sup> [Emphasis Added].

6. In its Order approving the Agreement, this Court explicitly retained “continuing jurisdiction over the Settlement and its implementation, interpretation and enforcement.” The Order also permits the parties to “seek judgments or orders from the Court in such form as necessary to implement and enforce the provisions of the Settlement Agreement and supervise and enforce the ongoing performance of the Settlement.”<sup>4</sup> This term was also provided for in Article 3.02 (g) of the Agreement.<sup>5</sup> These terms are consistent with the traditional supervisory role of the Courts in class proceedings.

7. The Representative Plaintiffs agree with Defendants in their response that *JW v. Canada (Attorney General)*<sup>6</sup> confirms the duty to ensure that an agreement is implemented in accordance with the intention of the Parties.<sup>7</sup> In the instant case, the intention was that women who worked or volunteered with the RCMP be compensated for harassment and that they are not permitted double compensation. It was not the intention to create a situation requiring a lay person to find, review and understand a technicality in a prior settlement agreement.

8. Although a settlement agreement in a class proceeding can be viewed as a contract between two parties, it is not only a contract between two parties as there are absent class members involved in this agreement. Class action settlements affect the rights of a large group of people who have no input in drafting or implementing of the settlement. It is for this reason that legislature, both provincially and federally included judicial oversight into the class proceedings rules.<sup>8</sup> Courts must approve a settlement of a class proceeding before it is implemented and once approved retain a supervisory role<sup>9</sup>.

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<sup>3</sup> *JW v. Canada (Attorney General)*, 2019 SCC 20, [2019] 2 S.C.R. 224.

<sup>4</sup> Tiller Settlement Approval Order dated March 10, 2020, PMR Tab 5, p. 27.

<sup>5</sup> Tiller Settlement Approval Order dated March 10, 2020, PMR Tab 5, p.

<sup>6</sup> *JW v. Canada (Attorney General)* 2019 SCC 20, [2019] 2 S.C.R. 224.

<sup>7</sup> Defendant’s Response, DMR Tab 2, p.75.

<sup>8</sup> *Federal Court Rules* SOR/98-106 at 334.29(1) and as example of Provincial legislation: *Class Proceedings Act* [RSBC 1996] Ch. 50 s. 35(1).

<sup>9</sup> *JW v. Canada (Attorney General)* 2019 SCC 20, [2019] 2 S.C.R. 224 at para. 120.

9. The Representative Plaintiffs are not asking the Court to rewrite or imply a contrary term in this situation. What is requested is that Volunteers be permitted to have their claims assessed because the synonymous use of the term Volunteer and the term Auxiliary Constable was not considered at the time of entering into the settlement and drafting the definition.

10. To accomplish this goal, the Representative Plaintiffs are seeking approval of a Protocol which takes into consideration the position of the Parties and position of the claimants to find a balance which is fair to all involved. The Protocol addresses the concerns highlighted by the Defendants in their Response. These concerns raised are addressed below.

**(a) The Tiller Class Definition will not Expand**

11. The purpose of this request to the Court is not to expand the class or open up the Tiller Settlement to allow an Auxiliary Constable a second chance to apply for compensation, rather it is to allow this narrow category of Volunteers to be classified as what they actually are: a Volunteer. These are women who are being denied access to justice based on a technicality that was not revealed until the implementation of the Tiller claims process. They have no other forum for recourse.

12. The Representative Plaintiffs are requesting a protocol that acknowledges that the classification term “Volunteer” is used synonymously with the classification term “Auxiliary Constable” and permits women in these classifications to have their claim assessed in the Tiller claim process unless they have been compensated in the Merlo-Davidson Settlement.

13. This is consistent with the approach agreed to by the Parties in the context of permitting all Public Service Employees to apply in the Tiller Settlement even those captured by the definition in the Merlo-Davidson Settlement.<sup>10</sup> In the instant case, a situation has arisen which was not contemplated by the Parties and it is a situation in which the Court has power to intervene to ensure that these claimants are not left out from receiving benefits.

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<sup>10</sup> Affidavit of Connie Luong, PMR Tab 3, Exhibit A at pp.78-81.

**(b) There is either no Extension to the Claims Period or a minimal extension**

14. The claims that were timely filed by Volunteer/Auxiliary Constables that have been denied or have not yet been reviewed by the Assessors, do not need an extension to the claims period. These claims were submitted within the prescribed time frame.

15. The Protocol only provides for a short opening (until the later of August 15, 2021 or 45 days after the approval of the Protocol) to subset of an already narrowly defined group.<sup>11</sup> It is not an extension that would be onerous or costly to the Defendant. The time frame suggested reasonably coincides with the conclusion of the assessments that are ongoing in the Tiller claim process. In other settled class proceedings, courts have extended claim deadlines when it is just to do so.<sup>12</sup>

**(c) The Finality of the Assessors' Decisions**

16. For the few claims that have been reviewed by an Assessor and have been denied on the basis they are Auxiliary Constables, the substantive content of the claim has not been assessed. They were denied on the basis of eligibility, which is a threshold issue and arguably the procedural precursor to the assessment of the incidents and impact reported in the claim.

**C. Issues Raised in the Defendant's Response about the Affidavit of G. Whitney Santos**

17. The affidavit was drafted in a way to protect the confidentiality of the claimants inherent in this settlement. In response to the critique about paragraph 20 of the affidavit, a more appropriate term such as "meaningful notice" of the Merlo-Davidson Settlement could have been used and to not do so was an oversight.<sup>13</sup> The Claimants' individual responses are attached at Exhibit "D" to the affidavit for the Court to review and draw its own conclusion. The other statements in the affidavit are fact and accurate observations of claims and other documents.

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<sup>11</sup> Notice of Motion, Appendix A – Proposed Protocol s. 5, PMR Tab 1, p. 6.

<sup>12</sup> *Harrington v. Dow Corning Corporation et. al* 2007 BCSC 244 at para 7; *Richard v. British Columbia* 2015 BCSC 265 at para. 38.

<sup>13</sup> Affidavit of G. Santos, PMR Tab 2, p. 13, Exhibit D, pp. 25-29.

## CONCLUSION

18. The relief requested is a proposed Protocol to remedy the unforeseeable result of the way the Primary Class Definition was drafted. The issue stemming from the use of the term Volunteer in the Tiller Settlement and the term Auxiliary Constable in Merlo-Davidson Settlement when they are commonly used and interpreted as synonymous terms, only came into view during the implementation of the Tiller Settlement.

19. This is a small group of women and the certainty of entering into a settlement by the Defendant is not usurped as double compensation is preventable. To permit these claims to proceed under the classification of Volunteer results in the implementation of the intention of the Parties.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of July, 2021**



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Plaintiffs

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