

Federal Court



Cour fédérale

Date: 20200310

Docket: T-1673-17

Citation: 2020 FC 321

CLASS PROCEEDING

BETWEEN:

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

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER
(Settlement Approval)

PHELAN J.

I. Introduction

[1] The Settlement Agreement at issue here follows upon the settlement approval in *Merlo v Canada*, 2017 FC 533 [*Merlo-Davidson*], which dealt with gender and sexual orientation based harassment and discrimination of women who worked in the Royal Canadian Mounted Police [RCMP] as “Regular Members, Civilian Members and Public Service Employees” since September 16, 1974 – the first date on which women were eligible to join the RCMP.

[2] While the issue of counsel fees is part of the Settlement Agreement, it is separate from this approval and is the subject of a separate and distinct decision.

[3] This Settlement Agreement is designed to address similar conduct in a RCMP controlled workplace experienced by women who worked with or volunteered with the RCMP but for whom the RCMP was not their employer and therefore those persons were not part of the “Merlo Class”.

[4] On June 21, 2019, the Representative Plaintiffs and the Defendant entered into a settlement for this group as set out in the “Settlement” (including its recitals, schedules and appendices). On October 1, 2019, the parties entered into a supplemental agreement which contains the terms of Appointment of the Administrator and the Assessor [Supplemental Agreement].

[5] For purposes of these Reasons and the Approval Order, the two agreements, the Settlement and the Supplemental Agreements, together form the “Settlement Agreement”, unless otherwise indicated.

[6] The Settlement Agreement establishes a confidential claims process for compensation ranging from \$10,000 to \$220,000. It is to be a non adversarial process and contains the feature of a non-retaliation directive so that Class Members still working with the RCMP may claim without fear of retaliation.

[7] The parties have asked for Court approval of the Settlement Agreement, the proposed form, content and manner of distribution of the notice of settlement approval [Notice], the appointment of Deloitte LLP to administer the Settlement Agreement and the appointment of the Honourable Louise Otis, the Honourable Pamela Kirkpatrick and the Honourable Kathryn Neilson as Assessors of the claims process established under the Settlement Agreement.

[8] For the Reasons set forth, the Court approves the Settlement Agreement and the related documents and appointments and consequently the action will be dismissed.

II. Background

A. Overview

[9] This action was commenced November 2, 2017. The Plaintiffs allege that the RCMP was negligent and in breach of s 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c 11, in failing to take reasonable measures to ensure that “Primary Class Members” could work in an environment free of gender and sexual orientation based harassment and discrimination. The Plaintiffs further allege that the Defendant Crown is liable for the action of individuals who worked for the RCMP and were at all material times Crown servants pursuant to the *Crown Liability and Proceedings Act*, RSC 1985, c C-50. The Plaintiffs claim that this conduct caused them psychological and physical injuries.

[10] Following service of materials in March 2018 for a contested certification application, the parties rapidly engaged in settlement discussions over a period of approximately one year starting in June 2018. These discussions resulted in the Settlement.

[11] As a result, the claim was amended for settlement purposes and an Amended Statement of Claim filed in April 2019.

[12] Following further discussions with and submissions to the Court, the action was certified for settlement purposes on July 5, 2019. As discussed later, the proper description of the Class was a complicated matter. It is also important to note that the Class was defined and settled for settlement purposes only – a point repeated by the Defendant.

[13] *Merlo-Davidson* is an essential backdrop and driving factor in this proceeding. As part of the Certification Order, Klein Lawyers LLP and Higgerty Law were appointed Class Counsel. Both firms have experience in class action litigation and Klein Lawyers were one of the class counsel in *Merlo-Davidson*. Their experience and recommendation is one factor which the Court must consider in approving this Settlement Agreement.

[14] While this case moved into the settlement negotiation phase very quickly and given *Merlo-Davidson*, hotly contested litigation was not on the horizon, the Plaintiffs, necessarily, began the work for a contested certification process. In that regard, two experts also assisted in crafting the Settlement.

B. *The Settlement Agreement – Key Terms and Provisions*

(1) Class

[15] One of the most critical aspects of the Settlement Agreement and of the Certification Order was the Class, particularly the definition of “Primary Class Members”. Apart from the exclusions such as the class in *Merlo-Davidson* being RCMP members, the intent was to capture a large group of people not captured in the exclusion. The genesis of this litigation was the realization that female non-RCMP personnel and others engaged with the RCMP and who experienced the same type of abuse and discrimination as the serving RCMP members, were not covered by the *Merlo-Davidson* case.

[16] In terms of exclusion (either specific or by implication) despite the RCMP being the provincial police force in eight provinces, provincial employees under the supervision, management or control of the RCMP are not included in this action because those employees had their own remedies under provincial law as discussed later.

[17] It was essential that there be a significant and meaningful connection with the RCMP. With input from the Court, the parties described that connection not only in terms of supervision and management but also in terms of circumstances where the RCMP was exercising control over the relevant personnel – paid employees or volunteers.

[18] The broad definition of the Primary Class is meant to describe the large group of women who have worked or volunteered with or under the RCMP in varying capacities but who were not included in the *Merlo-Davidson* settlement.

(2) Class Period

[19] The Class Period in the Settlement Agreement runs from September 16, 1974 until July 5, 2019 – a period of 45 plus years.

(3) Levels of Compensation

[20] The six levels of compensation provided for was to recognize the different forms of gender and sexual orientation based harassment and discrimination and that each could have a unique impact on the particular victim.

[21] The levels of compensation range from \$10,000 to \$220,000 as follows:

- Level 1 – Minimal Injury - \$10,000
- Level 2 – Mild Injury - \$35,000
- Level 3 – Low Moderate Injury - \$70,000
- Level 4 – Upper Moderate Injury - \$100,000
- Level 5 – Significant Injury - \$150,000
- Level 6 – Severe Injury - \$220,000

Compensation is also available to spouses and children of claimants whose claims have been assessed at Level 5 or Level 6.

C. Claims Process

[22] The claims process is intended to be confidential and non-adversarial. The process is based on document review and claimant interviews and the assessment performed in a psychological and emotional “safe” environment for Primary Class Members to facilitate the exchange of stories of sexual harassment, abuse and discrimination.

[23] The deadline for filing a claim is a relatively short 180 days from the later of the last day for an appeal (or leave to appeal) of the Approval Order or the date of a final determination of any such appeal by a Class Member.

[24] The claims process is clearly and succinctly set out in the Settlement Agreement and requires the provision of details of the offending conduct and the injuries caused by it.

[25] To avoid any potential for double recovery, the Defendant is required to provide the Administrator and the Assessor(s) with a list of Primary Class Members who have been paid by Canada under another civil claim, grievance or harassment complaint in respect of gender or sexual orientation based harassment or discrimination in the circumstances described in the Primary Class Member definition during the Claim Period [the Previous Compensation List].

[26] The Defendant through the RCMP has a further obligation to provide the Administrator with a list of potential Primary Class Members who have ever had a Human Resources Management System identification [HRMIS]. This is intended to assist the Administrator and

Assessor(s) in verifying the class membership. In the event that a claimant's name does not appear on this Class Member List, the Administrator will request additional proof of class membership from the claimant.

[27] Completed claim packages will be sent from the Administrator to the Assessor(s) where they will be placed in one of two categories – Levels 1/2 or Level 3 and above. Levels 1 and 2 attract only a paper review by the Assessor(s). For Levels 3 and above, the Assessor(s) will review the documents but also conduct an in-person interview of the claimant. For either category the Assessor(s) will determine whether the claim meets the compensation criteria and the appropriate level of compensation to be awarded.

D. Confidentiality

[28] Because of the nature of the offending acts and the concern for privacy, the Settlement Agreement contains numerous provisions to safeguard the confidential claims process. This is particularly important to Class Members still working for the RCMP who fear retaliation or other adverse consequences of making a claim.

[29] The RCMP itself has a necessarily limited role in the claims process generally restricted to certain administrative functions including making payments to the Administrator.

The offices of the Administrator and the Assessor(s) are and remain independent from the parties, the RCMP and each other.

[30] A particular feature of this Settlement Agreement to ensure confidentiality of the claims process is the creation of the “Designated Contact”. This is a confidential contact within the RCMP who responds to requests for information and records from the Administrator and the Assessor(s). Even within RCMP premises, the Designated Contact, who is responsible for ensuring the confidentiality of all requests/responses between the RCMP, is to be housed in a secure unmarked office accessible only to the Designated Contact.

E. Settlement Parameter

[31] As a claims made settlement there is no cap on the total settlement to be paid out. Each qualifying claim will be paid regardless of the total amount paid to the Class as a whole. This process avoids the risk of payment delays and reduced individual compensation if the number of claims exceeds the estimated “take up” rate (the estimate of the number of claimants and the amount of those claims).

[32] However, Class Counsel has estimated that about 5% of the Primary Claims Members will make claims, that the average claim value is approximately \$50,000 and therefore the total settlement payment will be approximately \$100 million.

F. Notices

[33] A critical element of any class action settlement is the opt-out provision allowing a potential claimant to opt out of the Settlement Agreement and proceed on their own. It is the ultimate protection for an individual who is dissatisfied with a class settlement.

As of the hearing before the Court, only two opt-outs were filed.

[34] Notices of Certification and of Settlement Approval Hearing have been distributed as required.

[35] Notice of Settlement will be dealt with according to the approved Notice Plan and will involve press releases, publication in print media, digital and social media, direct mailing, Class Counsel website display, posting in RCMP premises and requested distribution assistance in municipalities with municipal RCMP detachments and at CUPE branch offices.

G. *Opt-Out Rights*

[36] A key provision in every class action settlement is the Opt-Out Rights.

[37] The Opt-Out period is set at 70 days following the date of the Certification Order – September 13, 2019. To date, two opt-out notices have been received.

[38] The Opt-Out threshold was set at 50. As this threshold has not been met, the provision is academic.

H. *Administrator*

[39] The parties requested that Deloitte LLP be appointed Administrator. The duties of Administrator are well defined in Article 6 and Schedule B of the Settlement Agreement.

[40] The Court has evidence and knowledge of Deloitte LLP's experience in class action administration. The Defendant is responsible for paying the cost of administration.

I. Assessor

[41] The parties requested that the Honourable Louise Otis, formerly of the Court of Appeal of Quebec, be appointed as the Assessor. Subsequently they have asked for two further Assessors – the Honourable Pamela Kirkpatrick, formerly of the British Columbia Court of Appeal, and the Honourable Kathryn Neilson, formerly of the Supreme Court of British Columbia.

[42] The duties of the Assessor(s) are likewise well defined and are principally the evaluation of claims, where required, settling the amount of compensation claimed and preparing a report to the RCMP on their observations generally regarding claims and making recommendations to the RCMP to assist in minimizing workplace sexual harassment and discrimination. The Defendant is also liable for the costs of the Assessor(s).

J. Counsel Fees

[43] The matter of approval of Class Counsel fees is the subject of a separate decision. In general terms, however, the Defendant will contribute \$6 million and Class Counsel seeks fees based upon 15% of the amount received by each claimant. As between Class Counsel, they have agreed to 70% for Klein Lawyers LLP and 30% for Higgerty Law.

K. Support/Objection

[44] In the Hearing Approval Order, provision was made for expressions of support or opposition to the Settlement Approval.

[45] No expressions of opposition were received. While no expressions of support were received by the Court, the Santos Affidavit indicates that approximately 575 persons have expressed a desire to be included in the compensation process.

III. Issue

[46] The issue for determination is whether the Settlement Agreement (except for Class Counsel fees to be determined separately) is fair and reasonable and in the best interests of the Class. Consequent on that determination is the approval of various notices and appointments.

IV. Analysis

A. Legal Framework

[47] The test for approving a class action settlement is well established and described in such decisions as *Merlo-Davidson* at paras 16-19, *Toth v Canada*, 2019 FC 125 at paras 37-39 and *Condon v Canada*, 2018 FC 522 [*Condon*].

[48] The test is whether, in all the circumstances, the Settlement is “fair, reasonable and in the best interests of the class as a whole”.

[49] In the application of the test, the Court is to consider numerous factors.

[50] As set forth in *Condon* at para 19, the non exhaustive list of factors is:

- a. The likelihood of recovery or likelihood of success;
- b. The amount and nature of discovery, evidence or investigation;
- c. Terms and conditions of the proposed settlement;
- d. The future expense and likely duration of litigation;
- e. The recommendation of neutral parties, if any;
- f. The number of objectors and nature of objections;
- g. The presence of arm's length bargaining and the absence of collusion;
- h. The information conveying to the Court the dynamics of, and the positions taken, by the parties during the negotiations;
- i. The degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and
- j. The recommendation and experience of counsel.

[51] Recent case law in this Court and other superior courts (see *Manuge v Canada*, 2013 FC 341 [*Manuge*]) have emphasized that a class action settlement must be looked at as a whole and specially that it is not up to the Court to rewrite the substantive terms of a settlement. It is very much a "take it or leave it" proposition (except with respect to fees).

[52] In this case, the decision is relatively simple and straightforward given the settlement in *Merlo-Davidson*. The Defendant, through the RCMP having settled liability to serving members

of the RCMP for harassment and discrimination, could hardly avoid making a settlement in respect of civilian workers and similarly situated persons experiencing the same offending conduct from members of the RCMP.

[53] Further, I accept that there is a strong presumption of fairness where a settlement has been negotiated at arm's length by experienced counsel, as is the case here (see *Riddle v Canada*, 2018 FC 641).

[54] On the opposite side of the theoretical ledger of settlement approval is the impact of the Court rejecting a proposed settlement agreement. As held in *Manuge* at para 6 - "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."

[55] Given the parallel situation with respect to female members of the RCMP whose settlement was approved in *Merlo-Davidson*, it would be a travesty of justice to deny the non-members covered in the present Class a reasonable settlement of their claim.

[56] As with so many settlements, the "proof of the pudding is in the eating". To ensure that the goals and mechanisms of the Settlement Agreement are fulfilled, the parties accept this Court's continuing supervisory role. That role is vital as discussed in the Supreme Court's decision in *J.W. v Canada (Attorney General)*, 2019 SCC 20.

[57] In considering whether the Settlement is “fair, reasonable and in the best interests of the Class”, the Court will touch upon the factors laid out in *Condon*.

B. Factors

(1) Likelihood of Recovery/Success

[58] While the Plaintiffs’ counsel has suggested that this is complex litigation with a myriad of possible defences available to the Defendant – which might be the case if it were to be litigated – the chances of litigation unfolding were distant. The RCMP had settled the same type of claims for its members, and the Commissioner had issued statements acknowledging misconduct and pointing to the need for changes in the working culture within the RCMP.

[59] Having said this, while there were complexities in this case and its Settlement with respect to issues of union membership, Class Counsel has satisfied me that the Settlement Agreement does not interfere with grievance processes.

[60] In supplementary submissions, the parties addressed whether the Court had jurisdiction in this matter as it arguably related, at least in part, to remedies under labour relations regimes. I am satisfied that the decision in *Rivers v Waterloo Regional Police Services Board*, 2018 ONSC 4307 (upheld by the Ontario Court of Appeal), did not apply in these circumstances. The Primary Class does not have an employer-employee relationship with the Defendant similar to that discussed in the Ontario decision.

[61] A major issue was properly defining the Class. That process required some work and a failure to reach agreement on this definition would have led, at the very least, to an involved, uncertain certification process followed by the inevitable appeals and the potential of Class proceedings and individual proceedings clashing on many issues.

[62] I accept that the expansive Class definition and the 45 plus year Class Period represents a significant advantage in the Settlement Agreement, not necessarily achievable in contested litigation.

[63] Some sort of settlement was a strong probability; however, the nature and extent of this Settlement Agreement is a significant benefit to the Class and to the Defendant not so easily foreseen.

(2) Discovery/Evidence

[64] While there never was discovery or other significant pre-trial proceeding, Class Counsel did obtain reports from the RCMP and other sources about the gender based harassment culture within the RCMP. Class Counsel retained two experts to further develop an understanding of the nature of the offending conduct toward non-RCMP members in a workplace setting.

[65] Because of the less homogenous nature of the Primary Class – covering differing circumstances of engagement with the RCMP as compared to the *Merlo-Davidson* situation – Class Counsel engaged in detailed and extensive conversations with potential Class Members to

secure a better understanding of the types of discrimination and the impacts of that conduct on this diverse Primary Class.

(3) Settlement Terms and Conditions

[66] There are several features of the terms and conditions which support approval:

- a claims made approach avoids the risks of delay and the over-subscription risk present with lump sum settlements.
- the extensive Class Period commencing in 1974 avoids the complexities of limitation periods.
- the non-adversarial claims process reduces the risk of re-traumatization and facilitates the essential feature of confidentiality. Fear of retaliation or further harassment was a significant concern which confidentiality helps ameliorate.
- the compensation levels are consistent with damages awards and takes account of litigation risk and ease of claims process. They are also the same as *Merlo-Davidson* despite the different relationship with the RCMP and the different class definitions.

(4) Counsel Experience/Recommendation

[67] As expected, Class Counsel recommend this Settlement Agreement. More germane is that both firms are experienced class action counsel involved in a variety of such claims. Klein Lawyers have direct, highly relevant experience from *Merlo-Davidson* and are well versed in issues, complexities of the case and needs of the Class.

(5) Future Expense and Duration of Litigation

[68] Absent a settlement, the Plaintiffs would litigate a claim covering 45 years and conduct affecting thousands of Class Members. The potential for appeals at many of the key stages of a class action is real; the possibility of either the creation of sub-classes or individualized claims is also real.

(6) Number of Objectors/Objections/Opt Out

[69] There have been no objections filed. Also significant is that only two potential Class Members have opted out. With a class of approximately 41,000 members, this factor speaks to the support of the Class for this Settlement Agreement.

(7) Good Faith/Absence of Collusion

[70] There is no evidence of collusion. The year long negotiations appear from every perspective to having been conducted in good faith with the intention of finding resolution.

[71] The Court is not directly aware of the negotiations; however, it case managed this matter and there is nothing in the manner in which the case before the Court was conducted to even suggest that this was not an arm's length negotiation in which compromises had to be made.

(8) Communication with Class Members

[72] Based on the affidavit evidence before the Court, Class Counsel have been in regular contact with Class Members. Hundreds of women have contacted Class Counsel. The Representative Plaintiff has likewise personally communicated with Class Members.

(9) Dynamics of Negotiation

[73] The steps leading to the Settlement Agreement were described in the affidavit of Mr. Tanjuatco.

[74] The Notice of Settlement is consistent with the Court's requirements and the Notice Plan is robust and practical. Notice providers, experienced in the field, have been appointed. The RCMP and CUPE are prepared to assist in the dissemination of information.

[75] The Settlement Agreement has been posted on the website of Class Counsel and of the Settlement itself (rcmpsettlement.ca).

(10) Other Matters

[76] The proposed Administrator, Deloitte LLP, has extensive experience in class action settlements including in *McLean v Canada*, 2019 FC 1075. The Court is prepared to approve its appointment.

[77] The proposed Assessors are judges of considerable relevant experience, well qualified to assess claims under the Settlement Agreement.

[78] To assist in determining claimants' entitlement to compensation – Class Members are barred from making a claim if they have previously received compensation in respect of events and injuries covered in this action – the Defendant is to prepare a Previous Compensation List. This is intended to prevent double recovery, to the extent it can.

[79] The Previous Compensation List is to be provided to the Assessor(s) and the Administrator.

V. Conclusion

[80] For these reasons, the Settlement Agreement is found to be fair and reasonable and in the best interests of the Class as a whole.

[81] The Court will issue the necessary Order with these Reasons,

[82] The Court retains jurisdiction over this matter and the Order and Settlement Agreement specifically. The Order is subject to amendment as may be necessary.

"Michael L. Phelan"

Judge

Ottawa, Ontario
March 10, 2020

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1673-17

STYLE OF CAUSE: CHERYL TILLER, MARY-ELLEN COPLAND AND
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