

Federal Court



Cour fédérale

Date: 20170530

Docket: T-1685-16

Citation: 2017 FC 533

Ottawa, Ontario, May 30, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

**JANET MERLO AND LINDA GILLIS
DAVIDSON**

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] This matter was certified as a class action for settlement purposes by Order of this Court on January 13, 2017. This class action relates to gender and sexual orientation based harassment and discrimination of women who worked in the Royal Canadian Mounted Police [RCMP].

[2] This is a Motion by the Representative Plaintiffs seeking approval of the terms of the proposed settlement of this class action. The Defendant [Canada] consents to the terms of the

settlement. The proposed settlement has a number of features and benefits that extend beyond a strictly monetary compensation scheme and as a result, the Settlement Agreement goes well beyond what the Plaintiffs may have been awarded after a trial.

[3] For the reasons that follow, I approve the settlement, I approve the payment of an honorarium of \$15,000 to each of the Representative Plaintiffs, Ms. Merlo and Ms. Davidson, and I approve counsel fees.

I. Background

[4] On October 6, 2016, the Representative Plaintiffs and the Defendant reached an agreement to settle the claims for gender and sexual orientation based harassment and discrimination of women who worked in the RCMP since September 16, 1974 [Settlement Agreement]. The settlement is national in scope, therefore the Representative Plaintiffs consolidated the action filed in British Columbia in 2012 by Ms. Merlo [Merlo Action], and an action filed in Ontario in 2015 by Ms. Davidson [Davidson Action].

[5] In their claims the Representative Plaintiffs make allegations of gender-based bullying, discrimination, and harassment, which they both experienced while they were employed with the RCMP. The Plaintiffs claim that this harassment and discrimination has impacted their careers within the RCMP and has caused them to suffer physical and psychological damage, personal expense, and loss of income.

[6] On certification as a class action, the primary class was defined to include all female current and former living Regular Members, Civilian Members and Public Service Employees who worked within the RCMP since September 16, 1974. This date is significant as it is the first date on which women were eligible to join the RCMP. Including historical claims is significant as those claims would have been otherwise time barred due to the expiry of limitation periods.

[7] Secondary class members were defined to include those with a derivative claim in accordance with applicable family law legislation arising from a family relationship with a primary class member.

[8] In support of this Motion for approval the parties rely upon the following Affidavits:

- Affidavit of Whitney Santos sworn May 11, 2017 [Santos Affidavit]
- Affidavit of Mandy Ng affirmed May 11, 2017
- Affidavit of Janet Merlo sworn May 10, 2017
- Affidavit of Linda Gillis Davidson affirmed May 11, 2017

II. Key terms of the Settlement Agreement

[9] The Settlement Agreement contains non-monetary and monetary terms.

[10] The non-monetary terms are significant as they represent relief that would not otherwise be available to the class following a trial as they would be beyond the jurisdiction of the court, i.e. institutional change initiatives within the RCMP, a public apology, and the creating of a

scholarship. The following from the Settlement Agreement provides an overview of the Settlement terms:

B. The Plaintiffs and the Defendant (“the Parties”) recognize and acknowledge that gender and sexual orientation based harassment, gender and sexual orientation based discrimination, and sexual assault, including physical assault in the course of conduct constituting harassment have no place in the RCMP and wish to enter into this Settlement Agreement to:

(a) restore confidence in the RCMP as an organization that values equity and equality;

(b) implement measures to eliminate workplace harassment and discrimination in the RCMP; and

(c) resolve the Claims of Primary Class Members who experienced and/or continue to experience gender and/or sexual orientation based harassment and discrimination (as defined below) while working in the RCMP during the Class Period;

C. The Parties agree to: a) implement change initiatives and best practices aimed at eliminating Harassment in the RCMP and increasing equality and b) compensate Class Members who suffered injury as a consequence of that Harassment.

[11] The monetary terms of the settlement are outlined in the Santos Affidavit as follows:

11. As described in detail below, the Settlement provides six levels of compensation ranging from \$10,000 to \$220,000. For women whose claims are assessed at levels 5 and 6, compensation in an aggregate total of up to 10% of the claimant’s award will be awarded to their spouses and children.

Compensation Levels

12. The Settlement provides six levels of compensation. Each level sets out a non-exhaustive list of culpable conduct and effect on the victim. The multiple levels recognize that there are many different forms of gender and sexual orientation based harassment and discrimination, and each will have a unique impact on the victim.

13. The amount of compensation paid for each level reflects the recoveries class members might recover at trial with some compromise to take into account potential litigation risks (defences, statutory bars, limitation periods, contributing causes, etc.) and the fact that the adjudication process under the Settlement is confidential and non-adversarial. There is also, of course, the benefit of receiving compensation now rather than having to wait for the uncertain outcome of a trial and potential appeals.

14. The Compensation Levels and criteria are in Schedule B, Appendix 6 of the Settlement Agreement

[...]

The Claims Process

15. The Settlement creates a confidential, non-adversarial procedure for assessing claims that is based on document review and claimant interviews. The process is designed to be a safe environment for class members to tell their stories.

[...]

Confidentiality

24. The Settlement incorporates numerous safeguards to protect the privacy of claimants and to maintain confidentiality in the claims process. Confidentiality was a significant concern for class members, many of whom had experienced retaliation while working within the RCMP after making complaints that they experienced harassment and/or discrimination. The Settlement incorporates multiple measures to protect the identity of claimants, thereby encouraging class members to feel safe when making claims under the Settlement.

III. Notice of Proposed Settlement

[12] Following the certification of the class action, Class counsel undertook an extensive communication plan to advise potential class members of the proposed settlement and to advise them of the date of the settlement approval hearing. The right of class members to object to the settlement and the right to opt out were also detailed in the communications.

[13] At the hearing, I was advised that communications were sent to over 20,000 class members. As well, a copy of the Settlement Agreement had been made available on Class counsel websites and on the Assessor's website.

IV. Issues

[14] The following are the issues for determination on this Motion:

- (a) Approval of the Proposed Class Settlement Agreement
- (b) Approval of the Notice Plan and Appointment of Assessor
- (c) Relief from Rule 334.21(2)
- (d) Honorarium to Ms. Merlo and Ms. Davidson
- (e) Class Counsel Fees and Disbursements

V. Analysis

- (a) *Approval of the Proposed Class Settlement Agreement*

[15] Rule 334.29 of the *Federal Court Rules*, SOR/98-106 [*Rules*] provides as follows:

Approval

334.29 (1) A class proceeding may be settled only with the approval of a judge.

Binding effect

(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.

Approbation

334.29 (1) Le règlement d'un recours collectif ne prend effet que s'il est approuvé par un juge.

Effet du règlement

(2) Il lie alors tous les membres du groupe ou du sous-groupe, selon le cas, à l'exception de ceux exclus du recours collectif.

[16] On approving a settlement, the test to be applied “is whether the settlement is fair and reasonable and in the best interests of the class as a whole” (*Cardozo v Becton, Dickinson & Co*, 2005 BCSC 1612, 145 ACWS (3d) 381 citing at para 16 *Dabbs v Sun Life Assurance Co of Canada*, [1998] OJ No 1598, (24 February 1998), Ontario, 96-CT-022862 (Ont Gen Div) at para 9, aff’d (1998), 40 O.R. (3d) 429, 5 CCLI (3d) 18 (Ont Gen Div); *Haney Iron Works Ltd v Manulife Financial* (1998), 169 DLR (4th) 565, 9 CCLI (3d) 253 (BCSC) at para 27; and *Fakhri v Alfalfa's Canada*, 2005 BCSC 1123, 47 BCLR (4th) 379 at para 8).

[17] While the court has the power to approve or reject a settlement, it may not modify or alter a settlement (*Haney Iron Works, supra* at para 22; *Dabbs, supra* at para 10).

[18] The settlement is judged by a standard of reasonableness, not perfection (*Châteauneuf v Canada*, 2006 FC 286 at para 7, 54 CCPB 47).

[19] The factors to consider when the reasonableness of a settlement is being assessed have been delineated in a number of cases (*Fakhri, supra* at para 8) and are addressed below.

i. *Likelihood of recovery or the likelihood of success*

[20] It is evident from the litigation history of the Merlo and Davidson actions that there are many complex issues with these claims. Success was not guaranteed.

[21] There were various defences available to the Defendant. There was a risk that the Plaintiffs would not be successful at certification or at the common issues trial. Even if the

Plaintiffs were able to get over these hurdles, they faced the prospect of appeals and individualized proceedings which could take an additional ten (10) years to complete. For these reasons, the Parties submit that any litigation discount factored into this settlement is outweighed by the potential litigation risks and inevitable delays of carrying on with the litigation.

[22] Furthermore, as part of the settlement, potential barriers to recovery and defences which would have otherwise been available to Canada have been waived.

ii. *Amount and nature of discovery evidence*

[23] The Parties submit that although this litigation has not reached the discovery phase, Class counsel developed a complete understanding of the underlying facts and circumstances of the claims.

[24] The Santos Affidavit details the steps taken by Klein Lawyers LLP in 2012, in creating a detailed questionnaire that was sent to each potential class member who contacted the firm. In 2014, Klein Lawyers LLP contacted the approximately 150 class members who completed detailed questionnaires. With this information, Klein Lawyers LLP was able to prepare charts illustrating the types of harassment experienced by 147 class members, the impacts of that harassment, and the experiences of class members after reporting such behaviour to the RCMP.

[25] I accept the submissions of Class counsel that even without discovery they had a wealth of information on the nature of the claims they were advancing. They were also well positioned to understand the factual matrix of these claims and the challenges they would face in moving

forward with the litigation. Potential bars to recovery were a real risk. These factors informed the decision making process as counsel considered the proposed settlement and provided their recommendations to the Plaintiffs.

iii. *Settlement terms and conditions*

[26] The Parties submit that the Settlement Agreement is fair, efficient and in the best interests of the class.

[27] The inclusive class definition and a class period that dates back to 1974, provides compensation to class members who would otherwise be barred (because of limitation periods) from successfully pursuing an action. Further, considering the very personal and painful nature of the claims, the settlement process includes a non-adversarial claims process with numerous safeguards to protect the privacy of claimants.

[28] There are 6 levels of compensation, ranging between \$10,000.00 – \$220,000.00 dependent upon the nature of the conduct and its impact on the victim. Compensation is also available to spouses and children of claimants whose claims are assessed at the two highest levels (level 5 or level 6). The settlement is on a “claims made” versus a “lump sum” basis. This means there is no ceiling or cap on the total compensation that may be paid to members of the class. Therefore there is no risk of depletion of the settlement fund, nor is there any necessity to prorate claims. Simply put, every approved claim will be paid by the Defendant.

[29] At this stage, Class counsel conservatively estimates there will be over one thousand (1,000) claimants with an estimated pay out of approximately 89 million dollars.

[30] In the Settlement Agreement, the amounts allocated for non-pecuniary damages for the psychological injuries caused by workplace harassment is in line with, or exceeds, the amounts awarded in reported cases (*Sulz v Canada (AG)*, 2006 BCSC 99, 263 DLR (4th) 58, aff'd 2006 BCCA 582, 276 DLR (4th) 391; *Rees v Canada (Royal Canadian Mounted Police)*, 2004 NLSCTD 138, 239 Nfld & PEIR 1, rev'd 2005 NLCA 15, 246 Nfld & PEIR 79; *Martin v Alberta (Workers' Compensation Board)*, 2014 SCC 25, [2014] 1 SCR 546; *Clark v Canada*, [1994] 3 FCR 323, 76 FTR 241; *Unger v Singh*, 2000 BCCA 94, 133 BCAC 265; *Wong v Luong*, 2004 BCSC 1489, 135 ACWS (3d) 354; *Chancey v Chancey* (1999), 86 ACWS (3d) 885, [1999] BCJ No 551 (SC); *Kinsella v Logan* (1996), 179 NBR (2d) 161, 63 ACWS (3d) 840 (CA), rev'ing (1995), 163 NBR (2d) 1, 55 ACWS (3d) 542 (QB); *Nagy v Canada*, 2005 ABQB 26, 41 Alta LR (4th) 61, aff'd 2006 ABCA 227, 272 DLR (4th) 601; *J.R.I.G. v Tyhurst*, 2001 BCSC 369, 103 ACWS (3d) 635, aff'd 2003 BCCA 224, 226 DLR (4th) 447).

[31] The claims process will be handled the Honourable Mr. Bastarache, C.C., Q.C., who has previously administered class actions settlements involving institutional abuse. He also played a significant role in assisting the parties to reach this settlement. He is highly regarded by the parties and they are satisfied that he will act fairly and compassionately in the role as Assessor.

[32] Ensuring a confidential process for claimants is an overarching feature of the settlement because of the nature of the psychological injuries. The settlement also includes a number of confidentiality safe guards which are particularly important for current serving members of the

RCMP. The RCMP will not see the claims and they will not know the identity of the claimants. The RCMP designated contact will work from a secured room with access to the physical premises and to the records restricted.

[33] The settlement has strong support from class members. This settlement has a number of benefits beyond financial compensation, including an apology, change initiatives for the RCMP and the creation of a scholarship. These could not have been achieved through litigation.

iv. Recommendations and experience of counsel

[34] Class counsel, Klein Lawyers LLP and Kim Orr Barristers P.C., are highly experienced in class action litigation. Both firms have practiced in the specialized area of class action litigation for over 20 years.

[35] They have been involved in this litigation since the claims were filed. They recommend the settlement to Ms. Merlo and Ms. Davidson based upon a consideration of the benefits of the terms of the settlement as against the risks of continuing with the litigation. Their professional opinions are that the settlement affords the best opportunity for class members to be fairly compensated.

v. Future expense and likely duration of litigation

[36] If this settlement is not approved, the Merlo Action and the Davidson Action will resume. In the Merlo Action, the Defendant objected to certification and the certification hearing took 7

days. In the Davidson Action, part of the claim was struck (2015 ONSC 8008, 262 ACWS (3d) 648). The certification hearing started in 2016 and a decision has not yet been rendered.

[37] Based on the history of those proceedings to date, the Plaintiffs face the prospect of appeals; followed by the probability of further individualized proceedings which themselves may be subject to appeals.

[38] In reality, many years of litigation lie ahead if this settlement is not approved.

vi. *Recommendations of neutral parties*

[39] The parties concede that they would not have reached this settlement without the assistance of the Honourable Mr. Bastarache, C.C., Q.C., who has been a neutral participant in the settlement negotiations since April 2016.

[40] Additionally the parties were assisted by a number of experts who helped frame the terms of settlement, including the internal change initiatives within the RCMP, and also helped develop the compensation protocol.

[41] Psychologist Dr. Daylen helped to develop the recommended assessment protocol for this matter and proposed the contents of the different compensation levels which later became integrated, with some modification, into the Settlement Agreement.

[42] Professor Llewellyn is a Law Professor with an expertise in restorative justice. She provided guidance on the structure of the settlement process to ensure it was relational and restorative. Her recommendations assisted the parties in including restorative justice features in the Settlement Agreement such as change initiatives and the public apology.

[43] Dr. Berdahl is an expert in organizational behavior and workplace harassment. She was retained to prepare a report for the certification application in the Merlo Action. Her report outlines the necessity for confidentiality in the claims process and she made recommendations on steps to advance positive cultural changes within the RCMP.

vii. Number of objectors and nature of objections

[44] As of the date of the Motion, approximately 20,000 class members were provided with notice of the certification and notice of the settlement hearing. From that mass communication, only three written objections were received. Two of the objections are from individuals who are not included in the class definition. Therefore these were in effect objections to the class definition rather than objections to the settlement. The one other objection was from an individual who objected to the settlement amount on the basis that her claim would exceed the amounts provided for in the settlement. In which case, opting out of the settlement would have been the option open to this particular claimant.

[45] No objections were voiced at the hearing.

viii. *Presence of good faith and absence of collusion*

[46] Negotiations towards settlement in the Merlo Action started in early 2014 and continued into 2015. In January 2016, negotiations in both the Merlo and Davidson actions were undertaken and culminated in the Settlement Agreement. There were a total of ten in person settlement meetings and numerous conference calls and various forms of other communications.

[47] The Parties explain that this litigation has been ongoing for over five (5) years, and that the successful rounds of negotiations included the assistance of the neutral party the Honourable Mr. Bastarache, C.C., Q.C..

[48] Legal counsel for the Plaintiffs was assisted throughout the process by a number of experts who made important contributions to the framework of the Settlement Agreement.

[49] Based on the above, I am satisfied that all parties acted in good faith and there is no evidence of collusion.

ix. *Communication with class members*

[50] Following the certification of this class action on January 13, 2017, a robust notice distribution scheme to potential class members was undertaken. Class counsel estimates that over 20,000 notices were sent out. Notices were also published in newspapers throughout the country.

[51] Class counsel advise that they have been contacted by over a thousand (1000) women wishing to participate in this Settlement

[52] The representative Plaintiffs have also had a hands-on role in the settlement discussions and communication with potential class members.

x. *Information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation*

[53] The Merlo and Davidson actions were pursued as stand-alone claims and although there was some settlement discussion, both actions continued along their litigation path.

[54] As settlement negotiations in both the Merlo and Davidson actions were brought together, there were several reports addressing the issue of gender harassment within the RCMP. These reports provided the Parties with additional information as to the nature of the harassment problem in the RCMP and the steps that would be required to address the problem.

[55] In early 2014, the Defendant expressed an interest in a global settlement. Negotiations continued through 2015 and 2016. The Settlement Agreement was signed by all parties on October 6, 2016.

xi. *Conclusion*

[56] Having outlined and considered all the factors above, this Court finds the proposed Settlement Agreement fair, reasonable and in the best interests of the class as a whole. The Settlement Agreement is approved.

(b) *Approval of the Notice Plan and Appointment of Assessor*

[57] In addition to approval of the Settlement Agreement, the Parties also seek approval that the office of the Assessor (Honourable Mr. Bastarache, C.C., Q.C.) be responsible for disseminating the Notice to class members. The Honourable Mr. Bastarache, C.C., Q.C., conducted individual interviews and assessments to determine compensation in an out of court settlement for victims of sexual abuse by Catholic priests in the Diocese of Bathurst and Archdiocese of Moncton, New Brunswick. Based on his experience in this role, as well as his many years as a Supreme Court Justice, the Representative Plaintiffs believe that the Honourable Mr. Bastarache, C.C., Q.C., will fairly assess the claims and will deal with all claimants in a sensitive and empathetic manner. The Honourable Mr. Bastarache, C.C., Q.C., retained Versailles Communications to prepare a Notice Plan. The Notice will inform class members of how they may submit claims. The proposed manner of distribution for the Notice is the same as the distribution that was approved by this Court for the Notice of Certification and Settlement Approval Hearing.

[58] The Settlement Agreement is posted on the websites of Class counsel (Klein Lawyers LLP and Kim Orr Barristers P.C.), as well as on a settlement website which was created by the office of the Assessor (<https://merlodavidson.ca/en/>).

[59] The Notice will be distributed by:

- direct mail to potential class members;
- posting on the Assessor's website, Class counsel's websites, and the RCMP's website and intranet;
- publication of the Notice in major Canadian newspapers;
- an advertising campaign on Facebook; and
- posting in all RCMP physical premises.

[60] I approve the Notice Plan and I also approve the appointment of the Honorable Mr. Bastarache, C.C., Q.C., as the assessor to administer the settlement and determine which claimants are eligible for compensation pursuant to the terms of the Settlement Agreement.

(c) *Relief from Rule 334.21(2)*

[61] The Representative Plaintiffs seek relief from the application of Rule 334.21(2) of the *Rules, supra*, which states:

334.21 (2) A class member shall be excluded from the class proceeding if the member does not, before the expiry of the time for opting out specified in the certifying order, discontinue a proceeding brought by the member that raises the common questions of law or fact set out in that order.

334.21 (2) Le membre est exclu du recours collectif s'il ne se désiste pas, avant l'expiration du délai prévu à cette fin dans l'ordonnance d'autorisation, d'une instance qu'il a introduite et qui soulève les points de droit ou de fait communs énoncés dans cette ordonnance.

[62] They rely upon Rule 55 of the *Rules* which states:

55 In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.

55 Dans des circonstances spéciales, la Cour peut, dans une instance, modifier une règle ou exempter une partie ou une personne de son application.

[63] They argue that this would be an appropriate case to apply the relief provided for in Rule 55.

[64] This Court has held in *Chow v Canada (Minister of Citizenship and Immigration)*, [1998] 161 FTR 156 at para 8, 46 Imm LR (2d) 231, in explaining the requirement of special circumstances, that “implicit, in special circumstances is, on the one hand, justice and, on the other hand, that there be no prejudice.” This Court further noted in *Pearson v Canada* (2000), 195 FTR 31 at para 5, 100 ACWS (3d) 44, that “any application of rule 55 must accord with the general principles espoused by the Federal Court Rules”.

[65] The general principles are explained at Rule 3 of the *Rules*, namely that:

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

3 Les présentes règles sont interprétées et appliquées de façon à permettre d’apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

[66] The Parties submit that the Representative Plaintiffs should not be excluded from this proceeding, since allowing them to participate in the settlement claims process does not cause prejudice, actual or otherwise, upon the Defendant as they will discontinue the British Columbia and Ontario actions upon approval of the Settlement Agreement by this Court. They argue that the application of Rule 55 accords with the general principles of the *Rules* and specifically encompassed in Rule 3.

[67] The Court accepts these submissions and finds that, in these specific circumstances, Rule 334.21(2) shall not apply to the Representative Plaintiffs.

(d) *Honorarium to Ms. Merlo and Ms. Davidson*

[68] The payment of an honorarium of \$15,000 to each the Representative Plaintiffs is requested on the basis that this is an exceptional case and the contributions of the Representative Plaintiffs are worthy of recognition in the form of honorarium payment. If approved, the payment will be payable out of Class counsel fees.

[69] This request is based upon their important contributions to this litigation and their considerable time and efforts as the Representative Plaintiffs. They each commenced their own class actions in BC and Ontario, and actively advanced those claims. This included publicizing their personal account of the gender and sexual orientation harassment which they endured within the RCMP. This has required the public re-living of painful events.

[70] They gave their name and gave their face to high profile class litigation and by necessity, they forfeited their privacy for the benefit of many others who can remain anonymous. Being prepared to spearhead such a cause comes at a personal cost and a deprivation of privacy.

[71] They have both travelled for the litigation and Settlement meetings, they have given media interviews to raise awareness of this class proceeding, and encouraged other class members to come forward with their experiences. They have had personal contact with hundreds of potential class members.

[72] In *Robinson v Rochester Financial Ltd*, 2012 ONSC 911 at para 43, [2012] 5 CTC 24, a list of considerations were identified in assessing whether the representative plaintiff(s) should receive an honorarium, as follows:

- (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.

[73] In *Eidoo v Infineon Technologies AG*, 2015 ONSC 2675, [2015] OJ No 2062, citing at paragraph 13 *The Law of Class Actions in Canada*, by Warren K. Winkler et al, (Toronto: Canada Law Book, 2014), the Ontario Superior Court explains how usually compensation to the representative plaintiff is appropriate uniquely in situations where the plaintiff has provided services which are over and above the usual duties of a representative plaintiff.

[74] I have no difficulty concluding that this case warrants the award of honorarium to both Representative Plaintiffs, Ms. Merlo and Ms. Davidson, in the amount of \$15,000.00 each.

(e) *Class Counsel Fees and Disbursements*

[75] Approval of legal fees in the amount of 15% is also sought. Both Representative Plaintiffs signed contingency fee agreements agreeing to pay 33.3%, however, because of the

structure of the settlement, class members will only be paying 15% of recovery toward legal fees.

[76] No objections to the legal fees were raised.

[77] The Federal *Rules* provide:

Approval of payments

334.4 No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge.

Approbation des paiements

334.4 Tout paiement direct ou indirect à un avocat, prélevé sur les sommes recouvrées à l'issue d'un recours collectif, doit être approuvé par un juge.

[78] In *Cardozo v Becton, Dickinson & Co*, (*supra* at para 25), the British Columbia Supreme Court outlined various factors to be considered by the court in assessing the reasonableness of fees. These factors are addressed below.

i. *Results achieved*

[79] The terms of the settlement have been outlined above and offer advantages for class members which would not have been available had the matter proceeded through litigation. The class and class period are broadly defined, and the claims-made settlement ensures each approved claim will be paid. As well, the confidential and non-adversarial claims process is a significant feature of the settlement process considering the nature of the claims.

[80] The monetary compensation available under the Settlement Agreement is reasonable and within the range of compensation that might be awarded at trial.

[81] The Settlement Agreement also provides for non-monetary benefits for class members, namely, a public apology and the implementation of measures aimed at reducing and eliminating gender and sexual orientation based harassment in the RCMP.

[82] Class counsel also successfully negotiated settlement terms that the Defendant would not rely upon limitation periods or statutory bars to any of the class claims.

[83] Class counsel will also continue to be involved in settlement administration.

ii. *Risks undertaken*

[84] The litigation risks assumed by Class counsel here was substantial. The fact that no other Canadian law firms filed parallel actions indicated that this matter was seen by other lawyers as being highly complex and unlikely to succeed. Furthermore, Class counsel pursued this litigation to completion on their own rather than with a consortium of counsel from various provinces.

[85] Some of the risks associated with these claims included the fact that there was little accurate information as to the extent of gender and sexual orientation based harassment in the RCMP. Counsel was also aware that securing evidence to advance the claims was likely to require years of contested litigation and discoveries. There was a risk that the class would not be certified given the plethora of individual issues involved.

[86] The Defendant opposed certification of both the Merlo and Davidson actions. Based upon the submissions filed in those actions which were included in the Motion Record, it is clear that Canada was forcefully defending the claims.

[87] These were not claims that had a guarantee of success at the end of the day.

iii. *Time expended*

[88] The Parties submit that Class counsel diligently litigated the actions and engaged in intense settlement negotiations. Class counsel devoted considerable time and resources to the prosecution of the actions. In some cases, they hired personnel specifically to work on these claims. Many of the class members were interviewed and a total of six experts were retained. Class counsel also covered the costs of disbursements. By taking on litigation of this magnitude, counsel states that they were unable to explore or embark on other potentially lucrative class actions.

iv. *Complexity of the matter*

[89] This was multi-faceted complex class litigation with substantive legal complexity involving novel claims with potential legislative barriers. Expertise in in the areas of psychology, psychiatry, and the study of gender dynamics and gender and sexual orientation based harassment and discrimination were necessary. Additionally, class members were seeking more than monetary compensation. They wanted a public apology from the RCMP for the harassment experienced by class members, and they wanted to see initiatives and changes implemented

within the RCMP to reduce and eliminate harassment. While relief of this nature is outside the litigation realm, these were factors which the class members insisted upon and which added a level of complexity for Class counsel.

v. Degree of responsibility assumed by counsel

[90] The Merlo Action in British Columbia was commenced in 2012 and the Davidson Action in Ontario was commenced in 2015. No other parallel actions were filed. Class counsel assumed complete responsibility for commencing and prosecuting this litigation.

vi. Importance of the matter to the client

[91] As indicated in the Merlo and Davidson Affidavits, this was deeply personal litigation. Their claims were for serious psychological injuries that impacted their lives and the lives of other class members in many diverse and significant ways.

[92] The Plaintiffs also wanted a settlement which would have a lasting impact of the culture of the RCMP by helping reduce the incidents of gender and sexual orientation based discrimination. Their insistence on an apology and change initiatives demonstrates the importance of this this litigation to the Plaintiffs.

vii. Quality and skill of counsel

[93] As noted above, there is no question that Class counsel is highly experienced in the specialized field of class actions. Their experience has been noted in other class action decisions

(*Ramdath v George Brown*, 2016 ONSC 3536 at para 2, [2016] OJ No 2803; *McSherry v Zimmer GMBH*, 2012 ONSC 4113 at para 21, 226 ACWS (3d) 351; *Richard v British Columbia*, 2010 BCSC 773 at para 12, 191 ACWS (3d) 734; *Rideout v Health Labrador Corp*, 2007 NLTD 150 at para 71, 270 Nfld & PEIR 90).

viii. *Ability of the class to pay*

[94] Given the nature of the defences raised by the Defendant, class members could likely not have been able to afford to retain legal counsel on a fee for service basis. Of note as well is that Class counsel here did not seek any third party litigation financing in this case. In doing so, Class counsel incurred added financial risk.

ix. *Client and the class' expectation*

[95] By signing the contingency fee agreements, Ms. Merlo and Ms. Davidson expected to pay legal fees of 33.33% of whatever they recovered. However, as Class counsel was able to negotiate a contribution from the Defendant toward Class Counsel Fees, the amount for legal fees that will be paid by each class member will only be 15%.

[96] The Notice of Settlement Approval Hearing informs class members that Class counsel will ask the Court to approve a Class Counsel Fee of 15% payable from the compensation awarded to each class member under the Settlement Agreement.

[97] No class member objected to the legal fees.

x. *Fees in similar cases*

[98] The Parties submit that a contingency fee of 33.33% in a class action has been held to be presumptively valid on the basis of the decisions in *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537, [2016] OJ No 2936; *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686, [2013] OJ No 5825.

xi. *Conclusion*

[99] I am satisfied in all of the circumstances that the fees meet the criteria for approval and I therefore approve the fees. In addition to being reasonable, the fees are less than those provided for by the contingency fee agreements signed by both Ms. Merlo and Ms. Davidson. I would also note that the fact that Class counsel was willing to act on a contingency fee basis for these claims, which faced a number of hurdles, achieves one of the policy objectives of class proceedings which is access to justice for those who might not otherwise be able to afford legal representation.

[100] Furthermore, pursuant to the Settlement Agreement, the Defendant has agreed to pay the reasonable disbursements. Accordingly there will be no deduction from the amounts paid to the class members for disbursements.

ORDER in T-1685-16

THIS COURT ORDERS that:

- 1) The Settlement of this action as set out in the Settlement Agreement, including the Recitals, and Schedules and Appendices, in Schedule “A” attached to this Order, is fair and reasonable and in the best interests of Class Members, and is approved.
- 2) The Settlement and this Order are binding on the Parties and on every Class Member, including Persons Under Disability, unless they opted out or are deemed to have opted out on or before the expiry of the Opt Out Period, being March 29, 2017, and are binding whether or not such Class Member claims or receives compensation.
- 3) The Parties to the Settlement Agreement may make non-substantive amendments to the Settlement Agreement, including its Schedules and Appendices, provided that each Party to the Settlement Agreement agrees in writing to any such amendments.
- 4) The Notice to Class Members of the approval of the settlement of this action shall be substantially in the form and content attached to this Order as Schedule “B” (the “Notice”). The Notice shall be distributed in accordance with the Notice Plan attached to this Order as Schedule “C”.
- 5) The Notice shall be published within 10 business days of the “Implementation Date”, as defined in the Settlement Agreement.
- 6) The Defendant, Her Majesty the Queen, shall pay the amounts required under the Settlement Agreement, including the cost of Notice and administration of the Settlement.
- 7) The Honourable Michel Bastarache, C.C., Q.C., is appointed as Assessor to administer the Settlement.

- 8) The Assessor cannot be compelled to be a witness in any civil or criminal proceeding, administrative proceeding, grievance or arbitration where the information sought relates, directly or indirectly, to information obtained by the Assessor by reason of the Settlement or the settlement claims process.
- 9) No documents received by the Assessor, directly or indirectly, by reason of the Settlement or the settlement claims process, are producible in any proceedings.
- 10) The RCMP and Canada shall release to the Assessor information and documents required by him or as otherwise required by the Settlement Agreement, including in the Schedules and Appendices.
- 11) Rule 334.21(2) does not apply to the Representative Plaintiffs, Janet Merlo and Linda Gillis Davidson, and neither is excluded from this proceeding despite not having discontinued the parallel proceedings in British Columbia and Ontario (namely, Supreme Court of British Columbia Action No. S-122255, *Merlo v Canada (AG)* and Ontario Superior Court of Justice Action No. CV-15-52473600CP, *Davidson v Canada (AG)* collectively the “Parallel Actions”) prior to the opt out deadline.
- 12) The contribution to Class Counsel Fees payable by the Defendant, in the amount of \$12 million plus applicable sales taxes is approved, and is ordered to be paid by the Defendant to Class Counsel within 30 days following the Court Approval Date. The sum of \$6 million plus applicable sales taxes will be paid, by wire transfer, to each of Klein Lawyers LLP and Kim Orr Barristers P.C.
- 13) A payment by each Class Member of a Class Counsel Fee of 15%, plus applicable sales taxes, of the individual compensation paid to the Class Member under the Settlement, is approved. The 15% Class Counsel Fee is not payable on amounts paid to Class Members

for reimbursement of out of pocket or travel expenses pursuant to Article 11.04 of the Settlement Agreement. The 15% Class Counsel Fee payable by each Class Member will be calculated by the Assessor who will hold back the Class Counsel Fee and applicable sales tax from the compensation otherwise payable to the Class Member. The Assessor will remit 50% of the Class Counsel Fees plus applicable sales tax to Klein Lawyers LLP and 50% plus applicable sales tax to Kim Orr Barristers P.C. by wire transfer on the first business day of each month for all payments made to Class Members in the prior month.

- 14) Upon the Court Approval Date, the Defendant, Her Majesty the Queen, and any and all other applicable provincial and territorial Ministers and governments who are liable for the actions of RCMP members acting as provincial constables under provincial legislation and/or other provincial-federal policing agreements, and their respective officers, agents, servants and employees (“Releasees”), are forever and absolutely released separately and severally by the Class Members from any and all actions, including claims made under the *Canadian Charter of Rights and Freedoms*, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, grievances and complaints, and demands of every nature or kind available, asserted or which could have been asserted, whether known or unknown, including for damages, contribution, indemnity, costs, expenses and interest which any Class Member ever had, now has, or may hereafter have, directly or indirectly, arising from or in any way relating to, or by way of any subrogated or assigned right, or otherwise in relation to gender and/or sexual orientation based discrimination, bullying and Harassment while working in the RCMP that occurred during the Class Period (the “Released Claims”), and this release includes any such claim made or that could have been made in any proceeding

- including the Parallel Actions whether asserted directly by the Class Member or by any other person, group or legal entity on behalf of or as representative for the Class Member.
- 15) The obligations assumed by the Defendant, Her Majesty the Queen, under the Settlement Agreement are in full and final satisfaction of any and all claims by Class Members against the Releasees, including claims made under the *Canadian Charter of Rights and Freedoms*, relating to or arising from gender and/or sexual orientation based discrimination, bullying and Harassment while working in the RCMP that occurred during the Class Period.
 - 16) Class Members are barred from making any claim or taking or continuing any proceedings arising out of, or relating to, the Released Claims against any Releasee or other person, corporation or entity that might claim damages and/or contribution and indemnity and/or other relief against the defendant, Her Majesty the Queen, including relief of a monetary, declaratory, or injunctive nature, under the provisions of the *Negligence Act*, RSO, 1990, c N-1, or its counterparts in other jurisdictions, the *Police Act*, RSBC 1996, c 367 or its counterpart in other jurisdictions, the *Canadian Charter of Rights and Freedoms*, the common law, Quebec civil law, or any statutory liability.
 - 17) The Representative Plaintiffs, Janet Merlo and Linda Gillis Davidson, are each awarded an honorarium of \$15,000, which will be paid out of Class Counsel Fees.
 - 18) This Court shall retain continuing jurisdiction over the Settlement and its implementation, interpretation and enforcement.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1685-16

STYLE OF CAUSE: JANET MERLO AND LINDA GILLIS DAVIDSON v
HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 24, 2017

ORDER AND REASONS: MCDONALD J.

DATED: MAY 30, 2017

APPEARANCES:

David A. Klein	FOR THE PLAINTIFFS
Angela Bespflug	
Won J. Kim	
Megan B. McPhee	
Aris Gyamfi	
Mitchell R. Taylor	FOR THE DEFENDANT
Charmaine De Los Reyes	
Sarah Hagen	

SOLICITORS OF RECORD:

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