Federal Court  Cour fédérale

Date: 20190130

Docket: T-1068-14

Citation: 2019 FC 125

Ottawa, Ontario, January 30, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

RAYMOND MICHAEL TOTH

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] The Representative Plaintiff, Mr. Michael Raymond Toth [Mr. Toth or the Plaintiff], and the Defendant bring this joint motion pursuant to Rule 334.29 of the *Federal Courts Rules*, SOR/98-106 [the Rules] seeking approval of the Settlement Agreement in this Class Action. Class Counsel and Mr. Toth also seek the approval of the legal fees and disbursements of Class Counsel and an honorarium of $50,000 for Mr. Toth, to be paid by Class Counsel out of the approved legal fees.

[2] For the reasons that follow, the Court approves the Settlement Agreement, the legal fees and disbursements of Class Counsel and the honorarium for Mr. Toth as the Representative Plaintiff.

I. Background

[3] This Class Action addresses the claims of veterans who were in receipt of various benefits, including Disability Pension benefits, and had the Disability Pension amounts deducted from the other benefits which they received or were entitled to receive.

[4] The benefit programs at issue in the Class Proceeding are: the War Veterans Allowance [WVA] created under the *War Veterans Allowance Act*, RSC 1985, c W-3 and the Earnings Loss Benefit [ELB] and Canadian Forces Income Support [CFIS] benefit created under the *New Veterans Charter* (officially the *Veterans Well Being Act*, SC 2005 c. 21).

[5] The Class is comprised of: veterans of World War II and the Korean War, including their eligible spouses, dependants, survivors, or orphans [War Veterans]; and veterans of the Canadian Armed Forces, including their eligible spouses, dependants, survivors, or orphans [CAF Veterans].

[6] As explained in the affidavit of Michael Doiron, Assistant Deputy Minister Service Delivery with Veterans Affairs Canada [VAC], a Disability Pension under the *Pension Act*, RSC 1985, c P-6 [*Pension Act*] consists of monthly tax-free payments to eligible CAF Veterans and War Veterans, and their survivors and dependants.

[7] To qualify for a Disability Pension there must be, first, a medically diagnosed disability connected to military service and an assessment of the degree to which the injury is attributable to military service (entitlement), and second, an assessment of the extent or degree of the disability. The assessment of a disability is expressed as a percentage from 0% to 100%. The extent of disability may be reassessed at a later date and the disability rate may be adjusted.

[8] Since the enactment of the *New Veterans Charter* on April 1, 2006, no new monthly Disability Pensions have been awarded to CAF Veterans who served after the Korean War. However, CAF Veterans who received a Disability Pension under the *Pension Act* before April 1, 2006 continue to receive a monthly pension. Those who served after 2006 and became disabled may be eligible for a lump sum for disability, but not a monthly pension.

[9] As explained in the affidavit of Mr. Doiron, ELB came into effect in April 2006 as a taxable monthly benefit for eligible CAF Veterans who require rehabilitation or vocational assistance. It is payable during the period of rehabilitation services and vocational assistance. ELB can be payable until a CAF Veteran reaches 65 years of age if he or she meets the applicable criteria.

[10] The CFIS is a non-taxable monthly benefit available to CAF Veterans who are no longer entitled to ELB and are capable of working, but are not employed. The benefit is provided to CAF Veterans who are under 65 years of age and meet the employment and income criteria.

[11] The WVA is also a non-taxable benefit, which is available to low income War Veterans or their survivors and orphans to assist in meeting their basic needs. The amount of the benefit is based on an assessment of income from other sources and on marital status and the number of dependants.

[12] In accordance with the statutory provisions, Disability Pension amounts were deducted from the monthly benefits payable to CAF Veterans under ELB and CFIS up until September 30, 2012.

[13] Similarly, Disability Pension amounts were deducted from the monthly benefit payments to War Veterans under the WVA program up until September 30, 2013 (i.e., one year later).

[14] As a result of amendments made in 2012 and 2013 to the relevant statutory provisions, the deductions for the Disability Pension ended. VAC provided a one-time payment to some Class Members in the fall of 2014. The one-time payment was intended to compensate veterans for the deductions made from May 29, 2012, when the Government announced that it would end the deductions of the Disability Pension, to September 30, 2012 for ELB and CFIS Class Members and to September 30, 2013 for WVA Class Members, when the amendments came into force.

[15] The Plaintiff received a one-time payment in 2013. In addition, he more generally challenged the previous policy of deducting monthly Disability Pension benefits from the benefits available to disabled veterans under other federal benefit programs. He commenced this

Action on behalf of Class Members in April 2014.The Statement of Claim noted that the amount of the deductions in individual cases was based on the degree of the veteran's disability. The greater the disability, the greater the amount deducted and the lesser the amount received under WVA, ELB or CFIS. The original Statement of Claim asserted both common law claims and claims under the *Canadian Charter of Rights and Freedoms* [the *Charter*].

[16] In January 2016, the Statement of Claim was amended, with the consent of the Defendant, to exclude the common law claims for breach of social covenant, breach of fiduciary duty, unjust enrichment, unlawful assignment under the *Pension Act* and related claims. The Amended Statement of Claim narrowed the claims to the infringement of the Class Members' *Charter* equality rights.

[17] The Plaintiff now argues that as a result of the Government's previous policy of deducting payments intended to compensate veterans for their disability, Class Members suffered discrimination based on disability, which violates section 15 of the *Charter*.

[18] In March 2016, this Court certified the action as a Class Action, with the consent of the Defendant. As noted above, the Class includes War Veterans and CAF Veterans. The Certification Order describes two groups as follows:

> • **ELB/CFIS Class**
>
> All Canadian Forces members and veterans, and their spouses, dependants, survivors, and orphans who received a reduced Earnings Loss Benefit or Canadian Forces Income Support Benefit between April 1, 2006 and May 29, 2012, or received no benefit at all during that time, because of the deduction of disability benefit entitlements under the *Pension Act*; and

- **WVA Class**

  All veterans, their spouses, dependants, survivors, and orphans who received a reduced allowance under the *War Veterans Allowance Act* between April 17, 1985 and May 29, 2012, or who did not receive a veterans allowance at all during that time, because of the deduction of disability benefit entitlements under the *Pension Act*.

[19] This Court certified four common issues for determination. The Notice of the Certification Order was published in the *National Post* and *Globe and Mail* in French and English in April 2016. The 2016 Notice indicated, among other things, that the Class sought a declaration that the deduction of disability benefits was discriminatory and sought a **"refund of all disability benefits deducted and/ or damages"**. The 2016 Notice explained that by agreement with the Plaintiff, a scaled legal fee of up to 30% of any amounts received would be paid to Class Counsel, subject to the approval of the Court. The Notice directed interested persons to contact Class Counsel, Gowling WLG and Michel Drapeau Law Office [MDLO], for further information.

[20] VAC mailed the Notice of the Certification Order to the known 15,000 Class Members in August 2016. As noted by Mr. Doiron, the goal was to reach all CAF Veterans and War Veterans who received a monthly Disability Pension between April 2006 and May 2012, and who had either received, or were eligible to receive, ELB, CFIS or WVA payments during that period.

[21] The parties explain that they launched settlement discussions in the summer of 2017, which lasted over a year and involved several proposals and counter-proposals and arduous negotiations, ultimately resulting in the proposed Settlement Agreement.

[22] The proposed Settlement Agreement seeks to compensate Class Members for the alleged discrimination arising from mental or physical disability. As explained in more detail below, this compensation is not restitution or a refund for the amounts that were deducted. The total amount of the Settlement is $100 million, less the legal fees and disbursements of Class Counsel as approved by the Court.

[23] In September 2018, the Court approved the Notice to the Class of the Proposed Settlement. The 2018 Notice was mailed to known Class Members and posted on the website of Gowling WLG and MDLO. The September 2018 Notice, among other information, advised Class Members: that a proposed Settlement Agreement had been reached, that the Court's approval of the Settlement Agreement was required, the proposed date for the hearing to determine whether the Settlement Agreement should be approved, how Class Members could voice their support or objections regarding the proposed settlement, how and where they could attend the hearing, and that the website of Class Counsel included further details. The 2018 Notice indicated that the Class Action seeks "damages *and* compensation for all class members who were subject to the deduction".

[24] The key terms of the proposed Settlement Agreement were set out in the 2018 Notice, including that payments to CAF Veterans who were entitled to ELB and CFIS and received a disability pension between 2006 and 2012 would receive a payment based on the degree of their disability (as determined by their assessment pursuant to the *Pension Act*), and War Veterans would receive a lump sum payment.

[25] The 2018 Notice further indicated that Class Counsel would seek the Court's approval of their fees at 17% of the settlement amount plus disbursements. In addition, the Notice advised Class Members that the Court's approval would be sought for payment of an honorarium of $50,000 to Mr. Toth, to be paid out of Class Counsel's fees.

II. The Proposed Settlement

[26] The Defendant will pay $100 million as the Total Settlement Amount. The fees and disbursements of Class Counsel, as approved by the Court, will be paid from the total Settlement amount. The Settlement addresses all claims for damages, compensation, fees and disbursements.

[27] The basis for the settlement was described by the parties in their submissions to the Canada Revenue Agency regarding a determination on the tax consequences of the payments and in their submissions to this Court. The parties note that the Class alleged that, contrary to section 15 of the *Charter*, they were discriminated against on the basis of physical and mental disability under the previous policies and practices underlying the deduction of Disability Pension amounts. The settlement focuses on compensation for harm, including pain, suffering, humiliation, and loss of dignity, resulting from this discrimination. The compensation model is based on the degree of disability rather than calculating amounts for restitution of the amounts deducted from entitlements in individual cases.

[28] The total Settlement amount is divided into two parts, the WVA fund and the ELB/CFIS Fund. The WVA fund of $30 million will provide payments to an estimated 12,500 WVA Class

Members who received, or were eligible to receive, WVA benefits. The ELB/CFIS fund of $70 million will provide payments to an estimated 2500-3000 CAF Class Members who received, or were eligible to receive, ELB/CFIS benefits.

[29] Payments to CAF Class Members will be based only on an eligible Class Member's degree of disability as assessed pursuant to the *Pension Act* from 5% to 100%. The payments will range from approximately $2000 to $2500 for those with a 5% disability to $40,000-$50,000 for those with a 100% disability. The amount is not a refund and does not relate to the amounts previously deducted from any CFIS or ELB benefit.

[30] As noted, payments to the WVA Class Members who were eligible for the WVA and received a disability pension between 2006 and 2012 would receive a lump sum of approximately $2000-$2500. Class Counsel explain that the relatively large size of the WVA Class, the relatively small impact of the deductions on individual WVA Class Members, and the administrative resources which would be required to determine their individual entitlement based on degree of disability, led to the agreement that the WVA Fund be distributed in equal lump sum payments.

[31] The payments will be made to a deceased Class Member's estate where that Class Member has passed away since the 2016 Notice of Certification.

[32] The Settlement Agreement forgoes claims for pre-judgment and post-judgment interest on the amounts to be paid.

[33] The amounts to be paid to all Class Members will be exempt from income tax under paragraphs 81(1)(d) and 81(1)(d.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*Income Tax Act*]. No tax will be withheld from the payment and Class Members will not be required to report payments under the proposed Settlement on their income tax returns.

[34] The fees and disbursements of Class Counsel as approved by the Court will be deducted from each fund proportionally.

III. The Issues

[35] There are three issues to address:

- Should the Court approve the Settlement Agreement? This entails consideration of whether the agreement is fair, reasonable and in the best interests of the class.

- Should the Court approve an honorarium of $50,000 to Mr. Toth as the Representative Plaintiff (which will be paid out of the approved fees of Class Counsel)?

- Should the Fee Agreement for Class Counsel be approved? This entails consideration of whether the amount of the legal fees and disbursements is fair and reasonable. The Fee Agreement should be considered only after determining whether to approve the proposed Settlement Agreement for the Class Members.

IV. Should the Settlement Agreement be approved?

A. *The Jurisprudence with Respect to the Court's Approval of Settlement Agreements*

[36] In accordance with Rule 334.29 of the Rules, the Court must approve the settlement of a class action.

[37] The recent jurisprudence in this Court has confirmed the well-established test for approval of a settlement agreement in a class action. In *Merlo v Canada*, 2017 FC 533, [2017] FCJ No 773 (QL) [*Merlo*], Justice McDonald noted at para 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" (C*ardozo 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).

[38] In *Condon v Canada*, 2018 FC 522, 293 ACWS (3d) 697 [*Condon*], Justice Gagné elaborated on the test and the factors to consider in determining whether the test has been met, at paras 17-19:

> [17] The test for approving a class action settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the Class as a whole, taking into account the claims and defences in the litigation and any objections to the settlement by class members. However, the test is not whether the settlement meets the demands of a particular class member.
>
> [18] A settlement need not be perfect (*Châteauneuf v Canada*, 2006 FC 286 at para 7). It need only fall "within a zone or range of

> reasonableness" (*Ontario New Home Warranty Program v Chevron Chemical Company* (1999), 46 OR (3d) 130 (Ont Sup Ct J) at para 89).
>
> [19] In determining whether to approve a settlement, the Court may take into account factors such as:
>
> a. The likelihood of recovery or likelihood of success;
>
> b. The amount and nature of discovery, evidence or investigation;
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> c. Terms and conditions of the proposed settlement;
>
> d. The future expense and likely duration of litigation;
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> 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.
>
> (See *Ford v F Hoffmann-La Roche Ltd* (2005), 74 OR 3d 758 (Ont Sup Ct J) (QL) at para 117.)

[39] Justice Gagné noted at para 20 that the factors are guidelines; some may not be relevant at all and some may carry more weight than others.

B. *The Relevant Factors*

[40] The Court has considered all the relevant factors.

(1) The Likelihood of Recovery or Success

[41] The Plaintiff's position is that the policy of deducting the disability benefits, which were based on the degree of disability, violated the *Charter*. However, the Plaintiff acknowledges that establishing liability and being awarded significant damages would pose challenges.

[42] Without this settlement, several years of continued litigation could follow, with no guarantee of success or recovery.

[43] As Class Counsel note, equality rights claims under subsection 15(1) of the *Charter* require the Plaintiff, first, to establish that they have been denied equal protection or benefit of the law, meaning that the law creates a distinction based on an enumerated or analogous ground and that the distinction creates a disadvantage by perpetuating prejudice or stereotyping (*Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 30-31, [2011] 1 SCR 396). The Defendant then bears the burden of justifying the denial of such rights as resulting from reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Charter* (*Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 at para 42, [2018] 1 SCR 522). The establishment of such claims in the context of government benefit programs is an added challenge (see for example ***Law v Canada (Minister of Employment and Immigration***), [1999] 1 SCR 497, 170 DLR (4th) 1).

[44] In *Manuge v Canada*, 2013 FC 341, [2014] 4 FCR 67 [*Manuge 2013*], which involved analogous discrimination claims advanced in relation to the deduction of Disability Pension

amounts from other benefits, Justice Barnes commented at para 32 that the likelihood of the plaintiff establishing his *Charter* claims "was doubtful at best".

[45] Even if the Court had found that the policy of deducting Disability Pension amounts violated the equality provisions of the *Charter*, the Court would still need to determine the appropriate limitation period. The *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [CLPA], if applied, would limit the period of recovery to six years, and the application of provincial law would limit the period to two years. This litigation was launched in 2014 and the application of even the six year limitation period would leave out claims before 2008.

[46] As Class Counsel noted, even if the Court found that the *Charter* claims had been established, the recovery of all amounts deducted from benefit payments would not necessarily be the result. In *Vancouver (City) v Ward*, 2010 SCC 27 at para 24, [2010] 2 SCR 28 [*Ward*], the Supreme Court of Canada [SCC] held that after a *Charter* breach has been found, the Court must find that damages are appropriate and just to the extent that they serve a useful function or purpose before awarding them. The state may still establish that other considerations render *Charter* damages inappropriate or unjust (*Ward* at para 33). Even then, the damages must be fair to both the individual and the state. The Court may consider the effect of the diversion of public funds for large awards when determining the amount (*Ward* at para 53).

[47] In addition, if the litigation continued and was successful, but aggregate damages were denied, Class Members would be subject to individual assessments and claims processes. Class

Counsel cautioned that individual examinations would likely require substantial resources and take several years to complete.

(2) Amount and Nature of Discovery Evidence and Investigation

[48] A voluminous amount of information was reviewed by Class Counsel to permit a full understanding of the facts, the potential claims and the financial impact of the deductions. The Defendant provided Class Counsel with electronic versions of 7,080 separate documents, totalling approximately 27,000 pages of records. Class Counsel obtained another 6,394 pages of records in response to Access to Information Requests.

[49] The review of these documents informed and assisted Class Counsel and the Plaintiff in negotiating the Settlement Agreement with a view to addressing the interests of the Class as a whole.

(3) The Terms and Conditions of the Proposed Settlement

[50] As noted above, the settlement is designed to compensate Class Members for the loss of dignity, pain and suffering associated with discrimination based on their degree of disability. The settlement will provide payments to veterans that had amounts deducted from their benefits and for veterans who may have been eligible to receive benefits under the WVA, ELB, and CFIS programs but did not receive those benefits because the policy of deducting Disability Pension amounts made them ineligible.

[51] The settlement will provide compensation for the harm of discrimination—not for the amounts deducted. A model which would provide restitution for the deducted amounts would exclude Class Members who may have been eligible for one of the benefits but did not apply or was not eligible to receive the benefits due to the policy of deducting Disability Pension benefits. In addition, calculating individual amounts would be a lengthy and complicated process. A restitution model would also result in the taxation of the payments for ELB Class Members.

[52] While the proposed settlement does not focus on the amounts deducted in individual cases, as Class Counsel explain, the $100 million total settlement is significant as it represents approximately 40% of total payments made to all recipients of the ELB, CFIS and WVA benefit programs during the relevant six-year period between April 2006 and May 2012.

[53] The settlement will provide payments to some Class Members that may not have had any deductions made. However, all Class Members are disabled and the payments are intended to address discriminatory practices based on their disability. On the other hand, some Class Members, who had deductions made over several years, may receive payments that fall far short of the amounts deducted. The Plaintiff and Class Counsel acknowledge that the settlement is not perfect for each Class Member but note that perfection is not the standard and that the settlement is fair and reasonable for the Class as a whole.

[54] Class Counsel explain that in their settlement negotiations, they initially contemplated that payments to CAF Veterans receiving ELB would be taxable because the payments were assumed to be a replacement for ELB income that was taxable under the *Income Tax Act*.

Payments to WVA Class Members or CAF Veterans receiving CFIS, on the other hand, would not be taxable because WVA and CFIS payments are not taxable under the *Income Tax Act*.

[55] Class Counsel also explain that once the basis of the settlement and claims process was developed, they sought a determination from the Canada Revenue Agency [CRA] that payments based on the degree of disability, as proposed, would not be subject to taxation under the *Income Tax Act*. Class Counsel note that extensive discussions began in August 2018. The CRA advised Class Counsel in early December 2018, just before the hearing of this motion, that tax would not be withheld from payments under the proposed Settlement. In addition, Class Members will not be required to report payments under the proposed Settlement on their income tax returns.

[56] For purposes of settlement only, both parties made concessions. For example, the Defendant waived potential defences or barriers to recovery based on the limitation periods, section 1 of the *Charte*r, the ability of estates to claim *Charter* damages, and individual assessments that could demonstrate that no damages had been incurred. Payments will be calculated easily and will be paid promptly, within approximately six to eight months of the approval of the Settlement Agreement to all Class Members, and without tax. This is particularly beneficial for elderly veterans that should not have to wait any longer to be compensated. The Plaintiff also made concessions, including narrowing the claims and foregoing pre-judgment and post-judgment interest.

(4) Recommendations and Experience of Counsel

[57] Class Counsel note that Gowling WLG, and Mr. Ruby in particular, have been active in class proceedings for over 25 years. Gowling WLG has represented litigants in more than 100 proceedings throughout Canada. Mr. Ruby has represented litigants in more than 20 separate class proceedings on a range of issues. In the present case, Gowling WLG has drawn on their counsel with expertise in pension, taxation, and estates and trust law.

[58] Mr. Ruby and other lawyers at Gowling WLG have been involved in this litigation since the beginning. Shortly after the Statement of Claim was filed, Mr. Drapeau of MDLO was engaged as co-counsel, bringing his experience in military and veterans' law. Mr. Drapeau and members of his firm have communicated with hundreds of Class Members in both official languages.

[59] Class Counsel submit that their skill and expertise led to a positive outcome that recognizes the interests of Class Members and benefits the Class as a whole. Class Counsel add that they had no hesitation recommending that the Class Members accept the Settlement. Class Counsel note that the Settlement takes into account the litigation risks, including the risk of no recovery. Class Counsel acknowledge that the settlement represents a compromise from VAC's highest internal estimates of the financial impact of the disability deductions on Class Members but notes that the total settlement amount, $100 million, falls within the range of VAC's estimates. Class Counsel submits that the proposed Settlement provides fair and prompt

compensation for Class Members, leaves no disabled veteran out and that payments will not be taxed.

(5) Expense and Likely Duration of Contested Litigation

[60] If the proposed Settlement Agreement is not approved, the litigation would continue and would likely be long, arduous and costly. Continuing the litigation could involve further discovery, the trial, possible appeals and the determination of individual claims. This could take three to five years.

[61] As the Plaintiff notes, although the Defendant consented to the certification of this Class Action, the Defendant filed a Statement of Defence which strongly disputes the claims. If the litigation continued, the Defendant could revert to its position. The efforts made to date to reach the proposed Settlement could be abandoned. Further compromises and collaboration to narrow or resolve the issues would not necessarily continue.

[62] As noted below, with respect to the fees and disbursements of Class Counsel, over 5000 hours have been spent to date by Class Counsel, which includes time spent by lawyers, paralegals and others. Many more hours would be spent if the litigation continued.

(6) Views of Class Members

(a) *Support for the Settlement Agreement*

[63] Class Counsel report that they received over one thousand responses to the proposed Settlement Agreement including phone calls, emails, and comments on the MDLO website. The majority of the responses expressed support. A sampling of the positive written statements illustrates that several Class Members welcome the resolution of this litigation and the payment they will receive and appreciate the time and effort of Class Counsel.

[64] For example, a Class Member from British Columbia wrote:

> I have just read the news and re-read it again 3 more times. I am overwhelmed by this great news, I had to keep asking if it was real. I offer huge thanks to MDLO for all of their hard work and patience they exhibited during this time. I am so grateful that after more than 6 years we will be getting our illegally clawed back money returned to us.

[65] A Class Member from Alberta wrote:

> The settlement means a lot to me as I am certain it does to all the Veterans who will be receiving their disability pension monies finally returned.

[66] Another Class Member from Alberta wrote:

> All Veterans and direct families whom have been affected by the ELB clawbacks are certainly appreciative of your representing this case. Our hopes/aspirations and best wishes are with your team's success in resolving this legal matter Michael Drapeau.

(b) *Objections to the settlement*

[67] Two Class Members appeared at the hearing to oppose the Settlement Agreement, one of whom also provided a written submission in advance. A third Class Member did not attend the hearing but expressed his concerns about the Settlement Agreement in a letter provided to the Court.

[68] Mr. Donald Leonardo provided a written submission to the Court on the eve of the hearing and he appeared at the hearing to voice his concerns. In his view, the proposed settlement is unreasonable and unfair to him and a "minority of outliers" of CAF Veterans because payments are determined by the degree of disability alone, without regard to the length of time during which benefits were reduced. The result is that the distribution of settlement funds will not be proportionate to the actual amounts "clawed back" from each Class Member. He asserted, although no evidence was provided to the Court, that $144,000 was deducted from his benefits over the years, but that he will receive only $35,000 from the settlement based on his disability which has been assessed at 70%.

[69] Mr. Leonardo criticized the settlement for focusing on simplicity and speed over fairness, and suggested that the calculations that would be necessary for a restitution model, i.e. a refund of the amounts deducted) are not as complex as Class Counsel submitted. He suggested that a restitution-based model be used instead and that it was not too late for the parties to renegotiate the Settlement Agreement.

[70] Mr. Martin Frechette also spoke at the hearing. Mr. Frechette similarly criticized the Settlement Agreement for failing to take into account the amount of each Class Member's deductions or the length of time during which they experienced deductions. Mr. Frechette disputed Class Counsel's assertion that every member of the ELB class had been disabled for the entire 6 year period. He also expressed the belief that the Notice of the Proposed Settlement did not make it clear to Class Members that they would not be compensated for the amount of the deductions. Mr. Frechette suggested that the additional complexity of a more individually tailored restitution process would not be insurmountable, as all the relevant information is available.

[71] Mr. Christopher Greenlaw wrote a letter to Class Counsel, which was provided to the Court, expressing his dissatisfaction with the proposed Settlement. Mr. Greenlaw indicated that he expects to receive $25,000 as a result of the settlement, based on his disability, which is assessed at 50%. He notes that this falls short of the $73,336 by which he asserts that his ELB benefit was reduced. He noted that he is part of a subset of the Class which will receive an inequitable and insufficient amount compared to their overall loss. Mr. Greenlaw expressed the view that the settlement should be closer aligned with the financial losses experienced. The three dissatisfied Class Members are of the view that the settlement discriminates against a portion of the class by forcing them to accept a greater financial loss than the majority. Mr. Leonardo and Mr. Frechette believe that the settlement discriminates against the veterans who were most disabled for the longest period of time, because they suffered the greatest deductions but will not necessarily see a proportionally greater recovery. They noted that a Class Member who had been subject to the deduction of pension benefits for a short period of time could receive the same

amount of compensation as a person with a similar level of disability whose pension benefits were deducted for several years. They suggested that if the settlement is intended to address discrimination, it fails.

[72] Several other CAF Veterans raised similar concerns that the amount of individual entitlements resulting from the Settlement would not correspond to deducted amounts.

(c) *Differences with Manuge*

[73] Some Class Members, including Mr. Toth, received payments following the settlement of the class action in *Manuge 2013* and are familiar with the *Manuge 2013* settlement. The few Class Members who voiced their dissatisfaction appear to be of the view that the settlement in the present action should be similar in magnitude and approach. Comparisons with *Manuge 2013* and previous decisions in that class proceeding are not appropriate and will only fuel their disappointment. There are real differences between this litigation and *Manuge*.

[74] Although the *Manuge 2013* settlement also addressed the past practice of deducting Disability Pension amounts, the benefit programs at issue and the basis of the litigation and the settlement differ.

[75] The decision in *Manuge v Canada*, 2012 FC 499, [2013] 4 FCR 647 [*Manuge 2012*] challenged the Government's policy of reducing long-term disability benefits under the Service Income Security Insurance Plan (SISIP) by the amounts payable to members under the *Pension Act*.

[76] The *Manuge* Class initially argued that the policy of deducting the amounts violated subsection 15(1) of the *Charter and* was not contractually justified. SISIP was administered through a contract between the Chief of Defence Staff and a private insurer, which provided that the monthly benefit would be reduced by "total monthly income benefits". The contractual issue turned on whether the pension payments could be considered "income benefits", as described in the SISIP policy.

[77] The contractual issue was resolved in *Manuge 2012* through a motion under Rule 220 of the *Federal Courts Rules*. Justice Barnes concluded that the allowable reductions of "income benefits" in the SISIP policy did not include pension benefits because the Disability Pension was not intended as income replacement.

[78] Following this determination, the parties negotiated and agreed on a settlement. The *Charter* claims were not addressed. However, as noted above, Justice Barnes commented in *Manuge 2013* at para 32, in the context of considering the litigation risk taken by Class Counsel:

> This was also not a case where the Defendant's liability approached a level of certainty. The claim to Charter relief was doubtful at best and the point of contractual interpretation that ultimately drove the settlement was neither a sure thing nor invulnerable to appeal.
>
> [My emphasis]

[79] The present action involves Disability Pension deductions to the ELB, WVA and CFIS. Moreover, the claims are based on breach of the equality provisions of the *Charter*, not contract principles, and the settlement is crafted accordingly.

(d) *The Objections of Class Members do not outweigh the other factors supporting the approval of the Settlement Agreement.*

[80] The jurisprudence has established that perfection is not the standard for the Court to approve a settlement agreement and that the best interests of the class as a whole are considered *(Merlo* at para 18; *Manuge 2013* at para 5). The Court's role is to determine whether the proposed Settlement is "fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member" (*Dabbs v Sun Life Assurance Co of Canada*, [1998] OJ No 1598 at para 11, 1998 CarswellOnt 5823).

[81] Although the Court acknowledges the concern of the objectors that a one size fits all approach may advantage some over others, this is not a reason to reject the whole Settlement Agreement, which appears to have wide support.

[82] As noted in *Manuge 2013* at para 24:

> [24] No class action settlement will ever be perfect. Recovery is always limited to those who meet the definition of a class member under the terms of certification. In cases like this involving thousands of unique individual claims, it is impossible and undesirable to treat every beneficiary equally in either financial or administrative terms. It is inevitable that a settlement like this one will leave a few people behind or benefit some ahead of others. In this case those distinctions are of insufficient weight to reject the proposed settlement.

[83] With respect to Mr. Leonardo's suggestion that the terms of the settlement could be revised, the Court cannot tinker with its terms and conditions or direct the parties to revisit

certain aspects of the agreement, which is the result of a long negotiation process informed by a voluminous record. In *Manuge 2013*, Justice Barnes noted at paras 5 and 6:

> [5] It is not open to the reviewing Court to rewrite the substantive terms of a proposed settlement nor should the interests of individual class members be assessed in isolation from the interests of the entire class: see *Dabbs v Sun Life Assurance Co. of Canada*, [1998] OJ no 1598 at paras 10-11, (available on QL).
>
> [6] It will always be a particular concern of the Court that an arms-length settlement negotiated in good faith not be too readily rejected. The parties are, after all, best placed to assess the risks and costs (financial and human) associated with taking complex class litigation to its conclusion. The rejection of a multi-faceted settlement like the one negotiated here also carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost.

[84] In *Merlo*, Justice MacDonald reiterated the same principle at para 17, "[w]hile 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)."

[85] As Class Counsel explained, a settlement based on quantifying the amounts deducted would require a lengthy claims process and would require an examination of the Class Member's income from several sources. In addition, some of the amounts received would be taxable. This approach would also leave out many Class Members who did not have deductions from their benefits made based on the amount of their disability pensions because they were not in receipt of such benefits due to the policy.

(7) The Presence of Good Faith/ Absence of Collusion

[86] The parties explain that their negotiations to settle this litigation began in August 2017 and continued for a year with several proposals considered and revised. The parties describe the negotiations as adversarial and arms' length. As noted above, up to that point, the Plaintiff's claims were disputed by the Defendant. The discovery process provided a basis for the parties to engage in settlement discussions, but each maintained their respective positions. The parties presented a proposed settlement to the Court in September 2018.

[87] Class Members were represented by experienced and dedicated Counsel, as was the Defendant. Each advanced their respective positions with an appreciation of the facts, the issues and the law. The description provided of the settlement process demonstrates that each party made concessions in good faith to resolve the litigation.

(8) Communications by Class Counsel and the Plaintiff with Class Members

[88] The 2016 Certification Notice was published in the National Post and The Globe and Mail (in French and English) in late April 2016. In August 2016, copies of the Certification Notice were also mailed by VAC to all known members of the two sub-classes, (about 15,000 veterans). Class Counsel noted that they received and responded to over a thousand individual telephone calls and several hundred emails and other correspondence received from Class Members.

[89] In accordance with the Certification Order and the Notice Plan, Gowling WLG and MDLO established websites and posted information to assist Class Members. The Notice of the Proposed Settlement and the hearing date of this motion to determine whether to approve the Settlement Agreement were posted on the websites. Updates followed to describe the proposed Settlement Agreement and to respond to questions.

[90] Class Counsel also responded in detail to some of the written submissions which were critical of the settlement, including that of Mr. Greenlaw and the correspondence from Mr. Leonardo's lawyer.

[91] If the proposed Settlement is approved, Class Counsel will continue to liaise with VAC regarding the administration of the Settlement. Class Counsel will continue to engage Class Members and inform VAC of any errors or omissions they identify and will assist in the conduct of an audit, if necessary.

C. *The Settlement Agreement is Fair, Reasonable and in the Best Interests of the Class*

[92] The Plaintiff and Defendant submit that the Settlement Agreement is fair and reasonable. The Defendant notes that the Plaintiff set out the background facts and the applicable law thoroughly and fully canvassed the litigation risks, the implications of continued litigation and the benefits of the Settlement.

[93] The consideration of all the relevant factors supports the Court's finding that the Settlement Agreement is fair and reasonable and is in the best interests of the Class Members.

This determination includes the Court's careful consideration of the nature of the *Charter* claims advanced; the defences which the Defendant would have advanced if the litigation continued; the overall benefits of the settlement, which resulted from concessions and compromises on both sides; and the views of the Class Members, including the objections described above.

V. Should an Honorarium be paid to the Representative Plaintiff?

[94] Class Counsel requests that the Court approve an award of $50,000 as an honorarium to the representative plaintiff, Mr.Toth, to be paid out of the amount approved for Class Counsel's fees and disbursements. The honorarium does not reduce the amounts payable to Class Members.

[95] The Court has the discretion to award such an honorarium and has done so in several class actions. As noted in *Johnston v The Sheila Morrison Schools,* 2013 ONSC 1528 at para 43, 226 ACWS (3d) 655, an honorarium is "not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice".

[96] In *Robinson v Rochester Financial,* 2012 ONSC 911 at para 43, [2012] 5 CTC 24 [*Robinson*], the Court, in declining to award compensation to the representative plaintiff, noted that compensation should be reserved for cases where "considering all the circumstances, the contribution of the plaintiff has been exceptional." The Court identified several factors to consider in deciding whether to award compensation to the representative plaintiff, including their active involvement in the litigation, significant personal hardship or inconvenience in connection with the prosecution of the litigation, time spent in advancing the litigation,

communication with other class members and participation in the litigation, including settlement negotiations and trial.

[97] Mr. Toth as Representative Plaintiff explained why he pursued the issue and the litigation. Mr. Toth noted that he enlisted in 1985 and was part of the regular forces since 1990. He was injured in a training exercise in 1994 but continued to serve. He began to receive a Disability Pension based on a 5% disability in 2003, which was later increased to 20%. Mr. Toth received a medical discharge in 2007. He received a SISIP Long Term Disability pension for a few years and ELB for a short period of time ending in 2012 when he began a new business. Mr. Toth received a payment as a result of the *Manuge* settlement regarding the deductions made from SISIP. He then inquired VAC and the Veterans Ombudsman about the deductions of his Disability Pension amounts from his ELB and pursued the issue with his own lawyer. He was subsequently referred to Gowling WLG.

[98] Mr. Toth calculated that his deductions over 33 months totalled $22,037.40. He received the one-time payment in 2014 of $2735.82. As a result, his net deductions are $19,301.58.

[99] In 2014, Mr. Toth engaged with lawyers at Gowling WLG with respect to negotiating a Retainer Agreement, providing information to support the claim, preparing affidavits and gathering documents for disclosure. Mr. Toth also notes that he spent a great deal of time with Class Counsel discussing the documents provided by VAC, and subsequently during the negotiation of the settlement. He also sought the support of his former Army Commander, Andrew Leslie, and his local Member of Parliament.

[100] Class Counsel submit that an honorarium of $50,000 to Mr. Toth is appropriate, noting that he spent hundreds of hours working with Class Counsel to ensure that the case was brought to a successful conclusion. Class Counsel add that the time spent on this litigation took Mr. Toth away from his new business venture at a critical time. Class Counsel note Mr. Toth's commitment to the issue and litigation from the beginning and submit that without his efforts and involvement there would be no recovery at all for the Class.

[101] The $50,000 honorarium to Mr. Toth was set out in the Notice of the Proposed Settlement published in national media and sent by direct mail to each of the approximately 15,000 Class Members. The 2018 Notice of the Proposed Settlement states:

> Class Counsel are proposing to pay, from counsel fees, an honorarium of $50,000 to the representative plaintiff, Raymond Toth, in recognition of the extraordinary personal time and effort he devoted to the class action.

[102] Only one objection to the payment of the honorarium was made by Mr. Leonardo, who provided written submissions at the hearing of this motion rather than in advance. Mr. Leonardo is of the view that Mr. Toth will benefit twice—by receiving a payment as a Class Member (which is estimated to be $10,000 based on Mr. Toth's 20% disability) and by receiving an honorarium—and that this results in an excessive, disproportionate and undeserved payment to Mr. Toth. Mr. Leonardo made comparisons to the honorarium approved in *Manuge 2013* and suggested that the representative plaintiff in *Manuge* put in more effort, particularly in communicating with the class, and received a better result.

[103] As noted above, while the Class Action in *Manuge* provided redress for amounts previously deducted from benefits paid to Veterans, there are many significant differences between *Manuge* and the present Class Action. It is not advisable to compare the efforts of Mr. Manuge as representative plaintiff with that of Mr. Toth in the present Class Action to determine an appropriate honorarium. No two cases are the same and the efforts required and taken by the representative plaintiff will vary with the circumstances. While Mr. Toth may not have been personally engaged in communicating with Class Members about the litigation or the settlement, Class Counsel ensured that Class Members had access to the relevant information via their websites and other means.

[104] The proposed honorarium was clearly communicated to Class Members in the 2018 Notice of the Proposed Settlement and, as noted, only one objection was made.

[105] I find that Mr. Toth was engaged extensively in pursuing this issue since 2012 and in pursuing this litigation since 2014 and, but for his involvement, this litigation and the proposed settlement would not have occurred. The honorarium to Mr. Toth is justified and warranted.

VI. Should the Fee Agreement be Approved?

A. *The Fees and Disbursements of Class Counsel*

[106] Class Counsel seek approval pursuant to Rule 334.4 of the Rules of their fees and disbursements, noting that a Class Action Retainer Agreement [Retainer Agreement] was executed between Mr. Toth and Gowling WLG (Canada) LLP and that the fees and

disbursements reflect that agreement. Gowling WLG and MDLO worked in collaboration as Class Counsel. In addition, Class Counsel were assisted by Mr. Toth's personal lawyer, and other counsel, particularly in the early days of the litigation, whose fees will be paid from Class Counsel's fees.

[107] The Retainer Agreement provides for payment of Class Counsel's fees on a percentage-based contingency basis, i.e., to be paid only in the event of success. The terms were set out in the March 2016 certification motion, the April 2016 Notice of Certification, and the September 2018 Notice of the Proposed Settlement. The Notice of Certification and Notice of the Proposed Settlement were both published in national newspapers and were mailed directly to individual Class Members.

[108] Class Counsel explain that the Retainer Agreement provides, among other things: that legal fees would be paid only in the event that the Class Proceeding was successful in whole or part that the fees would be paid by a lump sum payment from the proceeds of any judgment or settlement awarding damages or costs to the class, and that Gowling WG would be entitled to a percentage of the total value of any settlement or judgment in favour of the class, less a deduction for disbursements. The legal fees would be calculated on a regressive scale based on the amount of the recovery as follows: 30 % for amounts up to $10,000,000; 20 % for amounts between $10,000,001 and $20,000,000; and 15 % for amounts over $20,000,000. The alternative model proposed in the Retainer Agreement was based on a multiplier of three times the actual fees, plus disbursements.

[109] The fees now proposed for approval are based on the regressive scale applied to the total value of the settlement ($100 million) and represent approximately 17%.

[110] Class Counsel explain that since 2013, when Mr. Toth was referred to Gowling WLG, Class Counsel have spent approximately 5,000 hours on this litigation. This includes the time spent by several lawyers, law students, and paralegals. Class Counsel have also incurred $120,554.59 in disbursements to date, which reflects the costs of publication of notices, expert fees, travel, postage, and photocopying costs. As described below, further fees and disbursements will be incurred until the settlement is administered, which will likely bring the total fees to over $3 million and total disbursements to $200,000.

[111] Class Counsel submit that the risks taken and the results achieved, coupled with the time and effort expended, among other relevant considerations, supports their request that the Court approve the fees and disbursements.

B. *The Principles from the Jurisprudence*

[112] The factors to be considered in assessing the reasonableness of Class Counsel's fees have been set out in recent jurisprudence (e.g. *Condon* at paras 81-83; *Merlo* at paras 78-98; *Manuge 2013* at para 28). They include the results achieved, the risks taken, the time expended, the complexity of the issues, the importance of the litigation or issue to the plaintiff, the degree of responsibility assumed by counsel, the quality and skill of counsel, the ability of Class Members to pay for the litigation, the expectations of the class, and fees in similar cases.

[113] The two key factors are the risks taken and the results achieved. In *Condon*, Justice Gagné noted at para 83:

> [83] In particular, courts have focused on two main factors in assessing the fairness and reasonableness of a fee request: (1) the risk that class counsel undertook in conducting the litigation; and (2) the degree of success or result achieved (*Parsons 2000*, above at para 13; *Sayers v Shaw Cablesystems Limited*, 2011 ONSC 962 at para 35). Risk in this context is measured from the commencement of the action (*Gagne v Silcorp Ltd* (1998), 49 OR (3d) 417 (Ont CA) at para 16). These risks include all of the risks facing class counsel, such as the liability risk, recovery risk, and the risk that the action will not be certified as a class action (*Gagne*, above at para 17; *Endean v Canadian Red Cross Society*, 2000 BCSC 971 (QL) at paras 28, 35).

[114] In *Manuge 2013* at para 37, Justice Barnes explained that the litigation risk taken by class counsel is "primarily measured by the risk they assumed at the outset of the case."

[115] In *Mancinelli v Royal Bank of Canada, 2018 ONSC 4206* at para 2, 294 ACWS (3d) 244 [*Mancinelli*], the Ontario Superior Court of Justice also noted that risk and the degree of success are the most important factors. The Court explained, at para 3, that the risk includes "all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding."

[116] In *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at para 41, 297 ACWS (3d) 295 [*Brown*], Justice Belobaba recently reiterated that risk and results are the key factors, that the risk is the factor that "most justifies" a premium and that this is primarily the risk of non-payment.

[117] There are generally two approaches taken by Class Counsel with respect to their fees: a percentage of the total settlement or a multiplier applied to fees and disbursements actually incurred. In the present case, the fees sought are a percentage of the settlement.

[118] In *Condon*, Justice Gagné noted at paras 86-87 that percentage-based fees encourage a results-based approach and reward counsel for their effectiveness. Justice Gagné expanded on the benefits of a percentage-based fee, noting at paras 89-91that entrepreneurial lawyers who accept contingency fee arrangements for class actions make such actions possible:

> [89] Effective class actions would not be possible without contingency fees that pay counsel on a percentage basis.
>
> [90] Contingency fees help to promote access to justice in that they allow counsel, rather than the client, to finance the litigation. Contingency fees also promote judicial economy, encourage efficiency in the litigation, discourage unnecessary work that might otherwise be done simply to increase the lawyer's fee based on time incurred, properly emphasize the quality of the representation and the results achieved, ensure that counsel are not penalized for efficiency, and reflect the considerable costs and risks undertaken by class counsel (*Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at para 21).
>
> [91] This Court, and courts across Canada, have recognized that the viability of class actions depends on entrepreneurial lawyers who are willing to take on these cases, and that class counsel's compensation consequently must reflect this reality (*Manuge*, above at para 49; *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602 at para 26; *Griffin v Dell Canada Inc*, 2011 ONSC 3292 at para 53). Compensation must be sufficiently rewarding to "provide a real economic incentive to lawyers to take on a class proceeding and to do it well" (*Sayers*, above at para 37).

[119] In *Mancinelli* at para 4, the Court made the same point, noting that "[f]air and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well."

[120] The Ontario Superior Court of Justice, in *Baker (Estate) v Sony BMG Music Inc*, 2011 ONSC 7105, [2011] OJ No 5781 (QL) [*Baker Estate*], canvassed the fees that had been approved by the Courts in other class actions, which were in the 20-30% range, and stated at para 64*:*

> There should be nothing shocking about a fee in this range. Personal injury litigation has been conducted in this province for years based on counsel receiving a contingent fee as high as 33%. In such litigation, it is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the "no cure, no pay" principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings. The contingent fee is recognized as fair because the client is usually concerned only with the result and the lawyer gets well paid for a good result.

[121] The jurisprudence clearly emphasizes that the fees—whether a percentage of the settlement or a multiplier of the actual fees—are the reward for counsel who take on the litigation and all the risks entailed and who pursue the litigation with skill and diligence, without assurances that there will be success (*Condon* at paras 90-91; *Mancinelli* at para 4; *Brown* at para 50; *Baker Estate* at para 71; *Gagne v Silcorp* (1998), 41 OR (3d) 417 at para 16, [1998] OJ No. 4182). Without the possibility of such a reward, such litigation would not be feasible.

C. *The Relevant Factors*

(1) The Results Achieved

[122] The benefits of the Settlement to the Class as a whole are more fully described above. Under the proposed Settlement, which totals $100 million, every Class Member and the estates of Class Members who have passed away since the Certification Notice was published will

receive a payment. Payments will be calculated and made promptly as the majority of Class Members are known and every effort will be made to ensure that all Class Members, or their estates, receive their payment, which will not be subject to income tax.

[123] Class Counsel and Counsel for the Defendant both note that they strongly advanced their respective positions based on their skill and knowledge of the issues at stake. They describe the settlement negotiations as arduous and "hard-fought" with several proposals and counter proposals over the course of a year. As noted above, both made compromises to achieve a fair result.

[124] As noted by Justice Gagné, in *Condon* at para 100:

> In weighing the results achieved by class counsel's work, it is also appropriate for the Court to consider to what extent the three objectives of class actions – namely, access to justice, behaviour modification, and judicial efficiency – have been met by the proposed settlement (*Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275 at para 49).

[125] The goals have been met in the present case. The policy challenged by the Class has ended. The Class of 15,000 has had the benefit of their claims being considered and addressed without the need to pursue many separate claims, some of which would have been for small amounts and for which the cost of litigation and the delay would have been a disincentive.

(2) The Risk Assumed

[126] Class Counsel submits that they took on a high degree of risk in this novel and complex claim. They note that their *Charter* claims were contentious and cast into doubt by the comments

of Justice Barnes in *Manuge 2013* at para 32, that, "[t]he claim to *Charter* relief was doubtful at best".

[127] The litigation also faced the obstacle of applicable limitations periods when the Statement of Claim was filed in 2014. Provincial law generally establishes limitation periods of two years. The limitation period pursuant to the CLPA, a federal statute, is six years. However, even the application of the six year limitation period would have excluded claims related to the period from 2006 to 2008.

[128] Despite the litigation risks and large overall Class size, which was only apparent after Certification, Class Counsel agreed to pursue the litigation without any guarantee that they would ultimately be paid. When the case was commenced, there was no prospect or guarantee of agreement on certification or settlement. No other Canadian law firm or lawyer, or individual, commenced any claim relating to this deduction of disability benefits. Class Counsel submit that without their role in taking on the litigation, none of the Class Members would have had any prospect of recovery.

[129] The risk taken to advance the claims of the Class at the outset of this litigation and in making strategic choices as the litigation progressed, without certainty of success or recovery, is an important factor in the determination whether to approve the proposed fees. As noted in the jurisprudence cited above, lawyers who accept contingency fee arrangements for class actions take the risk and advance the claims with skill and effort make such actions possible.

(3) The Complexity of the Litigation

[130] As noted above, equality rights claims under subsection 15(1) of the *Charter* pose challenges.

[131] This litigation was also factually complex given the operation of the various benefit schemes, some of which are affected by whether the veteran has income from other sources.

[132] Class Counsel also explain that the taxation issues arising from the characterization of the payments required careful consideration, the advice of senior tax and pension experts at Gowling WLG and their liaison with CRA to ensure the most favourable tax treatment for the proceeds of the proposed Settlement.

(4) The Time and Effort Spent

[133] The time and effort spent by Class Counsel to date includes communicating with and seeking instructions from Mr. Toth, preparing pleadings, conducting legal research, preparing the materials for the certification motion and draft Orders, reviewing the voluminous documents disclosed by the Defendant and provided through ATIP requests, attending Case Management Conferences, engaging in settlement negotiations with the Defendant, communicating with Class Members, liaising with CRA to resolve the tax treatment of the payments, and addressing the Class Members who inadvertently opted out.

[134] Class Counsel's role will not end with the approval of the settlement, but will continue until it is fully implemented. For example, Class Counsel will likely respond to inquiries to explain the Settlement and individual payments to Class Members and estates of Class Members. Class Counsel will also assist in an audit of VAC's distribution of settlement proceeds, which will entail further disbursements, including for an expert.

(5) Importance of the Litigation to the Class

[135] The support voiced by many Class Members highlights the impact of the deduction of Disability Pension amounts. The allegedly discriminatory practice of deducting payments meant to compensate for disability from other benefits has ended. The resolution of this issue and this litigation with the prospect of a prompt payment should be welcomed by Class Members. Even the concerns raised by the Class Members who spoke at the hearing or wrote to Class Counsel highlights the importance of the litigation, despite that the individual payment may be less than hoped for.

(6) Skill of Counsel

[136] As noted above in the context of assessing the factors to support approval of the Settlement Agreement, Gowling WLG, and Mr. Ruby have been active in representing parties in class proceedings for over 25 years. Gowling WLG's role in the litigation, settlement and tax treatment drew on the expertise of several members of that firm.

[137] Mr. Drapeau's expertise in military issues and veterans' law significantly contributed to the litigation and settlement. Among other things, he and his firm responded to inquiries from French and English-speaking Class Members.

(7) Ability of the Class to Pay

[138] Mr. Toth explained that he had no ability to finance the litigation on his own. Similarly, other Class Members who were in receipt of WVA, ELB or CFIS benefits would likely be unable to finance this litigation on a pay as you go basis. No other person stepped up to launch a proceeding.

[139] A feature or benefit of a Class Action is that it permits resolution of similar claims, which if brought individually would not be financially feasible because the cost of litigation, among other factors, could outweigh the potential recovery. It is the initiative and risk undertaken by Class Counsel that permits such actions to be pursued, as no individual needs to act alone or to finance the litigation.

(8) The Expectations of the Class

[140] Class Members were notified of the percentage-based fee arrangement in the 2016 Notice of Certification, which indicated that "a scaled legal fee of up to 30% of amounts received may be paid to class counsel" [emphasis added].

[141] The Notice of the Proposed Settlement was also published in the national media in September 2018 and sent by direct mail to each Class Member. The Notice described the proposed Settlement, including that the total amount of the Settlement was $100 million and that the overall percentage of the fees requested would be 17%. The Notice stated:

> At the December 2018 hearing, Class Counsel, Gowling WLG (Canada) and Michel Drapeau Law Office, will be asking the Federal Court to approve their fees and disbursements based on the retainer agreement between Mr. Toth and Class Counsel. As indicated in the 2016 Notice, a scaled legal fee of up to 30% is payable depending on the total amount of the recovery. Based on the retainer agreement and the proposed settlement, Class Counsel will seek approval of a legal fee of 17% of the total recovery.
>
> [Emphasis added]

(9) Support of the Class re the fees

[142] One objection to the payment of the fees was voiced by Mr. Leonardo at the hearing of the motion to approve the fees. Mr. Leonardo is of the view that the legal fees sought by Class Counsel are unreasonable and excessive to the extent of being a "windfall" given the results achieved and the efforts of Class Counsel. While Mr. Leonardo's views have been considered, the Court notes that Mr. Leonardo is the only individual, of approximately 15,000 Class Members, who has made submissions to the Court opposing the amount of the fees.

[143] Mr. Leonardo is mistaken in suggesting that Class Counsel's fees will reduce the payment he will receive as a result of the settlement. Although the fees will be paid out of the total amount of the settlement, the fees will not reduce the amounts to be paid to Class Members, which are based on the extent of their disability. The Court inquired and was assured by the Defendant that all claims would be paid and that there will be no shortfall.

[144] Mr. Leonardo has made comparisons to the fees approved in *Manuge 2013* and suggests that Class Counsel in *Manuge* put in more effort and received a better result, yet netted a much lower percentage of the total amount for the approved fees. As noted above, there are significant differences between the *Manuge* litigation and settlement and the present Class Action. In addition, the fee arrangement was clearly set out in the Notice of Certification and the Notice of the Proposed Settlement, both of which were published and mailed directly to all known Class Members. The regressive scale approach should not come as a surprise to Class Members, nor should the calculation based on the total amount of the Settlement, which was clearly set out in the 2018 Notice.

(10) Fees in Similar Cases

[145] Class Counsel submit that the fees sought in this case are well within the range of fees approved in other Class Actions based on a percentage of fees and are neither excessive or unreasonable. Class Counsel acknowledge that the total settlement of $100 million borders on being characterized as a "mega-fund" (*Brown* at para 47), but emphasizes that the retainer agreement is structured on a regressive scale, which in this case, results in approximately 17% of the total settlement or $16.9 million after disbursements. Class Counsel submit that there is "nothing shocking" about the fees when all the relevant factors are considered and other cases are compared.

[146] Class Counsel point to several Class Action outcomes where the Courts have approved fees of comparable percentages, or greater. For example: fees of $16,665,000 on a settlement of $50 million (*Anderson v Canada*, 2016 NLTD(G) 179, 273 ACWS (3d) 251); fees of

$16,400,000 on a settlement of $56,430,000 (*Jeffrey v London Insurance*, 2016 ONSC 5506, [2016] OJ No 4533 (QL)); fees of $14,300,000 on a settlement of $69 million (*Ironworkers Ontario v Manulife*, 2017 ONSC 2669, [2017] OJ No 2300 (QL)); and fees of $17,846,250 on a total settlement of $117 million (*Labourers' Pension Fund of Central Eastern Canada v Sino-Forest Corporation*, 2014 ONSC 62, [2013] OJ No 6143 (QL)).

[147] Mr. Leonardo points to the fees awarded in the *Manuge* to suggest that in the present case, the fees are an unjustified windfall. In *Manuge 2013*, the fees approved, expressed as an overall percentage were less than 5%. However, *Manuge* was a much larger "mega-fund" settlement and the actual amount of the fees approved was approximately $35.5 million.

D. *The Fee Agreement is Reasonable*

[148] As noted above, no two cases are the same in terms of the risks assumed, the complexity of the issues, the time and effort of Class Counsel and other factors. Hence, the Court considers all the relevant factors in the context of the particular case, with an emphasis on the results achieved and the risks taken. The total amount of the settlement at $100 million brings it into the mega-fund settlement category and the percentage based fees requested for approval have been carefully scrutinized. Class Counsel's fees of $ 16.9 million, pursuant to the regressive scale contingency fee as described in the Retainer Agreement, clearly provides a significant reward for the risk taken and results achieved by Class Counsel. The work of Class Counsel is not over; Class Counsel will continue to devote an estimated 1000 hours or more to complete the Settlement and audit the payment distribution process with the assistance of experts.

[149] The Defendant submits that the Fee Agreement is a matter between the Class Members and Class Counsel. The Defendant does not take any position with respect to the approval of fees, except to note that the fees at 17 % of the total settlement are within the range based on the jurisprudence and reflect the complexity of the litigation and the risks taken by Class Counsel.

[150] Taking into account all the relevant factors noted in the jurisprudence and in particular, the risk taken by Class Counsel at the outset of this litigation; the skill and diligence of Class Counsel in pursuing the issue and the litigation, which individual Class Members could not have done on their own; and the ultimate results achieved, the Court agrees that the fees of Class Counsel, while generous, are not beyond the norm and are fair and reasonable in these circumstances.

VII. Conclusion

[151] The Court finds that the Settlement Agreement is fair and reasonable and is, therefore, approved. The $50,000 honorarium for Mr. Toth as representative plaintiff is warranted given his contribution to this litigation and settlement and is approved. The fees and disbursements of Class Counsel are also fair and reasonable and are approved.

ORDER

THIS COURT ORDERS that:

1. The Final Settlement Agreement, expressly incorporated by reference into this Order and annexed as Schedule "A", is approved under Rule 334.29 of the *Federal Court Rules* and the Final Settlement Agreement shall be implemented according to its terms, the terms of this Order, and further orders of this Court;

2. Unless otherwise stated in this Order, the definitions in the Final Settlement Agreement apply to, and are incorporated within, this Order;

3. The Final Settlement Agreement is binding upon the Representative Plaintiff and all Class Members who did not validly opt out of, or who opted out of then opted back into, this Class Proceeding;

4. Any Class Member who validly opts out of, and does not opt back into, this Class Proceeding by the date established to do so shall not be entitled to participate in the Final Settlement Agreement;

5. In consideration of the payments and other good and proper consideration described in the Final Settlement Agreement, all Class Members, other than those Class Members who delivered valid opt out forms and did not opt back into, the Class Proceeding are hereby deemed to have completely and unconditionally released, forever discharged, and acquitted the Defendant and all related entities or persons (Releasees), from any and all Claims (Released Claims);

6. Any Class Member who has not validly opted out of, or who opted out of and then opted back into, the Class Proceeding, whether or not the Class Member makes a claim or receives compensation under the Final Settlement Agreement:

    i. Will be forever barred and enjoined from commencing, instituting, or prosecuting any action, litigation, investigation, or other proceeding in any court of law or equity, arbitration, tribunal, proceeding, governmental forum, administrative forum, or any other forum, directly, representatively, or derivatively, asserting against the Releasees, or any of them, any claim relating to or arising from the Released Claims;

    ii. Will be forever barred and enjoined from commencing, instituting, or prosecuting any action, litigation, investigation, or other proceeding in any court of law or equity, arbitration, tribunal, proceeding, governmental forum, administrative forum or any other forum, directly, representatively, or derivatively, against any person or entity that could or does result in a claim over against the Releasees or any of them for contribution, indemnity in common law, or equity, or under the provisions of any statute or regulation, including the Negligence Act and amendments thereto, or under any successor legislation thereto, or under the Federal Court Rules, relating to or arising from the Released Claims; and

    iii. If any Class Member does commence such an action or take such proceeding, and the Releasees or any of them are added to such proceeding in any manner whatsoever, whether justified in law or not, such Class Member will immediately discontinue the proceeding and claims, and shall indemnify the Releasees, or any of them, for their substantial indemnity costs incurred in defending any such proceeding;

7. Upon the Court's approval of the Final Settlement Agreement, all Class Members who have not validly opted out of, or who opted out of and opted back into, this Class Proceeding:

    i. Covenant and undertake not to bring any cause of action, proceeding, claim, action, suit or demand, or in any way commence, or continue any proceeding, claim, action, suit, or demand, in any jurisdiction, against the Releasees or any of them, in respect of, or in relation to, the Released Claims;

    ii. Covenant not to assert or prosecute any claim relating to or arising from the Released Claims, whether for damages, declaration, or other relief against any person who could claim over against the Releasees in respect of the claims whether for damages, declaration, or other relief;

iii. Covenant that in the event that litigation commenced or continued by a Class Member results in a claim over or a judgment against the Releasees or any of them to pay any amount to any person, the Class Member shall not collect any amount in respect of the claims that are the subject matter of the Settlement Agreement and will hold harmless, defend, reimburse, and indemnify the Releasees for the amount of the claim over or the judgment in respect of the claim;

iv. Covenant not to seek in any manner whatsoever an apportionment of negligence, fault, liability, responsibility, or wrongdoing as against the Releasees or any of them relating to or arising from Released Claims; and

v. Shall fully indemnify and hold the Releasees entirely harmless from any and all liability, damages, legal fees, disbursements and costs, with respect to any breach of the foregoing subparagraphs;

8. The Final Settlement Agreement shall operate conclusively as an estoppel:

i) in relation to any claim, action, complaint, or proceeding that in future may be brought by any Class Member relating to the matters covered by the Final Settlement Agreement;

ii) that may be pleaded as a complete defence and reply in the event any such claim, action, complaint, or proceeding is brought; and,

iii) that may be relied upon in any proceeding to dismiss the claim, action, complaint, or proceeding on a summary basis, and no objection will be raised by any Class Member in any subsequent action that the other parties in the subsequent action were not privy to formation of the Final Settlement Agreement;

9. The Class Proceeding shall otherwise be entirely dismissed without costs;

10. Despite the dismissal of this Class Proceeding, and without in any way affecting the finality of this Order, the Honourable Justice Catherine Kane shall remain seized of the Class Proceeding for purposes of administration of the Final Settlement Agreement and implementation of this Order and may issue further orders dealing with distribution of Settlement funds to Class Members, any necessary modifications to the distribution procedure contemplated in the Final Settlement Agreement, and resolution of any and all

issues that may otherwise arise in the administration of this Order and the Final Settlement Agreement;

11. Class Counsel's fees and disbursements shall be paid according paragraph 5 (a) of the Retainer Agreement, which provides for payment of a legal fee that is a percentage of the total value of any settlement, less a deduction for disbursements;

12. Class Counsel's fees, fixed under the Retainer Agreement at 17% of the total value of the Settlement after a deduction for disbursements, shall be paid by the Defendant from the proceeds of the Settlement;

13. The Representative Plaintiff shall be paid an honorarium fee of $50,000 to be paid from Class Counsel's fees; and,

14. There shall be no costs of this motion.

"Catherine M. Kane"
Judge

SHEDULE "A"

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1068-14
STYLE OF CAUSE:	RAYMOND MICHAEL TOTH v HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 10, 2018
ORDER AND REASONS:	KANE J.
DATED:	JANUARY 30, 2019

APPEARANCES:

Mr. Malcolm Ruby Mr. Adam Bazak Mr. Guy Poitras Mr. Michel Drapeau Mr. Joshua Juneau	FOR THE PLAINTIFF
Mr. Travis Henderson Ms. Lori Rasmussen Mr. Mitchell Taylor	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Gowling WLG Ottawa, Ontario	FOR THE PLAINTIFF
Michel Drapeau Law Office Ottawa, Ontario	FOR THE PLAINTIFF
Deputy Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT