Federal Court  Cour fédérale

Date: 20190129

Docket: T-210-12

Citation: 2019 FC 122

Ottawa, Ontario, January 29, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

JENNIFER MCCREA

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

ORDER AND REASONS

[1] The Plaintiff and 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. Within the Settlement Agreement, the parties also seek an honorarium in the amount of $10,000 for the representative plaintiff, Jennifer McCrea; the legal fees of the Class Counsel; a process to permit opting out of the Settlement Agreement; the appointment of a Monitor and a process to resolve disputed claims. In addition, the parties seek approval of an

ancillary order to amend the Plaintiff's Statement of Claim to reflect the causes of action which were certified and to certify an amended definition of the "Class". The Court issued a Direction on December 4, 2018 to amend the style of cause to reflect that the Defendant is Her Majesty the Queen in Right of Canada.

[2] For the reasons that follow, the Court approves the Settlement Agreement, the honorarium for the representative plaintiff and the fees and disbursements of Class Counsel.

I. Background

[3] The background to this action was previously described in *McCrea v Canada (Attorney General)*, 2013 FC 1278 [*McCrea 2013*], which addressed the Defendant's motion brought pursuant to Rule 220 to determine a question of law, which the Defendant argued would be conclusive of the action.

[4] The background was also described in *McCrea v Canada (Attorney General)*, 2015 FC 592, [2015] FCJ No 1225 (QL) [*McCrea 2015*], which is the Order and Reasons for the certification of this class action.

[5] The affidavit of Mr. Michael Wright, the managing partner at Cavalluzzo LLP, the Class Counsel's firm, provides additional details of the procedural history. In addition, the Defendant provided a succinct and consistent summary.

[6] To provide context for the issues to now be determined, the key aspects of the background previously described are set out below.

[7] The Plaintiff, Ms. McCrea, represents others who, like herself, were contributors to the Employment Insurance [EI] program, gave birth to a child, and were in receipt of parental benefits. Some EI recipients became ill while in receipt of parental benefits and applied to convert their parental benefits to sickness benefits during their period of illness, which would have extended their benefit period to account for the period of time they were ill. Some recipients were not able to care for their child while they were ill and had to rely on others to do so. The EI recipients who sought to convert their parental benefits to sickness benefits were denied the sickness benefits. Some returned to work, although they required more time to recover from their illness, because their parental benefits ended.

[8] Other EI recipients, who became ill and made inquiries about sickness benefits, were advised by representatives of the Employment Insurance Commission (the relevant authority at the time) or Service Canada that they were ineligible for the sickness benefits and, therefore, they did not apply to convert their parental benefits to sickness benefits.

[9] The Plaintiff explained that the rationale or explanation offered for being denied sickness benefits was the strict application of paragraph 18(b) of the *Employment Insurance Act*, SC 1996, c 23 (as amended) [the *Act*], as it read at the relevant time. Paragraph 18(b) required that a claimant for sickness benefits be otherwise available for work. Claimants already on parental

leave, who were caring for a child and receiving benefits, were considered not to be available for work.

[10] The Plaintiff argued that the wording of paragraph 18(b) made it impossible for claimants to receive sickness benefits. She noted that if the illness had occurred prior to the birth of their child, the claimants would have been entitled to up to 15 weeks of benefits because they would have been otherwise (i.e., but for their illness) available for work. Claimants would have subsequently received maternity and parental benefits after the birth of their child.

[11] The Act had been amended in 2002 by the *Budget Implementation Act*, 2001, SC 2002, c 9 to, among other things, respond to the decision of the Canadian Human Rights Tribunal [CHRT] in *McAllister-Windsor v Canada (Human Resources Development)*, [2001] CHRD No 4, [2002] CLLC 240-001 [*McAllister-Windsor*]. In *McAllister-Windsor*, the CHRT found that the "anti-stacking" or capping of sickness, maternity and parental benefits at 30 weeks (the cap in existence at that time) discriminated against women who became ill before or during the maternity or parental leave period. The 2002 amendments allowed for extensions of the benefit period to allow "stacking" of maternity, parental and sickness benefits, but did not include a specific amendment to section 18 of the Act to remove the requirement that a person seeking sickness benefits must be otherwise available for work.

[12] The Plaintiff acknowledged that the parental benefits regime had evolved over the years in several positive ways, including the 2002 amendments to respond to *McAllister-Windsor*. The Plaintiff argued that the 2002 amendments were intended to provide that those on parental leave

who become ill either before, during, or after their parental leave would be eligible to receive sickness benefits and that this would extend their benefit period by up to 15 weeks. The Plaintiff argued, among other things, that the 2002 amendments were not implemented as intended to address the identified gap because those who became ill while on parental leave were still denied sickness benefits.

[13] The Plaintiff noted that many claimants who were denied sickness benefits appealed their decisions to the Board of Referees and some also appealed to the EI Umpire (a process that no longer exists). Although the vast majority of claimants were unsuccessful, two (Ms. Rougas and Ms. Kittmer) were successful before the EI Umpire. It appears that these appeals to the Umpire, along with other advocacy efforts, raised awareness of the impossibility of being available for work while on parental leave, which is intended to permit a parent to be away from their employment to care for a young child.

[14] On March 24, 2013, amendments to the *Act* included in the *Helping Families in Need Act*, SC 2012, c 27 came into force. The *Helping Families in Need Act*, among many other amendments, amended section 18 to provide that those in receipt of parental benefits were not disentitled to sickness benefits due to their unavailability for work. This amendment ensured that claimants *after* March 24, 2013, in similar circumstances to the Plaintiff and Class Members would not be denied sickness benefits due to their unavailability for work. Since March 2013, those who apply to convert their parental benefits to sickness benefits are eligible to extend their benefits by up to 15 weeks, assuming that the other criteria for eligibility are met. However, the 2013 amendments do not benefit the Plaintiff or the Class Members who were on parental leave

and became ill before that clarification in the *Act* came into force because the amendments are not retroactive.

[15] Although the Plaintiff filed her Statement of Claim in 2012, this class action is limited to the period from March 3, 2002, the date of the coming into force of the 2002 amendments, to March 24, 2013, the date of the coming into force of the 2013 amendments.

[16] Despite the change in policy evidenced by the 2013 amendments, the Defendant opposed the Plaintiff's claim.

[17] The Defendant initially brought a motion pursuant to Rule 220 of the *Federal Courts Rules*, SOR/98-106, for a preliminary determination on a question of law, which focused on the interpretation of key provisions of the Act. The Defendants argued that the determination of the following question would be conclusive of the central issue and would dispose of the litigation:

> Did the Employment Insurance Act preclude the payment of sickness benefits to individuals during the period in which they were in receipt of parental benefits, under the legislation as it stood between March 3, 2002 and March 24, 2013?

[18] The Court dismissed the Defendant's motion (*McCrea 2013*), which meant that the question of law would not be determined. The Court found, among other things, that the statutory provisions at issue were interrelated and to some extent inconsistent, and that the *Act* had to be read as a whole to best understand the benefits regime. The Court noted that the record necessary to support the motion was at that point not sufficient and would be contentious at the next stages.

In addition, the resolution of the proposed question of law would only narrow the issues, leaving several other complicated issues to be resolved.

[19] On the Plaintiff's motion for certification in 2014, the Defendant argued that the causes of action pleaded had no reasonable prospect of success and disputed every other aspect of the test to determine whether the action should be certified as a class action.

[20] Upon considering the submissions of the parties, the evidence on the record and the jurisprudence, the Court granted the Plaintiff's motion and certified the action as a class proceeding, but only in part (*McCrea 2015*). The causes of action in negligent misrepresentation, unjust enrichment and misfeasance in public office were struck as they were found to have no reasonable prospect of success. The cause of action in negligence and some common questions which arise from that cause of action were certified. Ms. McCrea was found to be an appropriate representative plaintiff for the Class Members.

[21] The Defendant subsequently brought a motion, which the Court granted, to clarify specific terms of the Certification Order. The Plaintiff successfully appealed that decision and the original terms were reinstated. The parties then prepared for the next steps in the litigation and entered into discussions regarding amendments to the Plaintiff's Statement of Claim to reflect the causes of action as certified and to amend the class definition. In early 2018, the Plaintiff adjourned its proposed motion to amend the definition of the class to pursue further settlement discussions to resolve the litigation. Ultimately, a proposed settlement agreement was reached in August 2018.

[22] On September 11, 2018, the Court approved the Notice Plan, including the Notice to the Class informing them of the Certification Order, the proposed Settlement Agreement and other pertinent information. This information includes: how to support or object to the settlement in writing or in person, how to participate at the hearing of the motion to approve the settlement, how to opt out of the class if desired, how the claims process would operate, who will administer the agreement, how disputes can be addressed regarding the payment of benefits pursuant to the agreement, and where to obtain additional information.

[23] The Notice Plan described the manner in which Notice would be provided in order to ensure, to the greatest extent possible, that all potential Class Members are aware of the proposed Settlement Agreement and, if approved, how they can claim their benefits. The Notice of the Settlement Agreement was posted on the Government of Canada website, Class Counsel's website, and other social media and was published in major Canadian newspapers.

[24] This brings us to the present motion. In accordance with Rule 334.29, the Court must approve the Settlement Agreement. This motion is brought by the Plaintiff jointly with and on consent of the Defendant. However, this is not a rubber stamp process. Although the Court cannot tinker with the terms and conditions of the Settlement Agreement, the Court must determine whether the Settlement Agreement as a whole is fair and reasonable and whether it will reach those entitled to benefit from it.

[25] On this motion, Class Counsel thoroughly explained the terms of the proposed Settlement Agreement and responded to several questions from the Court. Similarly, Counsel for the

Defendant highlighted key features of the Settlement Agreement and clarified some small, yet significant, aspects which will ensure that the settlement can be implemented efficiently.

II. The Proposed Settlement

[26] The proposed settlement provides that:

- Class Members who establish that they applied for sickness benefits for an illness, injury, or quarantine during their parental leave, and were denied, are eligible for compensation. Claimants identified through the Employment and Social Development Canada [ESDC] File Review Project are deemed to be eligible Class Members. Claimants not identified as Class Members by the File Review Project will be eligible where it is established that they meet the class definition.

- ESDC will determine the amount of each Class Member's payment. The Defendant has agreed to make payments to eligible Class Members in an amount that is equivalent to the amount of sickness benefits that they would otherwise have received.

- Class Members will submit their claims in a simple form and will not be required to provide medical evidence to establish their illness.

- All eligible Class Members, including eligible estates, will receive compensation in satisfaction of all the claims raised, calculated as the number of weeks of illness they suffered during that benefit period, less the number of weeks they were paid sickness benefits, multiplied by the weekly EI benefit rate that applied at the time of their claim. The highest benefit rate in that period was $501. The details are set out in the Settlement Agreement which is attached to the Court's Order.

- In exchange for the compensation paid, all Class Members, except for those who have opted out within the Opt Out Period, will be deemed to have provided a full and final release of all claims against the government in respect of the matters at issue.

- The opt out deadline will be 60 days from the date of the approval of the Settlement Agreement.

- Class Members will be able to make their claim for compensation within a six month claims period. The claims period begins on the Implementation Date of the Settlement Agreement. Claimants may apply within five months from that date, with a possible one month extension, and their claims will be paid out in a timely manner.

- A third party Monitor, Mr. Gordon McFee, will be appointed to provide outside oversight of the administration process and to make recommendations to the administrator to ensure the efficient and fair processing of the claims. Mr. McFee's role, among other things, will permit possible problems to be resolved early in the process.

- ESDC will provide notice of the settlement, opt out process, and claims process to the class in accordance with the Notice Plan and will administer the claims process in accordance with the Administration Plan. ESDC will develop guidelines and provide training to the officers who will administer the claims. The Defendants will pay all amounts and taxes for the notice and for the Administration process and for the appointment of the Monitor.

- ESDC will send up to three reminders during the claims process to Class Members who have been identified and who have not submitted claims.

- Class Members who are denied their claim may seek a review of the decision by a designated Prothonotary of the Federal Court. The Class Member may submit a form (which is attached to the Order approving the Settlement Agreement) to seek review and both the Class Member and ESDC will have an opportunity to make brief written submissions. The Prothonotary's decision will be final.

- The Administrator will provide periodic reports to Class Counsel and the Monitor. The Monitor and the Administrator will provide final reports to the Court on the results of the claims administration process.

- The settlement is without any admission of liability.

- The Court retains jurisdiction until the claims are administered.

[27] In addition, the Plaintiff's Fresh as Amended Statement of Claim will be approved, which among other changes reflects the causes of action that were certified. The definition of the Class is also amended to include those who became ill while on maternity leave where that illness continued into the parental leave and benefits period and to include those who were in receipt of benefits under the analogous legislation in Quebec.

[28] The total amount of the settlement is estimated to be between $8.5 and $11 million. It is estimated that there are 1880 potential Class Members of which 1738 are deemed to be eligible because they have already been identified by ESDC. Another 142 possible Class Members have been identified, including those that will fall within the expanded definition of the Class.

[29] The Settlement Agreement also proposes that Class Counsel receive their legal fees and disbursements in the amount of $2,212,389, together with applicable taxes (GST and HST) thereon, not to exceed $2.5 million in total. The legal fees will be paid by the Defendant in addition to and separately from the compensation paid to eligible Class Members.

III. The Issues

[30] There are three issues to address:

1. 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.

2. Should the Court approve an honorarium of $10,000 to Ms. McCrea as the representative plaintiff?

3. Should the Court approve the fee agreement for Class Counsel? The Court considers whether the amount of the legal fees and disbursements is fair and reasonable and should be approved only after determining whether to approve the proposed Settlement Agreement for the Class Members.

IV. Principles from the Jurisprudence Regarding Approval of Settlement Agreements

[31] Rule 334.29 of the *Rules* provides:

334.29 (1) A class proceeding may be settled only with the approval of a judge.	334.29 (1) Le règlement d'un recours collectif ne prend effet que s'il est approuvé par un juge.
(2) On approval, a settlement	(2) Il lie alors tous les

binds every class or subclass member who has not opted out of or been excluded from the class proceeding.	membres du groupe ou du sous-groupe, selon le cas, à l'exception de ceux exclus du recours collectif.

[32] Several recent cases have canvassed the principles that apply to the approval of a settlement in a class action and the principles are not in dispute. For example, *Manuge v Canada*, 2013 FC 341, [2014] 4 FCR 67 [*Manuge*]; *Condon v Canada*, 2018 FC 522, 293 ACWS (3d) 697 [*Condon*]; *Riddle v Canada*; 2018 FC 641, 296 ACWS (3d) 36, and *Merlo v Canada*, 2017 FC 533, [2017] FCJ No 773 (QL) [*Merlo*] have been cited by the Plaintiff and Defendant.

[33] As the parties note, the test for the approval of a settlement agreement has been stated in slightly different words in recent cases. While the basic test remains the same and is not in dispute, the relevant factors which inform the test may differ between cases and carry varying degrees of weight (*Condon* at para 20).

[34] The recent jurisprudence in this Court has been consistent in articulating the test. In *Merlo*, Justice McDonald noted at para 16, "[o]n 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 '" (citations omitted).

[35] In *Condon*, Justice Gagné provided an overview of the principles regarding the approval of a settlement in a class action and the factors to consider 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:

1. The likelihood of recovery or likelihood of success;

2. The amount and nature of discovery, evidence or investigation;

3. Terms and conditions of the proposed settlement;

4. The future expense and likely duration of litigation;

5. The recommendation of neutral parties, if any;

6. The number of objectors and nature of objections;

7. The presence of arm's length bargaining and the absence of collusion;

8. The information conveying to the Court the dynamics of, and the positions taken, by the parties during the negotiations;

9. The degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and

10. 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.)

V. The Settlement Agreement

[36] The Court has considered all the relevant factors. As noted by both the Plaintiff and the Defendant, the most relevant considerations are the likelihood of recovery and success and the settlement terms and conditions.

A. *The likelihood of recovery if the action proceeded to trial*

[37] The action claimed several causes of action, including negligence, against the Defendant with respect to how the EI Commission implemented the 2002 amendments to the *Act*. The Plaintiff notes that despite their intention to establish negligence, there would have been several hurdles, including establishing a duty of care and proving that it was not met. For example, both parties note that the majority of the decisions of the EI Umpires relied on a strict or literal interpretation of section 18. This would have posed an obstacle to establishing negligence in the administration of the amendments.

[38] The Plaintiff also sought general damages, including for inconvenience and mental distress related to the pursuit and denial of claims. The Plaintiff acknowledges that there was a substantial likelihood that general damages would not have been awarded at trial. This is due in part to the current state of the law regarding general damages for this kind of anxiety and frustration and to the difficulty in establishing the criteria for general damages for mental distress as set out in *Fidler v Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 SCR 3.

[39] The Defendant agrees that this is a novel case which raises complex issues involving a comprehensive statutory benefit scheme. The Defendant notes that the Courts have not yet recognized a duty of care related to the implementation of statutory provisions, as claimed by the Plaintiff. The Plaintiff would first need to establish that such a duty exists and then prove a breach of the duty, both of which would be challenging and would require a voluminous record, witness testimony and novel legal arguments. The Defendant adds that the entitlement to and quantification of general damages would pose similar challenges.

[40] The Plaintiff and Defendant acknowledge that if general damages could be sought, each Class Member would have to establish their individual claim, which would pose significant challenges. In the event that the Plaintiff succeeded at trial, individual trials would have been required to determine whether each Class Member had met the test for general damages and whether the statutory limitation period barred their claim.

[41] The success of this litigation could not be predicted with any certainty. Continuing the litigation would have required considerable time, effort and resources which may not have been warranted by the risk. Even if negligence or the other causes of action were found, the nature of the damages claimed would not be easily established. Despite the natural inclination to root for a fair and equitable result to address a seemingly unfair or illogical situation caused by the provisions of the *Act*, the Court's focus would be on the legal issues, which are complicated. As noted by the parties, they each knew the issues and the strengths and weaknesses of their case and used their knowledge in a collaborative way to reach this settlement.

B. *The amount and nature of discovery evidence*

[42] The record before the Court is voluminous and permits the Court to determine that the Settlement Agreement is fair and reasonable. The Record includes the past decisions of the Court with respect to the Rule 220 motion and the Certification motion. The Record also includes several affidavits, including affidavits prepared for the approval of the Notice to the Class; the affidavit of Mr. Michael Wright, the managing partner of the Class Counsel's firm, Cavalluzzo LLP, which details the history of the litigation; the affidavit of Ms. Manon Courcelle, Manager of Employment Insurance Business Services, Transformation and Integrated Service Management Branch at Service Canada, which details the work undertaken by ESDC to identify Class Members and to prepare for the administration of the settlement; and the affidavits of Ms. McCrea.

[43] Although the litigation did not proceed to the discovery stage, the evidence before the Court provides a comprehensive background, demonstrating the issues at stake and the efforts of the parties to reach a fair settlement. The Plaintiff and Defendant both acknowledged each other's full understanding of the EI regime, the issues and the strengths and weaknesses of their positions.

C. *The terms and conditions of the settlement*

[44] The terms and conditions of the settlement are outlined above. The parties agree that the terms were carefully crafted by both parties to ensure fair compensation, a timely administrative process and other safeguards to ensure that the interests of the class are protected.

[45] The terms and conditions of the settlement are outlined above. The parties agree that the terms were carefully crafted by both parties to ensure fair compensation, a timely administrative process and other safeguards to ensure that the interests of the class are protected.

[46] The highlights include that the eligible Class Members who submit valid claims will be paid 100% of the amount they would have received had their claim been approved when they requested to convert their parental benefits to sickness benefits. The costs of the administration of the claims, the Monitor fees and Class Counsel's fees and disbursements will be paid separately by the Defendant. In other words, these costs will not cut into the amount to be paid to Class Members. The Claims process is designed to be simple and efficient. The evidentiary threshold to establish a claim is relatively low and Class Counsel will provide assistance to Class Members with their claims. ESDC has established a dedicated team to determine the claims and an internal review process for claims that may be denied. In addition, denied claims will be independently reviewed, on application by the claimant, by a Prothonotary of this Court, as an additional safeguard.

[47] Although the Class Members will not receive general damages as originally sought, they will receive the full amount that they would have received at the time they sought to convert their parental benefits to sickness benefits.

[48] Class Members will not receive interest. However, any award of interest following trial would be discretionary. The Court notes that in the relevant period, interest rates were low. The Plaintiff and Defendant both agree that the settlement, which provides 100% of the amount that

the claimant would have received at the time of the illness, but without interest, remains a fair amount given the other attributes of this Settlement Agreement.

[49] Other beneficial features of the agreement offset what has been abandoned and must be considered. Timely payments are promised to class members who need only submit a simple form, without the need for documentary proof or testimony. As noted above, 1738 claimants are deemed to be eligible Class Members as they are already known to ESDC. Another 138 persons may be Class Members. ESDC has done extensive preparatory work, including identifying and contacting Class Members, which should pave the way for a streamlined and prompt payment process.

[50] Other non-monetary features of the Settlement Agreement also enhance its benefit to Class Members. Notably, the definition of the Class is amended to capture all claimants who applied for and were denied benefits for sickness during their EI “parental window”. This will include those who became ill while on maternity leave and continued to be ill while on parental leave, to permit them to claim the weeks of illness while on parental leave as sickness benefits. The expanded definition was a point of dispute, but was ultimately negotiated and included in the Settlement Agreement.

[51] The appointment of a third party Monitor to assist in identifying any systemic issues that may arise and to make recommendations to the Administrator to address any such issues, will add to the efficiency of the claims process. The proposed monitor, Mr. McFee, is a retired senior Public Servant with extensive experience and knowledge of social benefits schemes, including

EI. Mr. McFee was the former Director of Policy and Legislative Development and former Director of EI Appeals. However, his role now is independent from ESDC. Both parties strongly support Mr. McFee as Monitor.

[52] The review process for disputed claims is also designed to be simple and to bring finality. A claimant who is denied compensation may seek a review by a Prothonotary of the Federal Court. The Prothonotary will review the claim based on the same documents or record provided to ESDC, along with the submissions of the claimant and ESDC. The Prothonotary will either confirm the ESDC decision or send the claim back to ESDC for redetermination. The Prothonotary's determination of the disputed claim will be a final determination, not subject to further review or appeal. This process is designed to ensure that there is an additional level of independent review.

[53] Class Members will be assisted by Class Counsel during the claims process if necessary. There is no need for the Class Members to engage or pay other counsel. Class Members who seek a review by a Prothonotary of a denied claim will also be assisted by Class Counsel.

[54] The Monitor and the Administrator will provide final reports to the Court after the administration period. The Court will retain jurisdiction over this Action until all the claims submitted in accordance with the Settlement Agreement have been determined.

[55] The take up rate for this settlement is anticipated to be high. The file review undertaken by ESDC to identify eligible claimants has resulted in 1738 claimants being deemed eligible.

The multi-faceted Notice Plan, which includes Facebook, Twitter, the Government of Canada website, ads in major newspapers, and the toll-free phone line and website established by Class Counsel, has reached many Class Members. Further outreach will continue as the second phase of the Notice Plan is implemented and reminders are sent throughout the administration of the agreement.

[56] It is also noted that to date, 106 letters of support for the Settlement Agreement have been received.

D. *The Risks of not Approving the Settlement*

[57] In the event that the Settlement Agreement is not approved, Class Members who pursued the litigation would incur expenses and further periods of uncertainty, perhaps up to three years. A discovery process, lengthy trial, and possible appeal would prolong the determination of an uncertain outcome.

[58] Moreover, the Plaintiff and the Class would be bound by the original Statement of Claim and the original definition of the Class. As such, some Class Members who will benefit from this Settlement Agreement would not benefit from the litigation even if it were ultimately successful. Similarly, the estate of any deceased claimant would not benefit from ongoing litigation.

E. *Communications with Class Members*

[59] Since this litigation commenced in 2012, Class Counsel have maintained a website, a toll-free phone line and a Facebook page to provide information to potential Class Members about the status of the litigation. More recently, the website and Facebook page have communicated the Notice to the Class Members of the terms and conditions of the proposed settlement, how to convey support or to object and how to participate in the hearing of this motion, among other information. Class Counsel sent emails to all Class Members who had registered with them advising of the proposed Settlement Agreement. Class Counsel reports that their website has been viewed by over 5300 users and that they have received more than 240 calls.

[60] In addition, the Notice of the Proposed Settlement was posted on the Government of Canada website in September 2018 and was published in major Canadian newspapers.

F. *Support for the Agreement; The Views of Class Members*

[61] Class Counsel received 106 letters and emails of support in response to the Notice of the proposed settlement. A potential Class Member, T.R., also spoke in support of the proposal at the hearing of the motion to approve the proposed settlement.

[62] The overall sentiment expressed in the letters was strong support for the settlement. Many Class Members wrote in detail about becoming sick while on leave, some very seriously, and described the significant challenges, pain and fear their illnesses injected into what had been

expected to be a happy time in their lives. Class Members explained how being denied sickness benefits affected them and their families by exacerbating financial and emotional stresses and requiring them to make difficult choices about their work and health. Several Class Members communicated intense frustration that they had been denied benefits and relief that they might now see that money.

[63] S.D. wrote:

> I believe the settlement offered at this point in time is sufficient and reasonable form of compensation for my loss… At the time of denial I felt pressure to return to work and the decision made by EI employees forced me to return to work on a part time basis which was not enough time for me to recover fully and I actually ended up having to quit my job that I had been an employee of for 15 years and so I do feel that the settlement will help me feel that some form of justice is and will be served after such a stressful experience at the time.

[64] S.B. wrote:

> Now with this Class Action I feel that my voice can be heard, that perhaps some restitution can be made and that there are others out there who deserve the same consideration.

[65] T.H. wrote:

> I would like to extend my sincerest thank you to Jennifer McCrea for having the courage and determination to put forth the energy to show what is right and just. Thank you… Support is everything. Support when needed is everything. This is why I support this class action suit. This needs to be corrected.

[66] At the settlement approval hearing, T.R spoke about her experience of being denied EI sickness benefits while on parental leave. T.R. described the physical and emotional strain

created by her long-term illness and the great difficulty it presented for her family. She was unable to return to work when she had planned but was denied sickness benefits. The denial caused enormous financial stress. T.R. told the Court that she was livid and heartbroken but did not have the energy to continue to challenge the denial at the time. She expressed gratitude towards the women who began this action and offered her support for the Settlement Agreement because she wants the sickness benefits to be given to the people who should have received them.

[67] In Ms. McCrea's affidavit, she expressed the belief that the Settlement Agreement is fair and reasonable for the Class, considering the risks and delays associated with continuing the litigation. In particular, she noted that the proposed settlement provides for a simple application process and recovery of the full amount of the EI benefits that Class Members would have received. She said that non-recovery of interest is a small concession, representing a reasonable balance.

[68] Some Class Members noted with concern that the Settlement Agreement does not provide damages for mental distress. For example, D.D. sent a letter stating that she supports payments being made, but she disagrees with the settlement amount. She noted that the proposal does not include interest or compensation for pain and suffering, which she believes should be considered. D.D. described her fight with cancer and the financial impact of being denied benefits. She wrote:

> I was forced to work via lack of monetary support by an employment insurance program I had paid into for ten years prior to my diagnosis. I risked my life for nearly a full year after I

> returned, and I was not declared "cured" for another 4 after that. Certainly this must be considered.

[69] T.R. also stated before the Court her hope that emotional costs be considered for compensation.

[70] In Ms. McCrea's affidavit, she noted that there is a substantial likelihood that damages for inconvenience and mental distress would not have been awarded after trial. She also acknowledged that Class Members would have had a significant burden to provide individual evidence justifying such recovery. Ms. McCrea believes that a significant portion of the potential recovery is achieved in the Settlement Agreement.

[71] While some Class Members expressed concern about the settlement amount, the great majority of those who expressed views regard the proposed settlement favourably.

G. *Objections to the Settlement Agreement*

[72] Only five written objections were received, which represents approximately 0.2 % of the estimated Class Members. The written objections filed do not reveal the reason for the objection. For example, one objector stated that "it does not apply to me," and another, that she "[does not] want to fight for this". The cryptic nature of the objections suggests that the objectors did not fully understand the terms of the Settlement Agreement, including that they did not have to do anything more to make a claim. Objectors may choose to opt out of the litigation and could pursue their own actions. However, if they do not opt out, they will be bound by the settlement whether they make a claim or not.

[73] The Court's focus is on the reasonableness and fairness of the settlement for the class as a whole. A few dissatisfied or misinformed Class Members should not derail an agreement that is otherwise well supported and reasonable when all relevant factors are taken into account

H. *Good Faith*

[74] The Plaintiff and Defendant commended each other for their conduct in advocating for their respective positions in an assertive yet respectful and collegial manner, and in their approach to the negotiation of the settlement. Although the settlement discussions remain privileged, each party acknowledged the other's skill and advocacy coupled with the good faith demonstrated throughout the process.

[75] Of note, ESDC undertook an extensive File Review Project to identify all potential Class Members and to contact them directly and indirectly through public and social media campaigns. The features of the Settlement Agreement, including the Opt Out process, the claims process, the appointment of a Monitor and the review process for disputed claims, all demonstrate the efforts made to ensure that the litigation would be resolved in a fair manner to benefit the class. ESDC's initiative to identify all potential class members as the litigation was ongoing in order to ensure that ESDC would be prepared for the next steps has paved the way for an efficient claims' administration process.

I. *Arm's Length Bargaining*

[76] The Class Members were represented by experienced counsel who advocated for their best interests throughout the litigation. The Defendant's Counsel were all equally highly skilled and, as acknowledged by the Plaintiffs, formidable opponents. Both the Plaintiff and Defendant advanced their respective positions in an adversarial process. As noted above, the Defendant sought to put an end to the litigation early on by way of a Rule 220 motion. The Defendant also strongly opposed the certification of the action. However, as the litigation continued and settlement discussions ensued following certification, both the Defendant and Plaintiff made concessions to reach a fair resolution.

[77] Given the continuity of the team of Counsel for both the Plaintiff and Defendant, each "side" had a thorough understanding of the issues, the strengths and weaknesses of their own positions, and the impact that the settlement would have on Class Members.

J. *The recommendations of experienced Class Counsel*

[78] Class Counsel are experienced in litigating class actions. The affidavit of Mr. Wright, managing partner of the Class Counsel's firm, Cavalluzzo LLP, details the approach taken by the team of Class Counsel throughout the litigation. Given the experience of this team and their pursuit of the interests of the Class for well over six years, including defending motions and pursuing appeals, their recommendation that this settlement is fair and reasonable is accorded significant weight.

K. *The Recommendation of the Representative Plaintiff*

[79] Ms. McCrea was engaged throughout the litigation (as described in more detail below) and was well aware of the risks of the litigation and of the benefits of the settlement. In addition to her efforts since early 2012 to advance both the issue of providing sickness benefits for those on parental leave and the litigation, she travelled to attend the hearing of this motion to approve the Settlement Agreement, further demonstrating her commitment and support.

L. *Conclusion*

[80] Upon considering all the relevant factors, the Court concludes that the Settlement Agreement, which is appended to the Court's Order, is fair and reasonable and is in the best interests of the Class Members.

VI. The Honorarium for The Representative Plaintiff is Approved

[81] Class Counsel requests that the Court approve an award of $10,000 as an honorarium to the representative plaintiff, Ms. McCrea, to be paid in addition to the amount payable to each Class Member.

[82] 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, [2013] OJ No 1126 (QL), an honorarium is "not an award but a recognition that the

representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice".

[83] In *Robinson v Rochester Financial Ltd.*, 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.

[84] In the present case, Ms. McCrea's contribution is indeed exceptional as measured by any standard, including the factors noted in *Robinson*.

[85] Class Counsel aptly noted that Ms. McCrea's role in this litigation required the stamina of a marathon runner given the many obstacles in the path of the litigation without a finish line in plain sight. There is no doubt that Ms. McCrea has ably advanced the interests of the Class Members. She has raised awareness of a "gap" in the parental benefits regime for those, like her, who became ill while in receipt of parental benefits in the relevant period, before the clarifying amendment was made to the *Act* in 2013. Ms. McCrea was one of the many real people affected. She became the recognized face of this issue long before the Statement of Claim was filed.

Among other things, Ms. McCrea immersed herself in the issues raised in this litigation, prepared several affidavits, provided input to Class Counsel regarding the terms of the settlement, communicated with other potential Class Members and brought their views to the attention of Class Counsel. She has been the spokesperson for the Class Members to respond to inquiries from the press and to explain what is at stake. She will likely continue to be one of the "go to" persons for the foreseeable future following the approval of the settlement as it is implemented. Class Counsel praised Ms. McCrea as an ideal representative plaintiff over the six plus years of this litigation.

[86] The Court has no hesitation in approving the honorarium of $10,000 for Ms. McCrea in recognition of her role in bringing this litigation and this cause to the finish line. No doubt, Ms. McCrea did not envision or welcome the disclosure of personal information or the additional stress of years of litigation in her busy life as a working parent. Many letters of support for the settlement expressed the gratitude of Class Members for Ms. McCrea's role in taking up their collective cause, raising awareness about the need for policy and legislative change and for pursuing the litigation for their benefit.

VII. The Fees and Disbursements are Reasonable

[87] In accordance with Rule 334.4 the Court must approve the legal fees and disbursements of Class Counsel. Rule 334.4 provides that:

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

payments are approved by a judge.

A. *The Fees and Disbursements Requested*

[88] Class Counsel seeks approval of their legal fees and disbursements in the amount of $2,212,389 plus applicable taxes, which in total will not exceed $2,500,000. This amount is to be paid separately and directly by the Defendant. In other words, Class Counsel's legal fees and disbursements will not come out of the amounts to be paid to Class Members.

[89] The affidavit of Mr. Wright explains that several lawyers, law clerks, paralegals and administrative assistants spent many hours since 2012 to pursue this litigation. The legal work and other tasks were performed by those best suited to do so. A detailed chart was provided outlining the hours spent by various members of this team from 2012 to the end of October 2018.

[90] Class Counsel explained that as of October 29, 2018, their team had docketed 2,949.2 hours of time (or $830,731 in fees, excluding taxes). As of the date of this hearing, that amount had risen to $865,000. Class Counsel anticipates that an additional $120,000 in fees will be incurred over the next several months as Class Counsel will assist Class Members with their claims. Class Counsel also noted that $93,301 in disbursements have been incurred (excluding taxes) and an additional $ 15,000 in disbursements is anticipated. Therefore, the total actual fees and disbursements are estimated at $950,000. However, as the jurisprudence in class actions has established, the fees approved recognize that more than the actual amounts incurred are warranted for several reasons.

[91] In the initial retainer agreement, the representative plaintiff entered into a contingency fee agreement with the Class Counsel which provided that Class Counsel would receive 30% of the total amount recovered plus HST. However, as the litigation evolved, the fee arrangement was revised.

[92] The proposed fees now sought by Class Counsel are not based on a percentage of the settlement or on a multiplier applied to the actual costs incurred, rather. Instead, they are a fixed amount.

[93] Class Counsel submits that the fees agreed upon are fair and reasonable if they are assessed with reference to either a multiplier applied to the actual hours that would otherwise be billed or a percentage of the total amount of the settlement. Class Counsel submits that while neither approach is a good fit, the multiplier approach would be the better option to "cross check" the reasonableness of the fees in the present circumstances.

[94] Class Counsel noted that the fees requested would reflect the application of a multiplier of 2.2, if a multiplier approach were used.

[95] Alternatively, if a percentage approach were considered, the proposed fee would be in the range of 19-24 % of the total value of the settlement, which is expected to be in the range of $ 8.5 to $11.5 million. As noted above, the payment of fees will not reduce the total amount of the settlement.

[96] Class Counsel submits that the fees are fair and reasonable when all the relevant factors are considered, including the steps involved in this litigation, the duration of the litigation, and more importantly, the risks undertaken by Class Counsel and the successful result achieved.

[97] The Defendant does not oppose the requested fees and disbursements and notes that Class Counsel's explanation of the fee structure, the jurisprudence and the relevant factors to be considered supports the reasonableness of the fees and the Court's approval.

B. *The Relevant Principles from the Jurisprudence*

[98] 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 82-83, *Merlo* at paras 78-98, *Manuge* at para 28) and 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.

[99] The jurisprudence has emphasized that 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).

[100] In *Brown v Canada (Attorney General)*, 2018 ONSC 3429, 297 ACWS (3d) 295, Justice Belobaba reiterated that risk and results are the key factors at para 41:

> 41 The two most important factors are risk incurred and results achieved. As between the two, it is the risk incurred that "most justifies" a premium in class proceedings. The nature of the risk incurred is primarily the risk of non-payment. As noted by the Ontario Law Reform Commission in its seminal *Report on Class Actions*, "the class lawyer will be assuming a risk that after the expenditure of time and effort no remuneration may be received ... [that is] the risk of non-payment."
>
> [Footnotes omitted]

[101] In *Manuge* 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."

[102] There are generally two approaches to assessing the reasonableness of Class Counsel Fees—a percentage of the total settlement or a multiplier applied to fees and disbursements actually incurred.

[103] In *Condon*, Justice Gagné noted at paras 86-87 that the application of a multiplier to class counsel's time has been criticized for discouraging efficiency and early settlement. On the other hand, percentage-based fees encourage a results-based approach and reward counsel for their effectiveness. Courts have suggested a preference for percentage based fees in class actions.

[104] Justice Gagné expanded on the benefits of a percentage based fee, noting that entrepreneurial lawyers who accept contingency fee arrangements for class actions make such actions possible, noting at paras 89-91:

> [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).

[105] In *Gagne v Silcorp Ltd.*(1998), 167 DLR (4th) 325 at para 16, 1998 CarswellOnt 4045(Ont CA) [*Gagne*], the Court explained the multiplier approach, noting that a multiplier is in part a reward to counsel for bearing the risk of litigation. In assessing the risk, "[t]he court must determine whether these risks were sufficient that together with the other relevant considerations a multiplier is warranted. While this determination is made after the class proceeding has concluded successfully, it is the risks when the litigation commenced and as it continued that must be assessed."

[106] In *Gagne*, the Court added at para 25 that the selection of the appropriate multiplier is an art, not a science, and is informed by all the relevant factors.

[107] In *Châteuneuf v Canada*, 2006 FC 446, 151 ACWS (3d) 20, Justice Tremblay-Lamer also explained the multiplier approach, noting at para 10 that a multiplier of 1.5 to 3 has been found to be appropriate:

> [10] The system adopted in Ontario is covered in subsection 33(7) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. On the motion of a solicitor who has entered into an agreement, the court shall determine the amount of the solicitor's base fee. The base fee is calculated by multiplying the hours worked by the solicitor's usual hourly rate, to which the court may add an additional fee, calculated by multiplying the base fee by a multiplier to reflect the risks incurred by the solicitor. The case law recognizes that a multiplier of between 1.5 and 3.5 is appropriate: Rachel Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004), at page 474. Finally, the court determines the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

[108] Much of the jurisprudence cited with respect to the assessment of the reasonableness of fees arises in the context of the fees as part of the total settlement. In the present case, the Settlement Agreement provides that the fees will be paid separately by the Defendant. In other words, the fees do not come out of the total settlement. In *Fantl v Transamerica Life Canada*, [2009] OJ No 4324 (QL), 181 ACWS (3d) 219 (Ont Sup Ct) [*Fantl*], the Court considered a similar arrangement where the class was not asked to share their recovery. The Court considered how to measure the fairness and reasonableness of the fees in the circumstances. At para 76, the Court stated "the solution is to measure fairness and reasonableness from more perspectives. What the case at bar requires is to measure fairness and

reasonableness of the counsel fee against what is fair and reasonable to all of the class, Class Counsel, the defendant, and the public interest."

[109] Whether the fees in a class action are based on a percentage of the total settlement, a multiplier of the actual fees, or another basis, the jurisprudence emphasizes that the fees are the reward for taking on the litigation and all the risks entailed and pursuing the litigation with skill and diligence. Without the possibility of such a reward, such litigation would not be feasible. Many actions would not be pursued but for the role that Class Counsel takes on. The same considerations apply to the fees in the present case, which are fixed.

C. *Application of the principles and Relevant Factors*

[110] The fees sought to be approved are of a fixed amount. However, the initial fee agreement was based on a percentage of the ultimate recovery. As the jurisprudence notes, such contingency fees permit class actions to be pursued and provide incentives and ultimately a reward for class counsel to take on risky litigation and pursue it with diligence. Whether a multiplier or a percentage, the jurisprudence establishes that more than the hourly rates and disbursements actually incurred is justified in successful Class Actions.

[111] Although I agree that when "cross checked" with reference to a percentage of the settlement or a multiplier, the fees are fair and reasonable, the fees are best assessed against all the relevant factors. As noted in *Fantl,* the fairness and reasonableness of the fees should be assessed from more perspectives, including what is fair to the Class and to Class Counsel. In my view, the application of several factors noted in the jurisprudence, including the risk of the

litigation, the settlement achieved, the effort, diligence, experience and commitment of Class Counsel and the "team" supporting Class Counsel all point to the reasonableness of the amount.

[112] With respect to the litigation risk, as noted in *Manuge* at para 37, it is the risk taken by Class Counsel at the outset—i.e. when the action is launched—that is most relevant. In the present case, Class Counsel took on this litigation over six years ago. The litigation raised novel issues and posed thorny evidentiary challenges, including the need to establish a duty of care by the Defendants in the administration of a complex benefits regime. Class Counsel faced discouraging EI Umpire decisions and limitation periods, among other obstacles. Class Counsel assumed the "carrying costs" of the litigation for over six years. There was no certainty that the action would even be certified and indeed, not all claims were certified. As Class Counsel noted, the Defendant was a formidable opponent. Taking on the Government is not for the faint of heart.

[113] The issues raised in the litigation were novel and complex. Class Counsel faced the Defendant's opposition to all aspects of the litigation. Class Counsel, among other things, defended a Rule 220 motion, pursued an appeal of a reconsideration order regarding the terms of the Certification Order, advocated for an expansion to the Class definition and raised awareness and understanding of the issues at stake. Class Counsel remained undeterred in advocating for the Class.

[114] The results achieved are demonstrated by the Settlement Agreement. The Settlement Agreement provides that the sickness benefits that eligible claimants would or should have

received at the relevant time, but for the impossible requirement of being otherwise available for work, will now be paid. Although this is only part of what the litigation sought to achieve, this is the nature of a settlement—each party made compromises. Class Counsel and the Class Members who have voiced their support to date describe it as an excellent result. As noted, the few objectors did not articulate any clear reason for not supporting the settlement. Notably, eligible claims will be paid promptly, based on a simple form and the Class Counsel fees will not reduce the amounts payable to eligible claimants.

[115] The time and effort expended by each member of the Class Counsel team since 2012 is well documented in the affidavit of Mr. Wright. The Court has also observed, through the Rule 220 motion, the certification motion and other Case Management Conferences, the diligent efforts of the Class Counsel team.

[116] With respect to the quality of the representation, Class Counsel notes that their firm, Cavalluzzo LLP, with 36 members, has significant experience in class action litigation, which was brought to bear in this litigation. Several experienced counsel were involved to varying degrees, drawing on their respective areas of expertise, including expertise in the EI benefits regime. As noted above, the members of the Class Counsel team divided the necessary work based on skill and experience. For example, work done by students and paralegals was billed at their respective and appropriate rates.

[117] The importance of this litigation to the class is an equally relevant factor, which goes above and beyond the fact that Class Members will now receive some compensation. Many

Class Members had sought to resolve their claims by appealing to the EI Umpire. Unsuccessful claimants were likely discouraged by the outcome for them, while observing that new benefit programs were promised and implemented to address other important needs, but not to address their failed claims. The amounts at issue for the eligible claimants are not large, but the terms of the settlement are nonetheless a victory for the Class Members and their cause. Parental benefits—as important as they are—may not approach the salary a parent would receive while working. A parent on leave from their employment, caring for their child continues to have expenses to pay, yet with a reduced income. The added stress of becoming ill, but not being able to convert those weeks of illness to sickness benefits in order to extend or retain their parental benefits for their intended purpose of caring for a child rather than recovering from their illness, spurred the Class Members on to pursue this litigation.

[118] The maximum amount a claimant could receive if they are eligible for a full 15 weeks of benefits at the highest weekly rate is $7500, and for many the amount may be much less. The benefits would have likely been of more help at the time of the illness. Nevertheless, the settlement is a very good result for the Class Members. They will receive their benefits, albeit years later, and they will have witnessed both a change in the legislation to benefit others like them and improvements in the manner that information is shared by Service Canada about such benefits.

[119] As one Class Member noted, the importance of supporting mothers and children cannot be overstated. The settlement appears to recognize this. The letters of support also clearly convey

the benefit of the settlement to individual claimants and the recognition of the importance of supporting families and children.

[120] The representative plaintiff, Ms. McCrea, supports the approval of Class Counsel's fees. As noted, she initially entered into a contingency fee agreement for Class Counsel to receive 30% of the total amounts recovered plus HST. Class Members were aware of this initial agreement and of the revised arrangement for fees. No objections were made to the proposed fees. The current agreement provides that the fees for Class Counsel will not come out of the total amount of the settlement for class members. Rather, the fees of Class Counsel will be paid separately by the Defendant. This is an advantage as it ensures that Class Members will receive 100% of the benefits that they would have received had they been paid out at the relevant time.

[121] As noted above, in addition to the fees and disbursements already incurred by Class Counsel, further work remains to be done. Class Counsel will continue to incur costs over the course of the administration of the settlement, as they will provide reasonable assistance to Class Members in pursuing their claims and to those who seek a review of a denied claim.

[122] Comparisons with the fees approved in other class actions settlements also demonstrate that the fees in the present case are well within the norm. Although no two cases are the same, there is nothing unusual or disproportionate about the fees. For example, in *Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc.,* 2018 ONSC 6447, 298 ACWS (3d) 474 and *Fakhri v Alfalfa's Canada, Inc.,* 2005 BCSC 1123, [2005] BCJ No 1723, a 2.5 multiplier was applied. In *Condon,* the fees approved were 30% of

the total settlement, which was valued at $17.5 Million. In *Fantl*, the fees represented 17% of the total settlement. In *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686, [2013] OJ No 5825 (QL), the Court approved fees of 33.33% where the total settlement was $28.2 Million.

[123] Upon considering the jurisprudence and the relevant factors, in particular the risk taken by Class Counsel at the outset of this litigation, their skill and diligence 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 concludes that by any measure, the fees of Class Counsel are fair and reasonable and are approved.

VIII. Conclusion

[124] The Court finds that the Settlement Agreement is fair and reasonable and is, therefore, approved. In addition, the honorarium for Ms. McCrea as representative plaintiff is warranted given her significant contribution to this litigation and settlement and is approved. The fees and disbursements of Class Counsel are also fair and reasonable and are approved.

[125] In addition, the Plaintiff's Statement of Claim is amended to reflect the causes of action which were certified and to certify an amended definition of the "Class".

ORDER in T-210-12

THIS COURT ORDERS that:

1. For the purposes of this Order, the following definitions shall apply:

   "Administrator" means the Transformation and Integration Service Management branch of Employment and Social Development Canada;

   "Approval Date" means the date that this Order is executed;

   "Approval Orders" means this Order and the Order approving counsel fees in this matter;

   "Canada" or **"Government of Canada"** means Her Majesty the Queen in Right of Canada;

   "Claimant" means a person who completes a Claim Form and submits it for Individual Payment, but is not necessarily a class member;

   "Class Counsel" means Cavalluzzo LLP;

   "Class Members" mean all persons who meet the class definition set out in paragraph 3 below;

   "Implementation Date" means the date on which implementation of the settlement commences and is the latest of:

   i) the day following the last day on which a Class Member may appeal or seek leave to appeal the Approval Order;

   ii) the day after the date of a final determination of any appeal brought in relation to the Approval Order; or

   iii) April 3, 2019.

   "Settlement Agreement" means the final **Settlement Agreement**, including the Schedules listed at **Section 1.07** of the agreement, executed between the parties on August 22, 2018, and attached as **Appendix "A"** to this Order.

2. All applicable parties have adhered to and acted in accordance with the Notice Order

   dated September 11, 2018.

LEAVE TO FILE FRESH AS AMENDED STATEMENT OF CLAIM AND AMENDMENT TO THE CLASS DEFINITION

3. The Plaintiff is given leave to file the Fresh as Amended Statement of Claim and the style of cause is amended to name Her Majesty the Queen in Right of Canada as Defendant.

4. The class definition is amended to read as follows:

The class includes all persons who, during the period from March 3, 2002 to, and including, March 23, 2013:

i) Applied for and were paid parental benefits under the El Act or corresponding types of benefits under Quebec's An Act Respecting Parental Insurance;

ii) Suffered from an illness, injury or quarantine while in receipt of parental benefits;

iii) Applied for sickness benefits in respect of the illness, injury or quarantine referred to in ii; and

iv) Were denied a conversion of parental benefits to sickness benefits because:

(a) the person was not otherwise available for work; or

(b) the person had not previously received at least one week of sickness benefits during the benefit period in which the parental benefits were received.

OPT OUT PROCEDURE

5. Any class member who wishes to opt out of this class action must do so by completing and sending to Class Counsel the form appended as **Schedule "G"** to the **Settlement Agreement** no later than April 2, 2019 (the "Opt Out Deadline"); where sent by regular mail, the opt-out form shall be postmarked no later than April 2, 2019.

6. No Class Member may opt out of this class proceeding after the Opt Out Deadline.

7. Class Counsel shall serve on the parties and file with the Court, within two (2) weeks of the expiry of the Opt Out Deadline, an affidavit listing all persons who have opted out of the class proceeding, if any.

8. No person other than the parties or the Court may access the affidavit listing all persons who have opted out of the class proceeding and the said affidavit and any exhibits may only be filed under seal.

SETTLEMENT APPROVAL

9. The Settlement of this action on the terms set out in the **Settlement Agreement**, and as expressly incorporated by reference into this Order, is fair and reasonable and in the best interests of Class Members as a whole, and is approved, subject to the following changes to the Settlement Agreement, which are made on the consent of the parties:

    (a) As reflected in paragraph 5 above, the Opt Out Deadline shall be 60 days from the date of the Approval Order, such that where sent by regular mail, the Opt Out form shall be post-marked no later than 60 days from the date of the Approval Order; and

    (b) The Claims Form (Schedule "L" to the Settlement Agreement) is amended to add the Court File Number, to delete the second and third sentences in Box 10, and to add additional instructions in the "Instructions Box", as reflected in **Appendix "B"** to this Order.

10. The Settlement and this Order, including the releases referred to in paragraph 12 below, are binding on the Parties and on every Class Member and Claimant, including persons

under a disability, unless they opt out on or before the expiry of the Opt Out Deadline, and are binding whether or not such Class Member claims or receives compensation.

11. The **Settlement Agreement** shall be implemented in accordance with this Order and further orders of this Court.

DISMISSAL AND RELEASE

12. The present action, and the claims of the Class Members and the Class as a whole, are dismissed against the Defendants and the Government of Canada, without costs and with prejudice and such dismissal shall be a defence and absolute bar to any subsequent action against the Defendant in respect of any of the Claims or any aspect of the Claims made in the Class Actions and relating to the subject matter hereof, and are released against the Releasees in accordance with Section 10 of the Settlement Agreement, in particular as follows:

> (a) Each Class Member, their Estate Executors, and their respective legal representatives, successors, heirs and assigns ("Releasors") fully, finally and forever release and discharge Her Majesty the Queen in Right of Canada, and all current and former Ministers, employees, officials, departments, Crown agents, agencies, and Crown servants ("Releasees") from any and all actions, suits, proceedings, causes of action, common law, Quebec civil law and statutory liabilities, equitable obligations, contracts, claims, losses, costs, 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 Releasor may ever have had, may now have, or may in the future have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise with respect to or in relation to any aspect of the Class Actions and this release includes any such claim made or that could have been made in any proceeding including the Class Actions whether asserted directly by the Releasor(s) or by any other person, group or legal entity on behalf of or as representative of the Releasor(s);

(b) The **Releasors** agree that if they make any claim or demand or take any actions or proceedings against another person or persons in which any claim could arise against a Releasee for damages or contribution or indemnity and/or other relief over under the provisions of the *Negligence Act*, R.S.O. 1990, c. N-3, or its counterpart in other jurisdiction in relation to the Class Actions, then the **Releasors** will expressly limit their claims to exclude any portion of the **Releasees'** responsibility;

(c) Canada's obligations and liabilities under the **Settlement Agreement** constitute the consideration for the releases and other matters referred to in the **Settlement Agreement** and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Releasors are limited to the benefits provided and compensation payable pursuant to the **Settlement Agreement**, in whole or in part, as their only recourse on account of such claims.

APPOINTMENTS

13. The Department of Employment and Social Development, otherwise known as Employment and Social Development Canada ("ESDC"), shall administer the claims process in accordance with the Settlement Agreement. The cost of Administration shall be borne by ESDC.

14. Mr. Gordon McFee is appointed as Monitor of the claims process. The fees, disbursements and applicable taxes of the Monitor shall be paid in accordance with Section 9, and **Schedule "M"** of the **Settlement Agreement**.

15. No person may bring any action or take any proceeding against the Administrator or the Monitor or the members of such bodies, or any employees, agents, partners, associates, representatives, successors or assigns, for any matter in any way relating to the Settlement Agreement, the public notice campaign, administration of the Settlement Agreement or the implementation of this judgment, except with leave of this Court on notice to all affected parties.

OPT OUT THRESHOLD

16. In the event that the number of persons who appear to be eligible for compensation under the **Settlement Agreement** and who opt out of this class proceeding exceeds two hundred (200), Canada may exercise the option to void the **Settlement Agreement** and this judgment will be set aside in its entirety, subject only to the right of Canada at its sole discretion to waive compliance pursuant to **Section 2.03** of the **Settlement Agreement**.

NOTICE

17. Notice of the Settlement Approval shall be provided, and distributed as set out in **Schedule "C"** to the **Settlement Agreement**. The Notice Plan (Phase II) satisfies the requirements of rules 334.23, 334.32, 334.34, 334.35 and 334.37 of the Federal Courts Rules and constitutes sufficient and adequate notice to the class members and other affected parties.

18. The Notice Plan shall be completed no later than forty five (45) days after this Order.

19. Notice of the Settlement Approval shall be given in the form(s) attached as **Appendix "C" (English)** and **Appendix "D" (French)** to this Order**.**

CLASS COUNSEL FEES, NOTICE FEES AND HONORARIUMS

20. Class counsel legal fees and disbursements in the amount of $2,212,389, together with any applicable taxes thereon, not to exceed the amount of $2,500,000, is approved and shall be paid to Class Counsel within sixty (60) days of the Implementation Date, and such amount is to be paid in addition to and separate and apart from the individual compensation paid to eligible Class Members.

21. No fee may be charged to Class Members in relation to claims under the **Settlement Agreement** without prior approval of the Federal Court.

22. The Representative Plaintiff Jennifer McCrea shall receive the sum of $10,000 as an honorarium to be paid in accordance with **Section 12.01** of the **Settlement Agreement**.

CONTINUING JURISDICTION AND REPORTING

23. This Court, without in any way affecting the finality of this Order, reserves exclusive and continuing jurisdiction over this action, the Plaintiffs, all of the Class Members, Deemed Class Members and the Defendant for the limited purposes of implementing and enforcing and administering the **Settlement Agreement** and this Order.

24. The Administrator shall report back to the Court on the Administration of the **Settlement Agreement** as contemplated in **Schedule "K"** to the **Settlement Agreement.**

25. The Monitor shall report back to the Court on the Administration of the **Settlement Agreement** at reasonable intervals and upon completion of the administration, in accordance with **Section 9.02** of the **Settlement Agreement** or as requested by the Court.

26. This Court may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the **Settlement Agreement**.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-210-12
STYLE OF CAUSE:	JENNIFER MCCREA v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 3, 2018, DECEMBER 4, 2018
ORDER AND REASONS:	KANE J.
DATED:	JANUARY 29, 2019

APPEARANCES:

Stephen Moreau Tassia Poynter	FOR THE PLAINTIFF
Christine Mohr Cynthia Koller Heather Thompson	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Cavalluzzo LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFF
Deputy Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANTS