Court File Number: T-889-08

FEDERAL COURT

PROPOSED CLASS ACTION

BETWEEN:

ESTATE OF A. GERARD BUOTE AND DAVID WHITE

PLAINTIFFS

-and-

HER MAJESTY THE QUEEN

DEFENDANT

MEMORANDUM OF FACT AND LAW

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PART I: INTRODUCTION

1. The Plaintiffs bring this motion to certify and settle this proposed class action on behalf of 1,056 disabled RCMP veterans. The proposed settlement ends the *Pension Act* disability pension offset, provides a 82% refund of all amounts previously offset with reasonable interest rates, eliminates all limitation period defences, provides a streamlined disability determination process and, if necessary, an adjudication process.

2. Class Counsel also seeks a determination of its legal fees and disbursements under *Federal Courts Rule* 334.4. It is submitted that they are reasonable based on the applicable factors, particularly the results achieved for the Class, the degree of risk undertaken by Class Counsel at the outset of this case, and the proposed substantial discount from the contractually agreed percentage. The proposed legal fees of 4.5% of the total projected benefits to the Class, both past and future, are much lower than the standard in Canadian jurisprudence for class actions in this size range. The total amount at issue here is more than an order of magnitude smaller than the "megafund" recovery in *Manuge,* which raised unique considerations.

3. Finally, Class Counsel seeks approval to pay stipends from within their proposed counsel fee to the Plaintiffs.

PART II: STATEMENT OF FACTS

Plaintiff Gerard Buote

4. On June 6, 2008, Gerard Buote commenced this proposed class action.

5. Mr. Buote became a Royal Canadian Mounted Police officer in 1980. In 1989, while arresting an impaired driver, an altercation ensued and Mr. Buote's back was severely injured.

6. In 1993, Mr. Buote was involuntarily medically released from the RCMP due to his back injury. Mr. Buote was entitled to a *Pension Act* disability pension for his service related disability, which was to compensate him for his pain and suffering.

7. Mr. Buote was also entitled to a long term disability (LTD) benefit under an insurance policy that is underwritten by the Defendant and administered by Great West Life (GWL-LTD). The purpose of this LTD benefit was to provide replacement income if an RCMP member became medically unable to serve, and therefore unable to receive his or her usual salary.

8. Mr. Buote's LTD benefit was reduced by the amount of his *Pension Act* disability pension ("*Pension Act* Offset"). For example, in 2008, Mr. Buote's long term disability benefit was reduced by $985 per month.

9. Mr. Buote passed away on August 24, 2009 at the age of 51 years old.[1]

Representative Plaintiff David White

10. David White, a member of the proposed Class, agreed to assume the role of Representative Plaintiff following Mr. Buote's death.

11. Mr. White became an RCMP officer in February 1973.

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[1] Driscoll affidavit. Para. 18.

12. In May 2001, Mr. White was serving as a constable with the RCMP detachment in Bridgewater, Nova Scotia. Mr. White was on duty and investigating a report of a break in at a private residence. Unbeknownst to Mr. White, the homeowner had modified the alarm so that it would be extremely loud, which sounded as Mr. White approached the home.

13. Mr. White's exposure to this alarm has caused him to suffer hearing loss, tinnitus and hyperacusis. Tinnitus is a high-pitched ringing sound in both ears. Hyperacusis is a severe sensitivity to sound, including everyday sounds such as a television, ringing phone or lawnmower.

14. On July 2, 2002, Mr. White was involuntarily medically released from the RCMP due to these disabilities. He could not work in the presence of loud noise, could not rely upon hearing to determine the location of a sound and could not drive a police vehicle.

15. Mr. White applied, and was approved, for LTD benefits. He continues to receive these LTD benefits as he has been determined to be totally disabled as defined in the GWL-LTD Plan.

16. Mr. White applied for a *Pension Act* disability pension. On August 8, 2002, Mr. White's disability was initially assessed at 10% under the *Pension Act*. Mr. White made numerous appeals with Veterans Affairs Canada and the Veteran Review and Appeal Board to increase the assessment of his disability. As the result of his appeals, the assessment of Mr. White's disability has been incrementally and retroactively increased six times, most recently to 42% on August 2, 2012.

17. Mr. White has not seen any financial benefit from the *Pension Act* disability pension, which was intended to compensate him for his pain and suffering. All amounts that Mr. White has received for his pain and suffering under the *Pension Act* disability pension have been offset from his LTD benefits.

18. Similarly, Mr. White has not seen any financial benefit from the recognition that his disabilities merited an increased assessment. Each time that Mr. White's disability assessment increased, Mr. White was provided a retroactive payment to properly

recognize his pain and suffering, but that retroactive payment promptly had to be handed over to the Defendant.

19. As a result of the *Pension Act* Offset, Mr. White receives only $67.20 in monthly income replacement under an insurance policy that he has paid premiums for throughout his 30 year career.

Litigation

20. Upon his release in 1993, Mr. Buote's LTD benefits were subject to the *Pension Act* Offset. When Mr. Buote read about the similar proposed class action for disabled Canadian Forces veterans brought by Dennis Manuge, he contacted Peter Driscoll.[2]

21. In October 2007, Mr. Driscoll travelled to Summerside, PEI to meet with Mr. Buote in his home. At the conclusion of that meeting, Mr. Buote retained Peter Driscoll to commence a similar class action on behalf of disabled RCMP veterans.

22. On June 6, 2008, Mr. Driscoll filed the Statement of Claim of this proposed class action.

23. The current case was case managed together with *Manuge*, where the long certification journey had just begun at the time this case was launched.[3] The Honourable Justice Zinn ordered on August 26, 2008 and June 12, 2009 that the current case be held in abeyance during the *Manuge* certification appeals to, respectively, the Federal Court of Appeal and the Supreme Court of Canada.

24. Following the Federal Court of Appeal's February 3, 2009 decision to de-certify *Manuge* and stay that action, Class Counsel filed a proposed class judicial review application in both *Manuge* and the current case. The judicial review application (Court File T-479-09) on behalf of Mr. Buote and the proposed class was filed on March 31, 2009.

25. On December 23, 2010, the Supreme Court of Canada upheld the Federal Court's certification decision in *Manuge*.

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[2] Driscoll affidavit. Para. 13.
[3] In *Manuge*, the certification Notice of Motion was filed on September 4, 2007, the certification hearing was held on February 12, 2008, the Federal Court issued its certification decision on May 20, 2008, which the Defendant appealed on June 5, 2008.

Litigation drives settlement

26. On May 1, 2012, the Federal Court ruled that the *Pension Act* Offset was not contractually justified under the terms of the LTD Policy in *Manuge*. On May 29, 2012, the Defendant announced that it would not appeal that decision. Settlement discussions commenced in Ottawa on July 4, 2012.

27. Despite requests from Class Counsel, the current case was not put on the agenda for the *Manuge* negotiations.

28. In fact, the Defendant advised Class Counsel that even the certification of the current case would be contested notwithstanding the certification of *Manuge*.[4]

29. On September 25, 2012, Class Counsel filed an amended Statement of Claim in this action to add nullification of insurance as a cause of action.

30. On October 3, 2012, Class Counsel filed its Notice of Motion for certification. The contested certification hearing was scheduled for December 3, 2012.

31. At the request of the Defendant, Class Counsel agreed to the adjournment of the contested certification hearing so that the Defendant could have time to consider settlement.

32. However, on December 20, 2012, Defendant Counsel advised Class Counsel that it had its instructions, and those instructions were to litigate this case.

33. On February 13, 2013, Defendant Counsel cross-examined Mr. White on his certification motion affidavit.

34. In April 2013, Defendant Counsel finally advised Class Counsel that it had instructions to enter into without prejudice negotiations.

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[4] Driscoll affidavit. Para. 30.

35. During these negotiations, Defendant Counsel advised Class Counsel that although the *Manuge* structure could be used as a model, the circumstances surrounding the negotiations were different and that there had to be a discount to reflect the litigation risk if this case was going to settle.

36. After several meetings and months of negotiations regarding these issues, the parties agreed to the proposed settlement, which is described in detail below.

PART III: ISSUES

37. The following issues arise in this motion:

a. Should this action be certified as a class proceeding?

b. Should the proposed settlement be approved?

c. Should the proposed legal fee and disbursements be approved?

d. Should the proposed payments to the representative plaintiffs be approved?

PART IV: SUBMISSIONS

ISSUE 1: This action should be certified as a class proceeding

38. For the proposed settlement agreement to be approved and binding on all Class Members, the action first must be certified as a class proceeding.

39. This certification motion has been brought by consent.

40. Federal *Courts Rule* 334.16(1) requires a judge to certify an action as a class action if the five listed requirements are met:

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies:
a. the pleadings disclose a reasonable cause of action;	a. les actes de procédure révèlent une cause d'action valable;
b. there is an identifiable class of two or more persons;	b. il existe un groupe identifiable formé d'au moins deux personnes;
c. the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	c. les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
d. a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	d. le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
e. there is a representative plaintiff or applicant who	e. il existe un représentant demandeur qui:
(i) would fairly and adequately represent the interests of the class,	(i) représenterait de façon équitable et adéquate les intérêts du groupe,
(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how	(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe

	the proceeding is progressing,		informés de son déroulement,
(iii)	does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and	(iii)	n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
(iv)	provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.	(iv)	communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

41. The parties agree that all of the above requirements are met in this case.

42. In the context of settlement, the test for certification is somewhat relaxed. The factors considered are the same, but the test does not have to be as rigorously applied. The Plaintiff need only show that there is a *prima facie* case for certification. If the *prima facie* case is made out, the court can move on to consider the fairness of the settlement.

43. In *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022, the Ontario Superior Court of Justice adopted this less rigorous approach:

> [27] The first issue is whether this action should be certified as a class proceeding for the purposes of the proposed settlement. The requirements for certification in a settlement context are the same as they are in a litigation context and are set out in section 5 of the Class Proceedings Act, 1992. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.
>
> [Emphasis Added]

The current case is similar to *Manuge*, which was found to meet all of the certification requirements on a contested basis

44. The current case is similar to *Manuge* on the issues germane to certification. The current case and *Manuge* have the following elements in common:

a. The same offset of LTD benefits due to the *Pension Act* disability pension;

b. A similarly situated and affected class;

c. Similar causes of action;

d. The same counsel for the Plaintiff Class and the Defendant; and

e. Dealt with in the same case management conferences before the Honourable Justice Barnes.

45. In its May 2008 decision of *Manuge v. Canada*, 2008 FC 624, rev'd 2009 FCA 29, aff'd 2010 SCC 67, the Federal Court found that all of the requirements in *Federal Courts Rule* 334.16 were met after a contested hearing.

Requirement 1 – The pleadings disclose a reasonable cause of action

46. The pleadings disclose a reasonable cause of action.

47. In *Manuge*, the Federal Court held that this is a very low threshold:

> [38] The parties agree that there must be a reasonable cause of action to support a motion to certify. It is clear from the authorities that the threshold which the plaintiff must meet to establish a reasonable cause of action is very low: see Le Corre v. Canada (Attorney General), 2004 FC 155, 131 A.C.W.S. (3d) 813 at para. 21. The test for resolving this issue is the same as that which is applied to a motion to strike such that it must be "plain and obvious" that the plaintiff cannot succeed; it should not be applied such that novel legal propositions would be stifled: see Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at p. 977, 43 C.P.C. (2d) 105 at p. 123.
>
> [Emphasis Added]

48. In *Manuge*, the Federal Court held that "the allegations of unlawfulness, *ultra vires* and a breach of section 15(1) of the Charter easily meet the legal threshold of a reasonable cause of action." These causes of action are all present in the current action.

Requirement 2 – There is an identifiable class of more than two persons

49. The parties propose the following Class definition:

> All former members of the RCMP whose long-term disability benefits under Great West Life Assurance Company Group Policy Number 24892GM ("GWL-LTD Plan") were reduced by the amount of their VAC Disability benefits received pursuant to the *Pension Act*.

50. The *Federal Courts Rules* simply require that there be at least two class members. McInnes Cooper has already been contacted by over 100 potential Class Members. Great West Life has recently provided Class Counsel with a list of 1,056 Class Members.[5]

Requirement 3 – The claims of the class members raise common questions of fact and law

51. Federal *Courts Rule* 334.16(1)(c) requires that there be common issues in a class action, but those common issues do not necessarily have to predominate over questions only affecting individual members.

52. In *Manuge* at para. 26, the Federal Court ruled that there was "no question" that the common issue requirement is met:

> [26] The question of commonality of issues has been described as lying at the heart of a class proceeding: see Campbell v. Flexwatt Corp., [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343 at para. 52. There is no question that the preponderance of issues as framed in Mr. Manuge's Statement of Claim would be common to all members of the proposed class. I think it is fair to say that all of the liability issues raised in this case are common issues and that if Mr. Manuge succeeds on any one of them, the individual claims of class members to restitution would be amenable to a rather simple calculation.

53. In the current case, the parties have agreed to certify 16 common issues at section 6 of the proposed settlement Order. The only individual issues that remain are the quantification of each Proposed Class Member's personal refund.

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[5] Driscoll affidavit. Para. 9.

Requirement 4 – A class action is the preferable procedure

54. *Federal Courts Rule* 334.16(2) provides some guidance in the assessment of the preferable procedure:

334.16(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether	334.16(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :
a. the questions of law or fact common to the class members predominate over any questions affecting only individual members;	a. a. la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;
b. a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;	b. la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;
c. the class proceeding would involve claims that are or have been the subject of any other proceeding;	c. le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;
d. other means of resolving the claims are less practical or less efficient; and	d. l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
e. the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.	e. les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

55. Each of these five factors lead to the conclusion that a class proceeding is a preferable proceeding. The questions of law and fact predominate over any questions affecting only individual members. As stated above, the only individual issues that will remain once the common issues are resolved are essentially quantification of damages.

56. The preferability analysis requires the court to consider the extent to which the proposed proceeding will achieve the goals of the *Class Proceedings Act*.[6]

57. In its June 9, 2000 discussion paper *Class Proceedings in the Federal Court of Canada*, the Rules Committee stated the three main benefits from class proceedings:

> There are three main benefits said to accrue from class proceedings: improved access to justice, enhanced judicial economy, and increased modification of wrongful behavior.

58. The Plaintiffs say that each of the three purposes of the Act will be assisted by class certification.

59. Depending on the extent of their disability and the length of their eligibility for long term disability, an individual class member's claim may be relatively small making an individual action economically impossible. In addition to significant financial constraints, many class members may not be physically or mentally capable of pursuing a lengthy legal action against the Government due to their disability/disabilities.

60. The settlement of this substantial litigation on behalf of approximately 1,000 members would certainly enhance judicial economy.

61. Through the cessation of the offset, the Defendant's behavior has been modified.

62. In *Manuge* at para. 42, the Court ruled that that case "seems to me to be ideally suited to certification as a class action." The current case is similarly ideally suited for certification.

Requirement 5 – The Representative Plaintiff is appropriate

63. Mr. White, the proposed Representative Plaintiff, clearly fits within the definition of the Class. There are no apparent conflicts between Mr. White and other members of the Class. In his affidavit, Mr. White states his involvement in this class action and his consultations with Class Counsel during settlement negotiations and his decision to recommend settlement.

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[6] *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.).

64. Any individual Class Member who feels that Mr. White would not represent them well may opt out of the class proceeding and pursue an individual action.

ISSUE 2: The proposed settlement is fair, reasonable and in the best interest of the Class. This settlement should be approved

65. Federal *Courts Rule* 334.29 provides that a class proceeding may only be settled with the approval of a judge:

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 binds every class or subclass member who has not opted out of or been excluded from the class proceeding.	(2) Il lie alors tous les membres du groupe ou du sous-groupe, selon le cas, à l'exception de ceux exclus du recours collectif

A settlement should be approved if it is fair, reasonable and in the best interests of the Class as a whole

66. The standard for approval of a settlement is whether, in the overall circumstances, the settlement is fair and reasonable and in the best interest of the class as a whole.

67. In approving the principal settlement in *Manuge*, the Federal Court set out the following general principles:

> **General Principles Applicable to Class Action Settlements**
>
> [4] Court approval of a class action settlement is appropriate where, in the overall circumstances, it is deemed to be fair and reasonable and in the best interests of the class as a whole: see Bodnar v The Cash Store Inc., 2010 BCSC 145 at para 17, [2010] B.C.J. No. 192. In Chateauneuf v Canada, 2006 FC 286 at para 7, [2006] F.C.J. No. 363, Justice Danièle Tremblay-Lamer, described the general approach to the approval of a class settlement in this Court:
>
> > 7 The Court with a class action settlement before it does not expect perfection, but rather that the settlement be reasonable, a good compromise between the two parties. The purpose of a settlement is to avoid the risks of a trial. Even if it is not perfect, the settlement may be in the best interests of those affected by it, particularly when the risks and the costs of a trial are considered. It is always necessary to consider that a proposed settlement represents the parties' desire to settle the matter out of court without any admission by either party regarding the facts or regarding the law.

71. With this feedback in mind, the parties sought to craft a settlement that followed the *Manuge* settlement. However, there was a major distinguishing factor that had to be carefully considered.

72. In *Manuge*, the negotiations only began after the Federal Court ruled that the terms of the SISIP LTD Plan did not permit the *Pension Act* Offset. This ruling was based on the definition of "income" in the SISIP LTD Plan.

73. Unfortunately, a different LTD policy was in place for the RCMP, which arguably permitted the *Pension Act* Offset:

> The amount of the monthly benefit to which an employee is entitled is his Amount of Insurance as of the date of commencement of the Period of Disability, reduced by...
>
> (iii) The monthly amount of any periodic payments he receives under the Pension Act for an occupational disability which occurred while he was on duty...[7]

74. This meant that the lead argument in the RCMP case would likely have to be based on the *Charter*, under which claims always involve a number of highly complex and unique legal and evidentiary challenges, or the relatively novel nullification of an insurance claim. Given that this case will still be pursued if the settlement is rejected, Class Counsel will refrain from saying much more on this particular issue, but expect that the Defendant will opine further on the strength of its merits defences at the approval hearing. The Defendant will also likely speak to their potential limitation defences.

75. Suffice to say that Class Counsel is extremely content with the relatively modest 18% liability discount they were able to negotiate on retroactive payments in all the circumstances.

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[7] Driscoll affidavit. Para. 27.

Proposed Settlement Terms

The value of this settlement is projected to be $70 million

76. The Defendant advises that the projected value of this settlement is $70 million[8]:

Benefit	Amount
Retroactive payments to April 30, 2014	$30.6 million
Interest to October 31, 2014	$9.1 million
Net present value of future benefits to the Class	$30.3 million
Total	**$70 million**

The *Pension Act* Offset will cease

77. The proposed settlement provides that the *Pension Act* Offset, which has existed since 1975, will cease:

> 9. As at the end of the month immediately following the month in which this order is made, the Defendant shall cease decreasing the Class Members' ongoing long-term disability ("LTD") payments under the GWL-LTD Plan by the amount of the Members' Pension Act disability benefits ("the Pension Act Offset.")

78. As such, there is no "liability discount" associated with the increased going forward LTD benefits. The discount discussed below only applies on the refund.

79. This forward-looking term was very important to Mr. White and Ms. Buote, as it means that the RCMP member who may be released next month will not have their LTD benefits reduced due to their *Pension Act* disability benefit, which is intended to recognize their pain and suffering.

80. The Defendant states that the net present value of future benefits to the Class is $30.3 million. As discussed below, Class Counsel does not seek any legal fees applied to this benefit.

[8] Driscoll affidavit. Para. 70

Class Members will be refunded 82% of the amount that their LTD benefits were reduced due to the *Pension Act* Offset. The Defendant will allow all class members to be paid, effectively avoiding all limitation defences.

81. The proposed settlement provides that all Class Members will receive 82% of the amount that their LTD benefits were reduced due to the *Pension Act* Offset. In settling on that particular percentage, the parties were guided by the very real litigation risk facing the Class on the merits of the case[9] and the Defendant's formidable limitation period defences, which threatened to completely bar some Class Members' claims. As the Statement of Claim was filed on June 6, 2008, the six year limitation period at section 39 of the *Federal Courts Act* would bar claims predating June 6, 2002.

82. The parties agreed that, in recognition of the litigation risk and in exchange for dropping all limitation period defences, the refund would be reduced by the estimated percentage of the global refund that predated June 6, 2002.

83. From Class Counsel's perspective, they viewed this outcome primarily as a merits risk discount. The Defendant likely viewed it primarily as a limitation risk discount. Irrespective of the perspective, Class Counsel believes that the ultimate outcome is fair and reasonable in the circumstances.

84. Class Counsel's primary objective was to ensure that all Class Members would be compensated. The approach adopted by the parties can be best described as applying the limitation period defence to dollars as opposed to Class Members, thereby achieving that objective.

85. On March 25, 2014, the Defendant advised Class Counsel that the projected total of all *Pension Act* Offsets to April 30, 2014 was $37.3 million, and the projected total of all *Pension Act* Offsets from June 6, 2002 to April 30, 2014 was $30.6 million. With 82% (30.6/37.3 * 100%) of amounts subject to the *Pension Act* offset occurring after June 6, 2002, each Class Member will receive 82% of all amounts subjected to the *Pension Act* offset.

[9] The Federal Court described the Charter claim in *Manuge v. Canada,* 2013 FC 341 at para. 32, as "doubtful at best".

86. As noted, this settlement ensures that Class Members whose refund, or substantially all of their refund, predates June 6, 2002 will not be shut out of all the benefits of this class action. This resolution was very important to Mr. White who wanted to make sure that no Class Members were left behind.

87. Coincidentally, Mr. White was released in July 2002: just after the period that would have been limitation barred. Nonetheless, he was concerned about the fairness and perception of any resolution that meant that members on one side of June 6, 2002 got nothing, while he got full, or almost full, recovery.

88. This form of resolution will benefit Ms. Buote as nine years of her late husband's claim predated June 2002.

89. In further recognition of the substantial litigation and limitations risk, and the limited legal means to compel these heads of damages, Class Counsel agreed to forego the unique tax gross up and the bursary fund that were part of the *Manuge* settlement. Again, absent the heavy leverage created by the merits victory in *Manuge*, it would have been extremely difficult to obtain these "bells and whistles" benefits for the RCMP class.

The Class will still benefit from generous prejudgment interest rates

90. The proposed settlement adopts the prejudgment interest rates from *Manuge*, which the Federal Court described, at para. 9, as reasonable.

91. In *Manuge*, there was a judgment on May 1, 2012 so the statutory *Interest Act* post-judgment interest rate of 5% was applied after that date. As there was no merits judgment in the current case, the prejudgment interest rates continue until the date that the refund is paid:

> 11. The Defendant will pay simple interest on the Principal Refund, calculated as follows:
>
> a. No interest shall be payable for the period prior to February 1, 1992.
>
> b. 6% per year from February 1, 1992 to December 31, 1995;

c. 5% per year from January 1, 1996 to December 31, 2008; and

d. 3% per year from January 1, 2009 to the date the amount is paid to McInnes Cooper in trust.

92. It should also be noted that the Order necessarily reflects the fact that the Defendant is not liable to pay pre-judgment interest prior to February 1, 1992, pursuant to subsection 31(6) of the *Crown Liability and Proceeding Act*, R.S.C. 1985, c. C-50.

The settlement includes a comprehensive and streamlined approach to determine the eligibility of all Class Members, and particularly Zero Sum Members

93. According to section 17(b) of the Order, a Zero Sum Member is a class member "to whom offsets for *Pension Act* disability benefits have reduced their LTD benefits to zero".

94. In *Manuge* at para. 63, the Federal Court observed that the effect of the *Pension Act* Offset on Zero Sum Members was "particularly harsh".

95. Section 17(a) of the Order provides that all Class Members (including Zero Sum Members) will be deemed to be eligible for LTD benefits for the first 24 months from their discharge.

96. Class Counsel made it clear that Zero Sum Members, many of whom are severely disabled, must not be required to take any positive steps and engage in substantial bureaucratic efforts to establish entitlement to benefits unless these efforts were absolutely necessary.

97. The Defendant has agreed to treat Zero Sum Members as "totally disabled" for the purpose of the "any occupation" test in the GWL-LTD Policy during the period that the Zero Sum Member qualified for a CPP disability pension or an Exceptional Incapacity Allowance from Veterans Affairs Canada.

98. Even if a Zero Sum Member has not been determined to be disabled based on either of the Proxies, Class Counsel has ensured that all Class Members will have the benefit of a streamlined process to determine eligibility.

99. The Defendant must make a thorough review of its own records before a Zero Sum Member was required to take any positive action to prove their claim.

100. If a Zero Sum Member does not provide the information within a reasonable time, the Defendant will advise Class Counsel. Class Counsel can then take steps to contact the Zero Sum Member and assist in completing the form. This has proved invaluable in the *Manuge* settlement.

101. If the Defendant determines that the Zero Sum Member is not entitled to benefits after it conducts its due diligence and obtains the information, the Zero Sum Member can file an appeal with an independent adjudicator setting out why he or she should be paid a refund for a certain period. Zero Sum Members have the right to file material in support of their claim.

102. As in *Manuge*, the parties have agreed to appoint Laura Bruneau, an experienced and highly regarded independent class actions administrator, to resolve any disputes with respect to Class Member claims. Ms. Bruneau will also be involved in resolving any calculation disputes that may arise. The Defendant has agreed to pay Ms. Bruneau's expenses. In *Manuge*, Class Counsel has represented 105 Class Members in their appeals to Ms. Bruneau.

103. The Plaintiffs put particular emphasis on the simplicity of the process. There have been many class action settlements that appear to offer useful benefits on the surface, but the claims process or claims form is so complex that Class Members do not make use of the system.[10]

104. As in *Manuge*, the parties have agreed to appoint Deloitte to review, monitor and report quarterly on the Defendant's compliance with the terms of the Settlement. The costs of the monitoring firm's services will also be paid by the Defendant.

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[10] Charles M Wright and Luciana P Brasil, "The Importance of 'Schedule F': How Real Access to Justice is Driven by Notice and Claim Forms", 5th Annual Symposium on Class Actions (Toronto: Osgoode Hall Law School of York University, 2008); Ward K Branch and Greg McMullen, "Take-Up Rates: The real measure of access to justice", 8th Annual Symposium on Class Actions (Toronto: Osgoode Hall Law School of York University, 2011); Ward K Branch and Greg McMullen, "Take-Up Rates: The real measure of access to justice", 8th Annual Symposium on Class Actions (Toronto: Osgoode Hall Law School of York University, 2011)

The proposed settlement terms for deceased Class Members track *Manuge*

105. With one clarification, the parties agreed to track the *Manuge* approach to the payment of deceased Class Members:

> 25. Class Members who are deceased at the date of this order shall be entitled to payments payable to the date of death, which payments shall be made only and directly to living persons in the following priority:
>
> a. All of the payments shall be paid to the surviving "Spouse" or "Common Law Partner" of the deceased member.
>
> b. If there is no surviving Spouse or Common Law Partner of the deceased member, all payments shall be divided equally and paid to the "Children."
>
> c. If there is no surviving "Spouse", surviving "Common Law Partner", or surviving "Child" as defined in Annex D or E hereto at the time of the member's death, no payments shall be payable by the Defendant.

106. Payments will be made to the deceased Class Member's surviving spouse or common law partner. If there is no surviving spouse or common law partner, payments will be made to the children, who are defined in the same manner as *Manuge*:

> "child" means a child of — or an individual adopted either legally or in fact by — a class member or the spouse or common-law partner of the class member who, at the time of the class member's death:
>
> a. was less than eighteen years of age; or
>
> b. was eighteen or more years of age but less than twenty-five years of age, and was in full-time attendance at a school or university, having been in such attendance substantially without interruption since the child reached eighteen years of age; or
>
> c. was unable to provide for his or her own maintenance owing to physical or mental infirmity.

107. In *Manuge*, some Class Members died between the date of the hearing and the date that his or her refund was processed. This raised the question of whether that Class Member would be considered a "Deceased Class Member" for the purposes of the settlement.

108. This ambiguity has now been resolved in the proposed settlement by providing at section 26 that "if a Class Member dies after June 20, 2014, but before they receive their Refund, the Refund will be paid to that Class Member's estate."

The Defendant will cover the administrative payout costs

109. As in *Manuge*, the settlement will be administered by McInnes Cooper, who has now developed considerable administrative expertise in these large scale payouts.

110. Unlike in *Manuge*, the Defendant has agreed to pay McInnes Cooper's administrative costs at $18 per member and to cover the costs of mailing the cheques by registered mail. This is a benefit that was not provided to the Class in *Manuge*, where these costs were borne by the Class as a projected disbursement.

111. For all these reasons, the Plaintiffs believe that this settlement is fair and reasonable, and ask that it be approved.

ISSUE 3: The fees and disbursements proposed by Class Counsel are reasonable

The test for approval of counsel fees

112. *Federal Court Rule* 334.4 states that no payments may be made to a solicitor from the proceeds recovered in a class proceeding unless those payments are approved by a judge:

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

113. In *Manuge*, the Federal Court set out the following approach in determining whether the fees were fair and reasonable:

> [28] At the heart of the application of Rule 334.4 is the requirement that legal fees payable to class counsel be fair and reasonable: see *Parsons et al v Canadian Red Cross Society et al*, 49 OR (3d) 281, [2000] OJ no 2374 [Parsons et al]. In determining what is fair and reasonable the Court must look at a number of factors including the results achieved, the extent of the risk assumed by class counsel, the amount of professional time actually incurred, the causal link between the legal effort and the results obtained, the quality of the representation, the complexity of the issues raised by the litigation, the character and importance of the litigation, the likelihood that individual claims would have been litigated in any event, the views expressed by the class, the existence of a fee agreement and the fees approved in comparable cases. Some authorities have also recognized a broader public interest in controlling the fees payable to the legal profession: see *Endean v Canadian Red Cross Society*, 2000 BCSC 971, at para 73, 2000 BCJ no 1254 [Endean].

Class Counsel requests legal fees of 4.5% of the projected total benefits

114. Class Counsel's fee request is projected to be just 4.5% of the total value achieved for the Class.

115. Class Counsel respectfully requests the approval of legal fees of 8% to the retroactive refund ($30,600,000) and interest ($9,100,000) and no legal fees applied to the future benefit ($30,300,000). As stated above, the bracketed amounts are based on the Defendant's projections. It may be that the amounts will be lower than projected, as has been the case to date in *Manuge*. Class Counsel assumes that risk.

Class Counsel based its legal fee request on the Federal Court's decision in *Manuge* v. Canada

116. In *Manuge*, the Federal Court set legal fees of 8% of each refund, which was projected to yield approximately 3.8% of the total $880 million value of the settlement. There were no legal fees applied to the future amounts or the $10 million bursary fund.

117. In determining that a premium was appropriate, the Federal Court relied upon four factors:

a. Quality of legal representation and results achieved;
b. Litigation risk of no recovery;
c. The time and effort expended; and
d. Importance of this litigation to the Class.

118. Each of these factors is applied to the facts of the current case below.

Quality of legal representation and results achieved

119. On the factor of quality of legal representation and results achieved, the Court stated the following:

> [29] The certification and liability determinations that provided impetus for this settlement resulted from the skillful and tenacious advocacy of class counsel in the context of an adversarial contest involving equally skilled and tenacious opposing counsel.
>
> [30] The terms of settlement are equally impressive[...]The excellence of the legal representation provided by class counsel and the success that was achieved in the settlement negotiations are factors that favour a significant premium in the assessment of costs.

120. In the current case, it is submitted that the terms of settlement are again strongly supportive of the proposed fee, particularly in light of the more challenging legal environment faced.

Litigation risk of no recovery

121. On the factor of litigation risk of no recovery, the Court stated the following:

> [31] There can be no doubt that legal counsel for the class exposed themselves to a significant level of risk in taking on this case[...]
>
> [34] The litigation risk that class counsel assumed is also illustrated by the fact that the grievance that was at the centre of the case had been well-known for more than 30 years and had attracted no litigation either individually or as a class proceeding until Mr. Manuge's claim was taken up by Mr. Driscoll in 2007[...]
>
> [37] It is sufficient to observe that the litigation risk assumed by class counsel is primarily measured by the risk they assumed at the outset of the case[...]
>
> [38] In my view the litigation risk assumed by class counsel was substantial and almost certainly exceeded the tolerance level of others. This is a factor favouring a premium costs recovery, in part, to motivate counsel to take on difficult class litigation involving potentially deserving claims that might not otherwise be pursued.

122. At the outset of the current case, the litigation risk was at least as heavy as the litigation risk at the outset of *Manuge*. No other law firm took on this long standing grievance. At the time of filing the claim, the *Manuge* case was in the midst of certification appeals, and was eventually decertified by the Federal Court of Appeal. That certification risk applied equally to this case, even after certification was ordered in *Manuge*. The merits risk was arguably much higher given the absence of an ability to argue that this could be resolved on the basis of a simply contractual interpretation of the word "income". The litigation risk also increased rather than decreased over time as a result of the decision of the Ontario Court of Appeal in *Ruffolo v. Sun Life Assurance Co. of Canada*, 2009 ONCA 274 leave to appeal refused [2009] S.C.C.A. No. 222 and the decisions of the Supreme Court of Canada in *Withler v. Canada*, 2011 SCC 12 and *Elder Advocates Society v. Alberta*, 2011 SCC 24.[11]

[11] Driscoll affidavit. Para. 73.

The Time and Effort Expended

123. On the factor of time and effort expended, the Court stated the following:

> [39] It is important to recognize that much of the billable time expended and all of the file disbursements have been carried by these law firms for several years and that considerable work remains to monitor and manage the individual claims of class members.

124. In the current case, Class Counsel have already put in hundreds of hours of work. Counsel was required to prepare for a contested certification hearing, and to negotiate terms of settlement.

125. Counsel will certainly have hundreds of hours of additional work following this hearing. The experience learned about the amount of "follow on" work incurred after the formal *Manuge* approval only magnifies this point.

Importance of This Litigation to the Class

126. On the factor of importance of this litigation to the Class, the Court stated the following:

> [40] This was important litigation dealing with a long-standing contractual grievance involving thousands of disabled CF veterans. Since 1976 the practice of deducting *Pension Act* disability payments from SISIP LTD benefits had been the source of hardship drawing considerable third-party criticism.

127. This case was equally important to Class Members in the current case.

The sheer magnitude of the Manuge recovery was a factor that favoured a lower legal fee. That factor is not present in the current case

128. The Federal Court held that it was the sheer size of *Manuge* that put it in a different category, a category with only three other cases in Canadian class action history:

> [50] It can be equally unhelpful to look for guidance from authorities where legal fees have been approved as a percentage of the amounts recovered. A reasonable fee should bear an appropriate relationship to the amount recovered: see *Endean*, above, at para 80. Cases that generate a recovery of a few million dollars may well justify a 25% to 30% costs award. It is more difficult to support such an approach where the award is in the hundreds of millions of dollars. Presumably that is the

> reason why class counsel are not relying on the initial contingency fee allowance of 30%. That is also the reason that the three authorities that represent the strongest comparators to this case in terms of amounts recovered fall at the bottom of the scale of costs awarded in percentage terms: see *Baxter v Canada (Attorney General)*, [2006] O.J. no. 4968, 83 OR (3d) 481; *Endean*, above, and *Killough*, above.[2]
>
> [2] In *Baxter*, above, a costs award representing 4.87% of a projected payout of almost $2 billion was approved. This resulted in legal fees of between $85 and $100 million. In *Endean*, above, legal fees of $52,500,000 were approved representing 4.26% of the total amount recovered. In *Killough*, above, legal fees of $37,290,000 were agreed between the parties and were not to be deducted from the settlement proceeds. This figure was approved by the Court - albeit with reservations - and it represented 3.64% of the total award.
>
> [Emphasis Added]

129. The "megafund" factor does not drive the current case. The refund and interest portions of the current case are the only components subject to legal fees, and are projected to have a value of $39.7 million.

Comparable Jurisprudence

130. In *Manuge*, the Federal Court compared *Manuge* to the other three comparable cases known as Indian Residential Schools, Blood #1 and Blood #2. In its submissions in *Manuge*, the Defendant also focused on the precedent from these three cases.

131. Accordingly, it is instructive to compare the current legal fee request to similar sized cases. For cases in the $40 million range, approved fees are generally in the 20-33.3% range, rather than the 8% requested here. This is so even in cases where there was no contested certification or merits determination. For detail on the range of percentages that have been approved in Canada, a chart showing percentage class action fee awards in Canada is attached as Schedule "A".

132. In *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 63, the Ontario Superior Court of Justice listed eight recent Ontario decisions where a fee of between 20% and 30% was approved and stated that the range was "very common":

> [63] First, a contingent fee retainer in the range of 20% to 30% is very common in class proceedings, as it has been in other kinds of litigation in

this province for some years. As Class Counsel has pointed out, there have been a number of instances in recent years in which this Court has approved fees that fall within that range. These include:

- *Abdulrahim v. Air France*, [2011] O.J. No. 326: 30%
- *Ainslie v. Afexa Life Sciences Inc.,* [2010] O.J. No. 3302: 9.4%
- *Robertson v. ProQuest LLC*, [2011] O.J. No. 2013: 24%
- *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093: 25%
- *Pichette v. Toronto Hydro*, [2010] O.J. No. 3185: 28.5%
- *Robertson v. Thompson* Canada *Ltd.*, [2009] O.J. No. 2650: 36%
- *Cassano v. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543: 20%
- *Martin v. Barrett*, [2008] O.J. No. 2105: 29%

> [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.

133. The Courts in British Columbia have applied a similar range. In *Parsons v. Coast Capital Savings Credit Union*, 2009 BCSC 330 at paras 9-10 rev'd on other grounds 2010 BCCA 311, the British Columbia Supreme Court approved the 30% class counsel fee requested and approvingly quoted the following excerpt from counsel's brief:

> The proposed fee of 30% of the Settlement Fund is consistent with contingency fees approved in other B.C. class actions, which generally range from 15% to 33%. The B.C. Courts have noted that under the U.S. authorities, there is a presumptively reasonable rate of 30% which is adjusted for special circumstances.

134. In *Verna-Doucette v. Eastern Regional Integrated Health Authority*, 2010 NLTD 29, the Newfoundland and Labrador Supreme Court approved a class counsel fee of 30.49% of the settlement amount. In that case, class counsel reduced its fee request from 33.3% to 30.49% to reflect fees already received from their involvement in a related inquiry.

135. In the recent case of *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602 at para. 22, the Ontario Superior Court approved class counsel's fee request of 25%, which it stated was "a reasonably standard fee agreement in class proceedings litigation".

136. In the very recent case of *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, the Ontario Superior Court of Justice approved legal fees of 33.3% of a $28.2 million settlement agreement stating:

> 7 In my view, it would make more sense to identify a percentage-based legal fee that would be judicially accepted as presumptively valid. This would provide a much-needed measure of predictability in the approval of class counsel's legal fees and would avoid all of the mind-numbing bluster about the time-value of work done or the risks incurred.
>
> 8 What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the presumption of validity should only be rebutted in clear cases based on principled reasons.

137. At para. 9 of *Cannon*, the Court allowed that there may be circumstances where the presumption of validity could be rebutted including where the magnitude of the recovery would make the legal fees unseemly:

> [9] Examples of clear cases where the presumption of validity could be rebutted include the following:
>
> (i) *Where there is a lack of full understanding or true acceptance on the part of the representative plaintiff.* [...]
>
> (ii) *Where the agreed-to contingency amount is excessive.* [...]
>
> (iii) *Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so*

> *large as to be unseemly or otherwise unreasonable.* I know that I would be quite comfortable approving legal fees of $10 or even $15 million based on overall cash recoveries of $30 or $45 million. But I frankly don't know what I would or should do as a class actions judge when the recovery is, say, $150 million and class counsel are asking for $50 million. Although the $50 million legal fees award would be enormous, to say the least, I really can't think of a principled reason for not approving these larger amounts. Fortunately, I don't have to decide this today.
>
> [Underlining Emphasis Added]

138. This factor, which may lead to a lower percentage, was applied to *Manuge* due to its sheer size, but does not apply to the current case, which is comparable in size to *Cannon*. Further, in recognition of all of the factors, including the time spent, the proposed legal fees in the current case is only 8% (and only 4.5% of the total benefits that the Class will receive), rather than the 33.3% approved in *Cannon*.

The multiplier approach is not appropriate to determine legal fees

139. In *Manuge*, the Federal Court dismissed the multiplier approach relied upon by the Defendant as "overly simplistic and largely insensitive to the factors favouring a premium recovery":

> [49] The Defendant places considerable emphasis on the relatively low value of professional time expended by class counsel and then argues for the use of typical multiplier of 1.5 to 3.5. This seems to me to be overly simplistic and largely insensitive to the factors favouring a premium recovery. The efficiency of counsel in getting to an excellent result is something to be rewarded and not discouraged by the rigid application of a multiplier to the time expended. Here I agree with the views expressed by Justice George Strathy in *Helm v Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at paras 25-27, [2012] OJ no 2081:
>
> > 25 The proposed fee represents a significant premium over what the fee would be based on time multiplied by standard hourly rates. Is that a reason to disallow it? If the settlement had only been achieved four years later, on the eve of trial, when over a million dollars in time had been expended, would the fee be any more or less appropriate? Should counsel not be rewarded for bringing this litigation to a timely and meritorious conclusion? Should counsel not be commended for taking an aggressive and innovative approach to summary judgment, ultimately causing the

> plaintiff to enter into serious and ultimately productive settlement discussions?
>
> 26 Plaintiff's counsel are serious, responsible, committed and effective class action counsel. They are entrepreneurial. They will likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here.
>
> 27 For those reasons, I approve the counsel fee.

Also see *Vitapharm Canada Ltd. v F. Hoffmann-La Roche Ltd.*, [2005] OJ no 1117 at para 107, [2005] OTC 208.

140. In *Manuge*, the Federal Court stated that the multiplier approach may be better suited where class counsel would be under-compensated by the percentage approach:

> [47] The use of percentages and multipliers to assess class action legal fees is appropriate, but mainly to test their reasonableness and not to determine absolute entitlement. Each approach has its place. The multiplier appears to be a tool better suited to cases where the social benefits achieved may be greater than the amounts recovered and where a percentage approach would likely under-compensate counsel. In the so-called common-fund cases the use of a percentage appears to be preferred because it tends to reward success and to promote early settlement.
>
> [Emphasis Added]

141. In *Cannon*, above at para. 5, the Court adopted a similar approach rhetorically asking why it should be "concerned about the time that was actually docketed? This only encourages docket-padding and over-lawyering, both of which are already pervasive problems in class action litigation."

142. Furthermore, as a practical matter, it is impossible to apply the multiplier approach at this stage in the proceeding. As in *Manuge*, there will likely be numerous additional hours necessary to handle the numerous individual appeals, address issues that arise in the administration of payouts and respond to questions from the class members.

Disbursements incurred by Class Counsel

143. Class Counsel paid expenses for the benefit of the Class in pursuing this litigation, and at the considerable risk that Class Counsel would never be reimbursed. None of these disbursements were paid by Mr. Buote, Mr. White or any of the Class Members.

144. The expenses incurred by McInnes Cooper total $11,228.61, including projected travel costs to Halifax for the June 20, 2014 hearing:

Expense	**Amount**
Taxi	552.30
Photocopies	127.72
Airfare	7,161.94
Hotel	1,535.82
Meals	300.39
Courier/special postage	33.84
Court filing fees	52.00
HST	$1,464.60
Total	**$11,228.61**

145. The expenses incurred by Branch MacMaster total $14,067, including projected travel costs to Halifax for the June 20, 2014 hearing:

Expense	**Amount**
Taxi	736.71
Auto	108.77
Airfare	9,971.10
Hotel	1,740.66
Meals	813.60
Conference calls	26.64
GST (5%)	669.95
Total	**$14,067.43**

146. Class Counsel respectfully requests that they be permitted to make a reduction of 0.064% from the Refund to cover their disbursements. This calculation is the result of $25,296 divided by $39.7 million.

147. The Defendant has agreed to pay McInnes Cooper $18 per member to process the claims and to pay the registered mail costs of mailing out the refunds. Accordingly, Class Counsel has not claimed for any disbursements related to the payout process.

ISSUE 4: Class Counsel should be permitted to make $5,000 payments to Mr. White and Ms. Buote from their approved fee

148. Mr. Buote and Mr. White did not request this stipend, nor was it promised to them by Class Counsel at any time. However, Class Counsel believes that their respective contributions to the action merit recognition. The proposed amount of $5,000 is a modest acknowledgment of their respective efforts.

149. In *Parsons v. Coast Capital Savings*, 2010 BCCA 311 at para 21, the British Columbia Court of Appeal has found that "competent service accompanied by positive results should be sufficient for recognition [...]" with a stipend to recognize the efforts made by the representative plaintiff.

150. Ontario courts have also been willing to award stipends to representative plaintiffs. In *Baker (Estate)*, above at para. 93, the Ontario Superior Court of Justice found stipends to be appropriate "where a representative plaintiff can show he or she rendered active or necessary assistance or preparation of the case and that such assistance resulted in monetary success for the class".

151. The awards from Ontario courts have ranged from smaller stipends to recognize that a representative plaintiff has "exceeded that which is ordinarily expected" (*Smith Estate v. National Money Mart Company*, 2010 ONSC 1334 at para 84, fee upheld but ordered to be paid from settlement fund at 2011 ONSC 233), to much larger awards for representative plaintiffs who have made an "extraordinary commitment of time and effort" to the action. (*Garland v. Enbridge Gas Distribution Inc*, [2006] O.J. No. 4907 (ONSC) at para 43 and *Hislop v. Canada (Attorney General)*, 2004 CanLII 11203 (ONSC) at para 22)

152. In *Hislop*, the court awarded the three representative plaintiffs what it found to be the modest amounts of $15,000, $10,000, and $5,000, respectively, in "recognition of the value of their contributions to the other class members and to their counsel." The court noted that these amounts "do not in any way compensate the representative plaintiffs for the enormous amount of their personal time and energy devoted to the advancement to these proceedings."

153. In *Garland*, the court awarded Mr. Garland $25,000 for such a contribution, in spite of the fact that in that case, individual Class Members saw no direct personal recovery.

154. In *Manuge*, the Federal Court approved a $50,000 stipend to recognize Mr. Manuge's exceptional contributions and tireless advocacy in that case.

155. As in *Manuge*, Class Counsel propose that the two $5,000 stipends in the current case be paid from Class Counsel's fee, rather than draw down any payment to any Class Member.

PART V: ORDER SOUGHT

156. The Representative Plaintiffs respectfully request that the proposed certification and settlement be granted and the proposed fee and stipends be approved.

Signature

Signed May 23rd, 2014

per Peter Driscoll

per Ward Branch

Daniel Wallace

PART VI: AUTHORITIES

See separately bound Book of Authorities