

Federal Court



Cour fédérale

**Date: 20160317**

**Docket: T-1068-14**

**Ottawa, Ontario, March 17, 2016**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**RAYMOND MICHAEL TOTH**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**ORDER**

**UPON** motion in writing made by the Plaintiff, Raymond Michael Toth, for an order certifying this action as a class proceeding, considered this day at 90 Sparks Street, Ottawa, Ontario, K1A 0H9;

**AND UPON** reading the amended notice of motion dated January 18, 2016 and the affidavit of Raymond Michael Toth sworn on January 6, 2016;

**AND UPON** considering the submissions of counsel for the parties and being informed of the consent of the Defendant to this Order;

**THIS COURT ORDERS that:**

1. The action be certified as a class proceeding against the Defendant, Her Majesty the Queen (HMQ).
  
2. The class is defined as:
  - (a) all Canadian Forces members and veterans, and their spouses, dependants, survivors, and orphans who received a reduced Earnings Loss Benefit or Canadian Forces Income Support Benefit between April 1, 2006 and May 29, 2012, or received no benefit at all during that time, because of the deduction of disability benefit entitlements under the *Pension Act*; and
  
  - (b) all veterans, their spouses, dependants, survivors, and orphans who received a reduced allowance under the *War Veterans Allowance Act* between April 17, 1985 and May 29, 2012, or who did not receive a veterans allowance at all during that time, because of the deduction of disability benefit entitlements under the *Pension Act*.
  
3. Raymond Michael Toth is appointed as representative Plaintiff on behalf of the class.
  
4. The following common issues are certified for the purposes of this proceeding:
  - (a) Did the deduction of disability benefits under the *Pension Act* from Earnings Loss Benefit, Canadian Forces Income Support Benefit, and War Veterans Allowance discriminate against class members on the basis of disability, association with a person with a disability, and/or family or marital status, contrary to section 15 of the *Charter*?

- (b) If so, is the deduction of disability benefits saved by section 1 of the *Charter*?
  - (c) Are class members entitled to an order pursuant to subsections 24(1) and 52(1) of the *Charter* declaring the legislation authorizing the deduction of disability benefits to be illegal, *ultra vires*, and of no force or effect?
  - (d) Can the damages of class or sub-class members be assessed in aggregate pursuant to Rule 334.28 of the *Federal Courts Rules*?
5. The Plan of Proceeding attached hereto as Schedule “A” is approved.
6. Gowling WLG (Canada) LLP (Gowlings) and Michel Drapeau Law Office (MDLO or Drapeau) are appointed as class counsel and counsel for any related proceedings.
7. HMQ provide Gowlings and MDLO with the name, date of birth, last known mailing address, telephone number, facsimile number, and email address (if known) of each class member, and/or that of any trustee, guardian, and/or estate trustee of each class member of whom it is aware.
8. HMQ shall deliver notice to the class in the form attached hereto as Schedule “B” by ordinary mail to all class members for whom such information has been provided to Gowlings and MDLO.
9. Class counsel shall:
- (a) Publish Schedule “B” on the Gowlings and MDLO websites;
  - (b) Deliver copies of Schedule “B” to all class members of whom class counsel and/or the Plaintiff are aware as of the date of this Order; and

- (c) Publish Schedule “B” in a national edition of the National Post and Globe & Mail.

10. A class member may opt out of the class proceeding by sending a completed Opt Out Coupon by mail, fax, or email to Gowlings or MDLO within 60 days of the mailing and/or publication of the notice, or by May 31, 2016, whichever is later, and that no class member may opt out of this proceeding after that date.

11. On or before 30 days following the end of the opt out period, class counsel shall report to the Defendant and the Court, the names of all class members who have opted out of this proceeding.

12. There shall be no costs on this motion for certification of a class proceeding.

“Catherine M. Kane”

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Judge

**SCHEDULE “A”**

**Court File No. T-1068-14**

**FEDERAL COURT**

**B E T W E E N:**

**RAYMOND MICHAEL TOTH**

**Plaintiff**

and

**HER MAJESTY THE QUEEN**

**Defendant**

**PLAINTIFF’S PLAN OF PROCEEDING**  
*(Federal Courts Rules, Rule 334.16(e)(ii))*

1. The *Federal Courts Rules*, SOR/98-106, Rule 334.16(1)(e)(ii) require a proposed plaintiff to produce a plan for the proceeding establishing a workable method for advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing. The Plaintiff proposes that the proceeding be conducted according to the following Plan of Proceeding.

**Introduction, Nature of the Proposed Class Proceeding, and Class Counsel**

2. In this proposed class proceeding (the proceeding), the Plaintiff Raymond Michael Toth asks the Court to determine whether the deduction of disability benefits from veteran income support programs was discriminatory contrary to section 15 of the *Charter of Rights and Freedoms*. The proposed class (the class) is defined as:

- (a) all Canadian Forces members and veterans, and their spouses, dependants, survivors, and orphans who received a reduced Earnings Loss Benefit or Canadian Forces Income Support Benefit between April 1, 2006 and May 29,

2012, or received no benefit at all during that time, because of the deduction of disability benefit entitlements under the *Pension Act*; and

- (b) all veterans, their spouses, dependants, survivors, and orphans who, on/or between April 17, 1985 and May 29, 2012, received a reduced allowance under the *War Veterans Act* or did not receive a veterans allowance at all because of the deduction of disability benefit entitlements under the *Pension Act*.

3. The Plaintiff is represented by two law firms acting in partnership: Gowling WLG (Canada) LLP (Gowlings) and Michel Drapeau Law Office (MDLO or Drapeau). Gowlings is a national law firm with a team of capable counsel who have the requisite knowledge, skill, subject matter expertise, and resources to prosecute the proceeding. Gowlings has assembled a team with particular expertise in class actions, human rights, and benefits litigation. MDLO is an Ottawa-based firm with significant expertise in military law, veterans' issues, and human rights. MDLO's principal, Michel Drapeau, retired from the Canadian Forces as a Colonel with 34 years' service, and is a noted authority on military law and veterans issues.

4. To date, Gowlings and MDLO have developed considerable resources and energy for advancing the proceeding. Members of both firms have reviewed applicable documents and prepared certification materials.

5. The Defendant is consenting to the Plaintiff's motion for certification.

### **Identification of Class Members and Notice of Certification**

6. Following certification as a class proceeding, a Notice of Certification will be delivered pursuant to Rule 334.32 of the *Federal Courts Rules* in a form and manner approved by the Court (the Notice).

7. The Plaintiff proposes to provide the Notice to class members through the following means:

- (a) Delivery of the Notice by regular mail to each identified class member's last known address.
- (b) Publication in one or more national newspaper(s) of a copy of the Notice, in both official languages.
- (c) Publication on a publicly-accessible website set up for this class action and administered by class counsel.

8. The Plaintiff will request that the opt out deadline be the 60th day following the required delivery date of the Notice or May 31, 2016, whichever is later. "Opt Out" forms will be attached to the Notice.

9. The Notice will outline the significance of opting out. In particular, it will state that those class members who choose to opt out will not participate in the class proceeding and do not stand to receive any payment if the proceeding is resolved (or settled) in favour of the class. The Notice will also make clear that affected persons who do not opt out will be considered class members and be bound by the Court's Order or the terms of an approved settlement. The Notice will direct class members to resources where they can obtain further information. A draft Notice (and opt out form) in both official languages is attached to this Plan of Proceeding as Schedule "B".

10. The Plaintiff proposes that the Court authorize Gowlings to receive opt out forms or other written documentation from class members who wish to opt out of the class proceeding. Within 60 days of the expiration of the opt out period, Gowlings will deliver to the Court and the Defendant, an affidavit listing the names of all persons who have opted out of the class proceeding, and attach copies of all opt out forms as exhibits.

### **Pleadings and Proposed Litigation Timetable**

11. The Plaintiff proposes the following schedule for the proceeding:

- (a) The Statement of Defence is served and filed by the end of January 2016;
- (b) The Plaintiff is to produce documents within 90 days of service of the Statement of Defence;
- (c) The Defendant is to produce documents within 60 days of the Plaintiff's document production;
- (d) Oral examinations for discovery are to be conducted within 60 days of the Defendant's document production;
- (e) Pre-trial motions are to be brought in the fall of 2016/winter of 2017; and
- (f) The trial is to be scheduled in the spring of 2017 or as soon thereafter as possible, subject to available trial dates.

### **Communication with Class Members**

12. Gowlings and MDLO will establish a publicly-accessible website or webpage to provide information on the proceeding for class members, potential class members, and the public. It is intended that all documents filed with this Court, all communications sent to members (in anonymous form), and periodic updates will be published on the website or web page.

13. In addition, Gowlings and/or MDLO will appoint one or more associate lawyer(s) to act as primary contact persons for class members to contact in the event they have questions or concerns regarding the proceeding. In light of the bilingual nature of the Canadian Forces and its veterans, some of the appointed associates shall be bilingual and class members will be given information on how to access services in both official languages.

### **Notice of Resolution of the Common Issues**

14. The Court, in consultation with the parties, can settle the particulars of a notice program following resolution of the proceeding. It is anticipated that all class members will be notified by regular mail, if applicable.

### **Claims Process**

15. Once the common issues are determined by the Court, the Plaintiff and the Defendant will determine the most appropriate method for administering payments. The Defendant, acting through the Minister of Veterans Affairs, operates the programs under which the Plaintiff claims there was an improper deduction of disability benefits. It may be most efficient to have the Defendant directly administer any payment or reimbursement, with assistance from class counsel as required.

### **Review of the Plan of Proceeding**

16. It is anticipated that this Plan of Proceeding will be reviewed periodically, as necessary, during the litigation process and modified, if required, under the continuing authority of the Court.

## SCHEDULE "B"

**CLASS ACTION REGARDING DEDUCTION OF *PENSION ACT* PAYMENTS FROM EARNINGS LOSS BENEFIT, CFIS BENEFIT, AND WAR VETERANS ALLOWANCE**

*Toth v. Her Majesty the Queen*  
Court No. T-1068-14

The Federal Court has certified the above case as a class action. If you are a former member of the Canadian Forces who was entitled to receive Earnings Loss Benefit or Canadian Forces Income Support Benefit, or a war veteran who was entitled to receive War Veterans Allowance, and the amount of your benefits were reduced because of disability payments under the *Pension Act*, you may be a member of the class. If you are the spouse, dependant, survivor, or orphan of an individual entitled to receive one or more of these benefits, you may also be a member of the class. If the action succeeds or is settled, your entitlement will depend on your individual circumstances.

**WHAT IS THE CLASS ACTION ABOUT?**

The new *Veterans Charter* created two benefits payable to qualified Canadian Forces members, veterans, and their families: Earnings Loss Benefit ("ELB") and Canadian Forces Income Support Benefit ("CFIS").

Individuals who were eligible for, applied for, or received a disability pension under the *Pension Act* before 1 June 2006, and who received ELB or CFIS, had the amount of their disability pension deducted from their ELB and/or CFIS payments. Similarly, recipients of War Veterans Allowance ("WVA") payments under the *War Veterans Allowance Act* had the amount of their disability payments deducted from their WVA on or after 17 April 1985.

The class action seeks, among other things, a declaration that the deduction of disability benefits from ELB, CFIS and WVA was discriminatory on the basis of disability contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*. The class action seeks a refund of all disability benefits deducted and/or damages.

**WHO ARE THE CLASS MEMBERS?**

The Federal Court has defined the class as follows:

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

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

The person who brought the lawsuit and who is a class member and the representative plaintiff is Raymond Michael Toth, c/o Malcolm Ruby, Gowling WLG (Canada) LLP, 100 King St. W., Suite 1600, Toronto, ON, M5X 1G5

**WHAT DO I NEED TO DO TO TAKE PART?**

All class members have the right to participate in the class action. You are automatically included in the class action *unless* you opt-out of participating. You do not need to do anything if you wish to participate. *If you wish to opt-out* you must do so by completing an opt-out notice available from Gowling WLG (Canada) LLP. Your opt-out notice must be received no later than **31 May 2016**. If you opt-out, you will not be affected by any decision the Court makes on the common issues in the class action, and will not be eligible to receive any payment from a settlement or judgment in favour of the class.

**Gowling WLG (Canada) LLP** can be reached at:  
100 King St. W., Suite 1600, Toronto, ON, M5X 1G5  
Attn: Malcolm Ruby  
Tel: 416-862-4314  
Fax: 416-862-7661  
Email: [Veterans@gowlingWLG.com](mailto:Veterans@gowlingWLG.com)

Gowling WLG (Canada) LLP can help you confirm whether you are a class member. When contacting Gowling WLG (Canada) LLP please provide as much of the following as possible:

- Your name, address, telephone and/or email
- The dates of your service in the Canadian Forces
- The date upon which you commenced receiving ELB, CFIS or WVA.
- The amount by which your ELB, CFIS or WVA was reduced by your disability benefits.

**DO I NEED TO PAY ANYTHING?**

You do not need to pay any legal fees directly out of your pocket. If the case is unsuccessful, no legal fees will be charged. By agreement with the representative plaintiff, a scaled legal fee of up to 30% of any amounts received may be paid to class counsel. If any settlement, judgment, or other benefit is obtained, class counsel shall apply to the Federal Court for approval of its fees.

**WHO ARE THE LAWYERS FOR THE CLASS?**

**Malcolm Ruby and Erica Maidment**, Gowling WLG (Canada) LLP, 100 King St. W., Suite 1600, Toronto, ON, M5X 1G5

**Michel Drapeau and Joshua Juneau**, Michel Drapeau Law Office, 192 Somerset West, Ottawa ON K2P 0J4

**WHERE CAN I FIND MORE INFORMATION?**

For more information or to opt-out of the class action, please contact Gowling WLG (Canada) LLP at the address above.

**OPT OUT COUPON**

**Gowling WLG (Canada) LLP**

Barristers & Solicitors

1 First Canadian Place

100 King Street West

Suite 1600

Toronto, Ontario M5X 1G5

**Malcolm Ruby / Erica Maidment**

Tel: (416) 862-4314 / (416) 369-6641

Fax: (416) 862-7661

**I wish to Opt Out of the Class Proceeding against  
Her Majesty the Queen.**

\_\_\_\_\_  
*(Signature)*

**Class Member Name:**

\_\_\_\_\_  
*(please print)*

**Address:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Email** *(optional)*: \_\_\_\_\_

**Telephone:** \_\_\_\_\_

**NOTE:** To Opt Out, this Coupon must be completed and received at the above address before **31 May 2016**.

**RECOURS COLLECTIF CONCERNANT LA RÉDUCTION DE PRESTATIONS POUR L'ALLOCATION POUR PERTE DE REVENUS, L'ALLOCATION DE SOUTIEN DU REVENU DES FORCES CANADIENNES (ASRFC), ET L'ALLOCATION D'ANCIEN COMBATTANT EN VERTU DE LA LOI SUR LES PENSIONS**

*Toth c. Sa Majesté la Reine*

Numéro de dossier du greffe T-1068-14

La Cour fédérale a autorisé l'instance comme recours collectif. Si vous étiez membre des Forces canadiennes et étiez admissible à une allocation pour perte de revenus ou à un soutien du revenu des Forces canadiennes, ou si vous êtes un ancien combattant admissible à une allocation d'ancien combattant, et que le montant de vos prestations a été réduit en raison de la pension d'invalidité en vertu de la *Loi sur les pensions*, vous pourriez vous qualifier en tant que membre du recours collectif. Si vous êtes marié(e), êtes une personne dépendante, êtes un(e) conjoint(e) survivant(e), ou êtes orphelin(e) d'une personne admissible à une ou plusieurs de ces allocations, vous pourriez vous qualifier aussi en tant que membre du recours collectif. Advenant la réussite du recours collectif ou la survenance d'une entente, le montant de votre remboursement dépendra de votre situation personnelle.

**EN QUOI CONSISTE LE RECOURS COLLECTIF?**

La nouvelle *Charte des anciens combattants* établit deux catégories d'aide financière pour les membres des Forces canadiennes et à leurs familles : l'allocation pour perte de revenus (APR) et le soutien du revenu des Forces canadiennes (SRFC).

Les personnes qui étaient admissibles, qui ont souscrit, ou qui ont reçu une pension d'invalidité en vertu de la *Loi sur les pensions* avant le 1<sup>er</sup> juin 2006, et qui ont reçu une APR ou un SRFC, ont vu leur pension d'invalidité réduite des montants payés de l'APR et le SRFC. De la même façon, les bénéficiaires de l'allocation d'ancien combattant (AAC) conformément à la *Loi sur les allocations aux anciens combattants* ont vu leur pension d'invalidité réduite des montants payés de l'AAC.

Le recours collectif vise, entre autres, à obtenir une déclaration à l'effet que la réduction des prestations des montants payés de l'APR, de SRFC et l'AAC est discriminatoire sur la base d'une déficience, ce qui contrevient à l'article 15 de la *Charte canadienne des droits et libertés*. Le recours collectif vise à recouvrer un remboursement de toutes les allocations réduites et/ou des dommages-intérêts.

**QUI SONT LES MEMBRES DU GROUPE?**

La Cour fédérale a approuvé la définition suivante du groupe:

(a) tous les membres des Forces canadiennes et les anciens combattants, et leurs conjoint(e)s, personnes dépendantes, conjoint(e)s survivant(e)s ou orphelin(e)s qui, du 1<sup>er</sup> avril 2006 au 29 mai 2012, ont reçu une APR réduite ou un SRFC réduit, ou qui n'ont reçu aucune allocation durant cette période, en raison de la pension d'indemnité réduite en vertu de la *Loi sur les pensions* et,

(b) tous les anciens combattants, et leurs conjoint(e)s, personnes dépendantes, conjoint(e)s survivant(e)s ou orphelin(e)s qui, du 17 avril 1985 au 29 mai 2012, ont reçu une allocation réduite en vertu de la *Loi sur les allocations aux anciens combattants*, ou qui n'ont reçu aucune allocation d'ancien combattant en raison de la pension d'indemnité réduite en vertu de la *Loi sur les pensions*.

La personne qui représente tous les membres du recours collectif est Raymond Michael Toth, a/s Malcolm Ruby, Gowling WLG (Canada) S.E.N.C.R.L., s.r.l., 100 King St. W., Suite 1600, Toronto, ON, M5X 1G5

**QUE DOIS-JE FAIRE POUR Y PARTICIPER?**

Tous les membres concernés par le recours collectif ont le droit d'être partie au recours. Vous êtes automatiquement inclus dans le recours collectif à moins que vous ne déposiez une demande de retrait du recours. Vous n'avez rien d'autre à faire si vous désirez faire part du recours. *Si vous désirez vous exclure du recours*, vous devez compléter un avis de retrait, disponible en contactant Gowling WLG (Canada) S.E.N.C.R.L., s.r.l. L'avis de retrait doit être reçu au plus tard le **31 Mai 2016**. Si vous vous retirez, vous ne serez touché par aucune décision de la Cour relativement à ce recours collectif et vous ne recevrez aucun montant issu de l'entente ou du jugement qui serait en faveur du groupe.

Vous pouvez joindre Gowling WLG (Canada) S.E.N.C.R.L., s.r.l. au: 100 King St. W., Suite 1600, Toronto, ON, M5X 1G5

Attn: Erica Maidment

Tél: 416-369-6641

Télec: 416-862-7661

Courriel: [Veterans@gowlingWLG.com](mailto:Veterans@gowlingWLG.com)

Gowling WLG (Canada) S.E.N.C.R.L., s.r.l. peut vous aider à déterminer votre admissibilité au recours collectif. Si vous contactez Gowling WLG (Canada) S.E.N.C.R.L., s.r.l., veuillez fournir le plus de renseignements possibles, en donnant :

- Votre nom et prénom, adresse, numéro de téléphone et/ou courriel
- Vos années de service au sein des Forces canadiennes
- La date à laquelle vous avez commencé à recevoir une APR, un SRFC ou une AAC.
- Le montant qui a été réduit de votre APR, SRFC ou AAC.

**QUEL MONTANT DOIS-JE PAYER?**

Vous n'avez aucun frais à déboursier directement.

Advenant l'échec du recours collectif, aucun frais juridique ne vous sera facturé. Selon l'entente conclue par la personne représentant le groupe, des frais juridiques allant jusqu'à 30% du montant obtenu peuvent être exigibles par les avocats représentant les membres du recours collectif. Advenant qu'une somme soit versée suite à une entente, un jugement ou que d'autres avantages sont négociés, les avocats assignés au dossier feront application pour faire approuver les frais juridiques.

**QUI SONT LES AVOCATS REPRÉSENTANT LES MEMBRES DU RECOURS COLLECTIF?**

**Malcolm Ruby** et **Erica Maidment**, Gowling WLG (Canada) S.E.N.C.R.L., s.r.l., 100 King St. W., Suite 1600, Toronto, ON, M5X 1G5

**Michel Drapeau** et **Joshua Juneau**, Cabinet juridique Michel Drapeau, 192 Somerset West, Ottawa ON K2P 0J4.

**OÙ PUIS-JE TROUVER D'AUTRES INFORMATIONS?**

Pour plus d'informations ou pour vous exclure du recours collectif, veuillez écrire au cabinet Gowling WLG (Canada) S.E.N.C.R.L., s.r.l. à l'adresse mentionnée ci-haut.

## AVIS DE RETRAIT

**Gowling WLG (Canada) S.E.N.C.R.L., s.r.l.**

1 First Canadian Place

100 King Street West

Suite 1600

Toronto, Ontario M5X 1G5

**Malcolm Ruby / Erica Maidment**

Tel: (416) 862-4314 / (416) 369-6641

Fax: (416) 862-7661

**Je désire m'exclure du recours collectif contre  
Sa Majesté la Reine.**

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*(Signature)*

**Nom du membre:**

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*(prière d'écrire en lettres moulées)*

**Adresse:**

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**Courriel** *(optionnel)*:

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**Téléphone:**

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**NOTEZ:** Pour vous exclure du recours, cet avis doit être rempli et reçu à l'adresse ci-dessus avant le **31 mai 2016**.