

Federal Court



Cour fédérale

Date: 20220107

Docket: T-1673-17

Citation: 2022 FC 11

Ottawa, Ontario, January 7, 2022

PRESENT: The Honourable Mr. Justice Phelan

CLASS PROCEEDING

BETWEEN:

**CHERYL TILLER, MARY-ELLEN
COPLAND AND DAYNA ROACH**

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Proceeding

[1] This is an application by the Representative Plaintiffs for approval of a Protocol to resolve an issue which has arisen during the processing of claims. It seeks to insert Auxiliary Constables as part of the Class in this litigation entitled to compensation.

[2] The parties had a class action settlement agreement dated June 21, 2019 [*Tiller Settlement*] approved by the Court on March 10, 2020 in *Tiller v Canada*, 2020 FC 321 [*Tiller*].

[3] The *Tiller Settlement* addressed the claims of women who were not eligible to make a claim under the *Merlo-Davidson* class action settlement [*Merlo-Davidson Settlement*], approved in *Merlo v Canada*, 2017 FC 533 [*Merlo-Davidson*]. The *Tiller Settlement* arose from the fact that female non-Royal Canadian Mounted Police [RCMP] personnel and others engaged with the RCMP, who experienced the same type of abuse and discrimination as serving RCMP members, were not covered by the *Merlo-Davidson Settlement*.

[4] The Primary Class in *Tiller* was described in para 18 as follows:

The broad definition of the Primary Class is meant to describe the large group of women who have worked or volunteered with or under the RCMP in varying capacities but who were not included in the *Merlo-Davidson* settlement.

[5] This application arises because at least seven (7) claims filed in the *Tiller Settlement* process had been denied by the Office of the Assessor on the basis that the claimants applied as volunteers but were Auxiliary Constables – a volunteer position.

[6] Under the *Merlo-Davidson Settlement*, Auxiliary Constables fell into the Class as “Regular Members” of the RCMP. This application was brought to address the denial of claims of Auxiliary Constables and other volunteers who have not been compensated under the *Merlo-Davidson Settlement*. The problem is that these possible claimants did not act upon their opportunity to apply for compensation under the *Merlo-Davidson Settlement*.

II. Background

[7] The *Merlo-Davidson* class proceeding was certified on January 13, 2017 for settlement purposes (*Merlo v Canada*, 2017 FC 51). That class action related to gender and sexual orientation discrimination of women who worked in the RCMP.

[8] The *Merlo-Davidson* Certification Order referred to Auxiliary Constables being part of the Primary Class:

Primary Class Members: All female current and former living Regular Members, Civilian Members and Public Service Employees (who are appointed by the Commissioner of the RCMP under the delegated authority of the Public Service Commission pursuant to the *Public Service Employment Act*, R.S.C., 1985, c. P-32; amended S.C. 2003, c. 22, ss.12 and 13) who worked within the RCMP at any time during the Class Period. The Class Period is September 16, 1974, to the date the Settlement receives court approval.

For the purposes of the Settlement, “Regular Members” includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members, and Reserve Members.

For the purpose of the Settlement, “Public Service Employees” includes Temporary Civilian Employees who, prior to 2014 were appointed under the now-repealed subsection 10(2) of the RCMP Act, R.S.C., 1985, c. R-10.

(Underlining by this Court)

[9] The Notice of Certification and Settlement Approval Hearing attached to Justice McDonald’s order certifying the litigation as a class proceeding, repeated the Primary Class definition and its express inclusion of Auxiliary Constables. In addition, in the opening lines, it stated:

If you are a female or identified as a female and were an RCMP Regular Member (for purposes of this Proposed Settlement includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members, and Reserve Members), Civilian Member or Public Service Employee (for purposes of this Proposed Settlement includes Temporary Civilian Employees) working within the RCMP, this notice may affect your legal rights. Please read it carefully.

(Underlining by this Court)

[10] Evidence in support of certification included details referring to the number of Auxiliary Constables and the number of volunteers working with the RCMP.

[11] After certification, Klein Lawyers, counsel on this present matter as well, posted on its website information about settlement including that Auxiliary Constables were eligible to participate in the *Merlo-Davidson* Settlement.

[12] The *Merlo-Davidson* Settlement included a strong notice distribution scheme to potential class members. The representative plaintiffs, and presumably class counsel, played a hands-on role in the settlement discussions and communications.

[13] The *Merlo-Davidson* Notice of Settlement Approval continued the same opening language as the Notice of Certification including explicit reference to Auxiliary Constables being included in the settlement.

[14] There can be no doubt that Auxiliary Constables were and were intended to be specifically included in the *Merlo-Davidson* Settlement.

[15] In the *Tiller* Settlement, the parties defined the class broadly in order to capture women who were not included in the *Merlo-Davidson* Settlement. That intent was specifically referred to in the *Tiller* Settlement Approval Order (*Tiller v Canada*, 2020 FC 320) and the *Tiller* Certification Order (*Tiller v Canada*, 2019 FC 1501).

[16] That intent was captured in the *Tiller* Certification Order:

Primary Class Members: all current and former living Municipal Employees, Regional District Employees, employees of non-profit organizations, volunteers, Commissionaires, Supernumerary Special Constables, consultants, contractors, public service employees, students, members of integrated policing units and persons from outside agencies and police forces who are female or publicly identify as female and who were supervised or managed by the RCMP or who worked in an RCMP controlled workplace during the Class Period, excluding individuals who are primary class members in *Merlo and Davidson v. Her Majesty the Queen*, Federal Court Action Number T-1685-16 and class members in *Ross, Roy, and Satalic v. Her Majesty the Queen*, Federal Court Action Number T-370-17 or *Association des membres de la police montée du Québec inc., Gaétan Delisle, Dupuis, Paul, Lachance, Marc v. HMTQ*, Quebec Superior Court Number 500-06-000820-163. The Class Period is September 16, 1974 to the date the Court certifies the action as a class proceeding.

[17] The Notice of Certification expressly excluded Primary Class Members in the *Merlo-Davidson* Settlement.

[18] The *Tiller* Settlement Approval Order contained the same definition of Primary Class Members as referred to above from the Certification Order – specifically the exclusion of individuals who are “primary class members in Merlo and Davidson ...”.

[19] The Notice Plan, the Notice of Settlement Approval and the claim form each referred to the exclusion as Class Members of class members in the *Merlo-Davidson* Settlement.

[20] Germane to the issue raised in this application is clause 14.02 of the *Tiller* Settlement which allows for substantive amendments only where the parties first agree to those amendments in writing.

In this case, the Defendant does not agree to all Auxiliary Constables who are clearly part of the primary class members in the *Merlo-Davidson* Settlement being eligible for compensation under the *Tiller* Settlement.

[21] The parties did make amendments to the *Tiller* Settlement resulting from problems associated with the COVID-19 pandemic including extensions of the Implementation Date and the completion of claims forms and their filing. None of these amendments affect the issues in this application.

III. Issues

[22] I agree with the Defendant's articulation of the key issues on this application:

- Are Auxiliary Constables included as Class Members in the *Tiller* Settlement?
- Can or should this Court amend the class definition to include Auxiliary Constables?
- As part of any such amendment, can the Court amend provisions to extend the claim period and to require Assessors to reconsider and potentially reverse decisions already issued?

IV. Analysis

A. *Preliminary*

[23] The Defendant raises an objection of sorts to the affidavit of Whitney Santos filed for the Plaintiffs. Its concern is the weight to be given to such evidence, not that it is necessarily inadmissible although it contains inadmissible opinion.

[24] The Court has noted the opinion and hearsay in the affidavit. As to matters of contradictory statements or inaccuracies, there is no counter affidavit from the Defendant.

[25] The Court can, on its own, determine whether a claimant would need to read the whole of the *Merlo-Davidson* Settlement to determine that a volunteer who is also an Auxiliary Constable would meet the exclusion in the Primary Class Member definition in the *Tiller* Settlement.

[26] The Santos affidavit, with its flaws, was not particularly helpful or persuasive and was accorded minimal weight.

B. *Auxiliary Constables/Tiller Settlement*

[27] The Plaintiffs say that the use of the word “volunteer” in the class definition in the *Tiller* Settlement has created confusion for claimants in the *Tiller* Settlement. The Plaintiffs contend that a reasonable volunteer with the RCMP would not know that she had to review the *Merlo-Davidson* class definition in its entirety to determine if she was included in the *Tiller* Settlement.

[28] With respect, a court is entitled to assume that persons should and would take the steps necessary to determine their rights by reading the relevant parts of documents available to them including notices issued, class counsel's website or even seeking legal advice.

[29] That some individuals did not take these steps is possible but that is not the fault of the respective Settlements. The wording is clear and there is no gap or something missing from the class definitions.

[30] The *Tiller* Settlement can only be interpreted as excluding Auxiliary Constables where Auxiliary Constables are specifically included in *Merlo-Davidson* where "Regular Member includes ... Auxiliary Constables" and that persons entitled to claim in *Merlo-Davidson* cannot claim in *Tiller*.

C. *Can/Should the Court amend the Tiller Class Definition?*

[31] The Plaintiffs' proposed relief would amend the terms of the *Tiller* Settlement without the consent of the Defendant as required by clause 14.02 referred to in paragraph 20 of these Reasons.

[32] This is not an instance of oppression or unconscionable action. The wording in the *Tiller* Settlement was negotiated and settled with the assistance of experienced Class Counsel and after court management sessions at which the issues of clarity of definition were raised.

[33] Any reference to “volunteers” must be read in the context of the definition in which the term is used. Auxiliary Constables are a subset of volunteers but unique in that they receive specialized training by the RCMP and commit to a program for an extended period.

[34] There is nothing misleading or inadequate in the notices issued in *Tiller*. Auxiliary Constables are expressly excluded by excluding *Merlo-Davidson* Primary Class Members. The fact that the two definitions must be examined does not establish inadequacy or confusion. Notices issued both in *Tiller* and *Merlo-Davidson* were advanced by the parties and approved by the Court.

[35] The Plaintiffs’ attack in this *Tiller* matter is an attack on the *Merlo-Davidson* Settlement and its notice provisions. Such a collateral attack cannot be permitted.

[36] The jurisdiction of the Court to amend a settlement approved by the Court is severely limited. This Court, in *McLean v Canada (Attorney General)*, 2021 FC 987 – on a matter of amendment to a class action settlement – followed the teachings in *JW v Canada (Attorney General)*, 2019 SCC 20 [*JW*], which underlined courts’ obligation to supervise class action settlements and affirmed the limits on courts to intervene: to where relevant negotiated terms are not applied or where there is a gap in the settlement agreement.

[37] What the Plaintiffs have described as a “Protocol” is an amendment to the *Tiller* Settlement. Courts are not free to amend agreements or re-write agreements unless a relevant term of the agreement is not considered or if there is a gap in the agreement (*JW*). I adopt the

principle outlined by Justice Perell in *Lavier v MyTravel Canada Holidays Inc*, 2011 ONSC 3149 at para 31, that where a court in approving a settlement reserves jurisdiction to consider applications about the administration of the settlement, the court does not have jurisdiction to change the nature of the settlement reached by the parties.

[38] As discussed earlier, there is no gap in the *Tiller* Settlement. The words and the principles/concepts are clear. The problem identified is the failure of certain individuals to examine the definitions to determine entitlement to participate in the class action settlement.

[39] There is no suggestion that the negotiated terms are not being applied – quite the opposite. The terms are being applied which results in unfavourable consequences to some individuals.

[40] Rule 334.19 of the *Federal Courts Rules*, SOR/98-106, also precludes this motion as the Plaintiffs are seeking to effectively amend the *Merlo-Davidson* Certification Order in circumstances where the Auxiliary Constables have released their claims pursuant to Rule 334.29.

[41] To grant this motion is to change the *Tiller* Primary Member Class, to run counter to the wording agreed to by the parties, and to impose a term not consented to by the Defendant. It would alter the claim period which has expired and alter the finality of the Assessor's decisions – all matters of substance.

[42] There is no gap in the *Tiller* Settlement nor has a term of the *Tiller* Settlement been ignored. The classes in both *Merlo-Davidson* and in *Tiller* have received precisely that to which they were entitled in this regard.

[43] The wording of the *Tiller* Settlement is clear and it accords with the intention of the parties at the time that Settlement was agreed. The Auxiliary Constables were not intended to be part of the *Tiller* Settlement since they were covered by the *Merlo-Davidson* Settlement.

[44] While it may be unfortunate if some Auxiliary Constables did not understand that they should seek compensation under the *Merlo-Davidson* Settlement, the problem is not attributable to the *Tiller* Settlement.

[45] In hindsight, counsel on this motion, who were the same Class Counsel in both *Merlo-Davidson* and *Tiller*, suggest that wording in respect of Class Members could have been more precise. However, the wording did express the intention of the parties and is clear and understandable.

[46] It is not accurate to suggest, as the Plaintiffs have, that the Notice did not take account of the fact that there were two RCMP settlements which include females who experienced gender based harassment by the RCMP. The specific wording of the Primary Class in *Tiller* makes reference to the *Merlo-Davidson* Settlement and includes those who were entitled to compensation under the *Merlo-Davidson* Settlement.

[47] While one may be sympathetic to those who missed the opportunity to claim compensation, as one might feel sympathy for a person who missed filing a claim in a timely manner, class action settlements are contracts and the terms of the contract attract consequences.

V. Conclusion

[48] In summary, the Court does not have the authority to amend the *Tiller* Settlement by imposing the Protocol requested by the Plaintiffs. Therefore, the motion will be dismissed.

[49] As the Defendant did not ask for costs, no costs will be ordered.

ORDER in T-1673-17

THIS COURT ORDERS that the Representative Plaintiffs' motion is dismissed
without costs.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1673-17

STYLE OF CAUSE: CHERYL TILLER, MARY-ELLEN COPLAND AND
DAYNA ROACH v HER MAJESTY THE QUEEN

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: PHELAN J.

DATED: JANUARY 7, 2022

WRITTEN REPRESENTATIONS BY:

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