Federal Court Cour fédérale

***3**

Date: 20221017

Docket: T-1106-20

Citation: 2022 FC 1409

Ottawa, Ontario, October 17, 2022

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

SEAN BRUYEA

Plaintiff

and

HIS MAJESTY THE KING

Defendant

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ORDER AND REASONS

[1] The Plaintiff brings this motion seeking to certify this action as a class action on behalf of an estimated 10,000 veterans who were eligible for a Supplementary Retirement Benefit in 2019 and who may not have received this benefit or who may have received this benefit in a lower amount than the Plaintiff claims they should have received due to the alleged conduct of the Defendant.

[2] The issue on this motion is not whether the Plaintiff has established his claim, but whether the Plaintiff has established that the conditions of Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 have been met, as this governs whether an action should be certified as a class proceeding. In other words,

- that the pleadings disclose a reasonable cause of action;
- that there is an identifiable class of two or more persons;

- that the claims of the proposed class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

- that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law and fact; and,

- that there is an appropriate representative plaintiff.

[3] For the reasons that follow, the Plaintiff's motion is granted; I find that the Plaintiff has satisfied the requirements of Rule 334.16. These reasons explain the contents of the Order that is being issued under Rule 334.17.

[4] In summary, I find that the Plaintiff's claims for systemic negligence, breach of fiduciary duty and unjust enrichment have no reasonable prospect of success. The Plaintiff is granted leave to amend his Further Amended Statement of Claim to specifically and alternatively plead negligent misrepresentation. I find that the Plaintiff's claim for negligent misrepresentation is a reasonable cause of action and that the Plaintiff has established some basis in fact for the other requirements of certification. The Order below reflects the reasons and the requirements of Rule 334.17, including setting out the common questions that are certified. The Case Management Process will be relied on to address the potential need for amendments to the common questions, Litigation Plan and other procedural matters.

I. Background

A. *The Nature of the Claims*

[5] The Plaintiff, Mr. Sean Bruyea, is the proposed representative plaintiff and class member. He joined the Canadian Armed Forces [CAF] in 1982 and was medically released in 1996. He recounts that he has continued to experience service-related injuries and illnesses that have prevented him from rejoining the civilian workforce.

[6] In this motion, Mr. Bruyea seeks the certification of a class proceeding on behalf of himself and other veterans, alleging systemic negligence (and alternatively, negligent misrepresentation, as explained below), breach of fiduciary duty, and unjust enrichment by Canada, more particularly, Veterans Affairs Canada [VAC].

[7] Mr. Bruyea claims that VAC, through its operations and management, failed to properly inform and advise him and other veterans about the financial benefits for which they were eligible, in particular the Supplementary Retirement Benefit [SRB] (described below) and its underlying criteria, resulting in smaller payouts than they would otherwise have been entitled to or received.

B. *The Benefits at Issue*

[8] To better understand Mr. Bruyea’s claim and to determine whether it is appropriate for certification, some of the benefits available to veterans are described below. This description

should not be regarded as comprehensive. The benefits have various eligibility requirements. In addition, amendments to the governing statutes made over the years, with a view to enhancing the benefits available to veterans, have resulted in further complexity in understanding who is entitled to what and when.

[9] The Service Income Security Insurance Plan [SISIP] was established in 1969 as a long-term disability program for losses unrelated to military service. In 1976, the SISIP was extended to service-related injuries. The CAF long-term disability plan [CAF-LTD] is part of SISIP and falls within the mandate of the Department of National Defence, not VAC. CAF-LTD is administered by Manulife and is for members of the CAF who are designated as "totally disabled" for the purposes of the plan. ["Total disability" for the purpose of CAF-LTD is basically equivalent to "totally and permanently incapacitated" [TPI], which is the term used for the benefits administered by VAC]. The CAF-LTD payable is calculated at 75% of the veteran's pre-release salary and is available until the veteran reaches age 65.

[10] On April 1, 2006, the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [the 2006 Act, also referred to as the *Veterans Charter*] came into force. The 2006 Act established several new programs and benefits, including a rehabilitation and vocational services program to assist veterans in their return to civilian life [the Rehabilitation Program]. To be eligible for the Rehabilitation Program, veterans must either have been medically released from the CAF (section 9 of the 2006 Act) or have been determined to have a "physical or a mental health problem resulting primarily from service in the Canadian Forces that is creating a barrier to re-establishment in civilian life" (section 8). These two

eligibility criteria have been referred to by the Defendant's affiants as the "gateways" to the Rehabilitation Program.

[11] As explained by the Defendant's affiants, to be eligible via either gateway, a veteran had to apply and be approved for the Rehabilitation Program. Once approved, the veteran was then also eligible for the Earning Loss Benefit [ELB] and the SRB.

[12] The ELB was an income replacement benefit available to veterans participating in the Rehabilitation Program (subsection 18(1) of the 2006 Act) who applied for ELB. The benefit continued to be payable until the veteran's individual rehabilitation plan had been completed or cancelled, or until the veteran reached age 65 (subsection 18(3)). If a veteran were determined to be "unable to engage in suitable gainful employment as a result of being totally and permanently incapacitated" or, following the 2017 legislative amendments, to have a "diminished earnings capacity" [DEC], the ELB would continue to be payable even after completion or cancellation of the rehabilitation plan, up until age 65 (subsection 18(4)). This benefit was known as "extended ELB." In such cases, TPI and DEC determinations were made on a case-by-case basis by the veteran's case manager based on a number of factors set out in VAC policy documents.

[13] The amount of the ELB was initially calculated at 75% of the veteran's imputed income (the higher of the veteran's pre-release salary and a prescribed minimum), subject to deductions for certain income sources [offsets], including CAF-LTD. Because both the ELB and CAF-LTD were calculated at 75% of the veteran's imputed income, a veteran who was already receiving CAF-LTD and who applied for ELB would not receive any additional income.

[14] On October 1, 2016, the ELB was increased to 90% of the veteran's imputed income, and the minimum imputed salary was raised. As a result, veterans to whom ELB was payable (although not necessarily paid due to the offset) received a top-up over the amount received as CAF-LTD.

[15] The SRB was a one-time, lump sum payment intended to be paid when the veteran reached age 65. The SRB was designed to acknowledge that veterans in receipt of ELB had a diminished capacity to contribute to a retirement pension plan. The SRB was available, on application, to veterans who had been approved for extended ELB payments due to a TPI or DEC designation when their entitlement to the ELB ended, which was typically at age 65, or where the criteria for a TPI or DEC designation were no longer met (subsection 25(1) of the 2006 Act). The SRB was calculated at 2% of the total ELB payable (regardless of whether it was paid out) to a veteran, without considering any income offsets (section 29 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*, SOR/2006-50).

[16] In the event of a veteran's service related death, the ELB was available, on application, to the survivors until the veteran would have reached age 65 (sections 22 and 23 of the 2006 Act) at which point the survivors became eligible to receive the SRB (subsections 25(2) and (3)).

[17] On April 1, 2019, amendments to the 2006 Act, which had since been renamed the *Veterans Well-being Act*, came into force and replaced the ELB and SRB with other benefits, including the Pension for Life and Retirement Income Security Benefit [RISB]. Transitional provisions in the amendments to the *Veterans Well-being Act* provided for a one-time, lump sum

payment equal to the amount of the SRB to which an eligible veteran would have been entitled as of March 31, 2019 [the SRB payout], if they had not yet received the SRB. [In other words, veterans who had not reached age 65 and who would have received SRB upon reaching age 65 under the 2006 Act, received a lump sum amount pursuant to the transitional provisions pro-rated to that date; they were not denied this benefit, but did not receive the amount they would have received at age 65].

II. The Proposed Class Members' Experience

[18] Mr. Bruyea and other veterans provided affidavits attesting that, due to their service-related injuries, they struggled to re-establish themselves in civilian life. The affiants described their experience seeking and receiving information from VAC about the ELB and SRB benefits.

A. *Mr. Bruyea*

[19] Mr. Bruyea joined the CAF in 1982 and was medically released in 1996. In 2000, he was determined to be "totally disabled" and was approved for CAF-LTD. He attests that he learned about the VAC Rehabilitation Program and the ELB in 2005 when the 2006 Act was introduced. He states that he spoke to VAC employees several times between 2005 and 2011 and was always advised that there was no benefit to him to apply for the new program because the ELB—to which he would be entitled—would be entirely offset by his CAF-LTD. Mr. Bruyea states that VAC never informed him of the SRB, its eligibility requirements or how it would be calculated.

[20] Mr. Bruyea recounts that in 2011 he spoke to his VAC case manager about improving his conditions. The case manager suggested that he apply for the Rehabilitation Program and the ELB. He applied and was approved for the Rehabilitation Program in early 2012. He was subsequently designated as TPI in March 2012. In September 2012, VAC advised him by letter that he had been approved for the ELB but was not entitled to any additional payment because he was receiving CAF-LTD. In 2016, when the ELB was increased from 75% to 90%, of pre-release salary, VAC informed Mr. Bruyea that he may be eligible for the top-up. He submitted the necessary forms and began to receive the top-up payments in November 2016. Mr. Bruyea attests that none of the communications he received from VAC during this time mentioned the SRB or its eligibility criteria.

[21] Mr. Bruyea attests that in 2019, when the termination of the SRB was announced, his VAC case manager advised him that he would receive a lump sum amounting to 2% of the total ELB to which he had been entitled since his acceptance into the Rehabilitation Program in 2012. Mr. Bruyea explains that it was only at that time in 2019 that he understood that if he had applied for the Rehabilitation Program and ELB and had been approved when those programs were first established in 2006, rather than six years later, he would have been entitled to a significantly greater SRB payout.

[22] Mr. Bruyea attests to his belief that VAC employees did not properly understand the interlocking benefit schemes and, therefore, failed to provide him and others with the necessary information and advice to take full advantage of the benefits. He complained to the Office of the

Veterans Ombudsperson [OVO] in May 2019 alleging unfair treatment by VAC about the start date for the calculation of his SRB.

B. *Danny Carvalho Raposa*

[23] Mr. Raposa attests that he served in the CAF from 1987 until his medical release in November 2001. He has received CAF-LTD since December 2001. Around December 2005, VAC determined that he was TPI.

[24] Mr. Raposa attests that he was not assigned a VAC case manager until 2014. He states that he first learned of the Rehabilitation Program in 2014 from sources other than VAC. He applied and was approved. Mr. Raposa adds that his case manager advised him to apply for ELB but did not advise him about the interrelationship between the benefit programs. He attests that although he was approved for ELB in 2015 he did not receive any additional payment because the ELB (at 75%) was offset by his CAF-LTD. He began to receive payments for ELB after it was increased to 90%.

[25] Mr. Raposa attests that he received a lump sum SRB payout of approximately $4,000 in 2019.

[26] The Defendant notes that VAC communicated with Mr. Raposa, including with respect to his approval for the Rehabilitation Program and ELB on June 23, 2014. The November 5, 2014 letter from VAC advised Mr. Raposa that he was determined to be TPI and that he was eligible to receive ELB until the age of 65 or until his status changed. The letter further advised that

when the ELB ends, he could apply for SRB, a taxable lump sum payment calculated as equal to 2% of ELB he was eligible to receive. The letter also explained that he could request a review and provided a contact number if he had any questions.

[27] The Defendant notes that Mr. Raposa was immediately informed of the SRB once he satisfied all three criteria. Although, Mr. Raposa recalls that he learned of the SRB at a conference, VAC advised him by letter in November 2014.

[28] On cross-examination, Mr. Raposa was asked whether he thought he was entitled to more than the SRB lump sum he received. He acknowledged that he did not know how the amount was calculated and could not, therefore, respond.

C. *Andre Joseph Serge St-Jean*

[29] Mr. St-Jean served in the CAF from 1976 until his medical release in 2013. He has received CAF-LTD since August 2013. He attests that he was also advised about the Rehabilitation Program from his case manager in August 2013, immediately applied and was approved in September 2013.

[30] By letter dated October 2, 2013, VAC advised him that he was also eligible for ELB, adding: “However, as you are eligible for this type of benefit through Service Income Security Insurance Plan Long Term Disability (SISIP LTD) there is no VAC Earnings Loss Benefit payable to you from VAC at this time.” The letter also explained that he could request a review and provided a number to call with any questions.

[31] By letter dated March 21, 2014, VAC notified Mr. St-Jean that a rehabilitation plan would not be developed, as his rehabilitation needs had not been identified, and that his participation in the program was considered to be completed. Mr. St-Jean did not request a review.

[32] Mr. St-Jean attests that VAC did not advise him that the completion of the Rehabilitation Program would have implications for the ELB or SRB.

[33] On May 19, 2015, Mr. St-Jean was advised that his SISIP claim had been reviewed and that his condition met the definition of "total disability."

[34] Mr. St-Jean attests that in 2016, upon learning that the ELB had increased to 90%, he inquired about how to apply for the top-up. He states that he was advised by a VAC case manager that his file had been improperly closed in March 2014 upon completion of the Rehabilitation Program. The case manager advised him that he should have been designated TPI at that time and that he would be reinstated into the VAC Rehabilitation Program and designated TPI so that he could access the ELB top-up.

[35] By letter dated November 3, 2016, VAC advised Mr. St-Jean that his ELB would continue to age 65. The letter also explained that when ELB ends, he could apply for SRB, and also explained how SRB is calculated. The letter further advised Mr. St-Jean that he may be eligible for the RISB at age 65, which is a benefit available to veterans who were eligible for

ELB as a result of being TPI and are also in receipt of a disability benefit. The letter provided information about requesting a review and a number to call with any questions.

[36] In September 2019, Mr. St-Jean was advised by VAC that SRB had ended and that, because he had not yet reached age 65 and had not received SRB, he was eligible for a lump sum payment of $4,938.61. This amount was calculated based on 2% of ELB payable from April 2014 to October 25, 2016 (when he was deemed TPI). Mr. St-Jean complained to the OVO and the Minister of Veterans Affairs that a gap in his ELB, due to his wrongfully closed file, reduced his SRB payment. Mr. St-Jean attests that the OVO concluded that he had been unfairly treated.

[37] In May 2020, VAC advised Mr. St-Jean that his SRB had been recalculated to take into account the gap period from September 30, 2013 to March 31, 2014. However, the additional payment amounted to only $10.93 after taxes. Mr. St-Jean attests that VAC did not recalculate the April 2014 to October 2016 period during which VAC determined that a rehabilitation plan would not be developed. The May 10, 2020 letter from VAC includes the recalculation worksheet and provides contact information for questions.

D. *Perry Robert Gray*

[38] Mr. Gray served in the CAF from 1976 until his medical release in 2002. He began to receive CAF-LTD in 2002 and was subsequently deemed to be TPI. He attests that he learned of ELB in 2006 but did not apply for ELB as he was told by VAC that he did not qualify. He states that his VAC case manager never discussed the Rehabilitation Program, ELB or SRB.

[39] Mr. Gray attests that he learned of the Rehabilitation Program from another veteran in 2011, applied and was approved in November 2011.

[40] Mr. Gray states that in 2018, VAC informed him that he was entitled to ELB. He applied and began to receive ELB in 2018. He attests that VAC did not tell him about the ELB he should have received from 2006 to 2018. He believes that he was not provided with sufficient information to understand the Rehabilitation Program, a TPI designation, the ELB, or the SRB.

[41] Mr. Gray attests that he received a lump sum SRB payment in 2019.

[42] On cross-examination, Mr. Gray did not recall whether he received an application for the Rehabilitation Program and ELB from VAC in 2006, but acknowledged that this was possible.

E. *Ronald Joseph Cundell*

[43] Mr. Cundell served in the CAF from 1981 until his medical release in 2000. He has received CAF-LTD since 2000.

[44] He attests that he found the changes to the benefits programs implemented in 2006 to be overwhelming and did not understand which benefits he was required to apply for and which were automatic. He explains that through his own research he learned of the Rehabilitation Program in 2006 and contacted VAC. He attests that VAC asked him if he intended to forfeit his CAF-LTD, which led him to understand that he could not apply for the Rehabilitation Program.

[45] Mr. Cundell attests that in 2011, his VAC case manager applied for ELB on his behalf, and he assumes that the case manager also applied for the Rehabilitation Program. He states that his case manager presented him with forms regarding TPI, the Permanent Impairment Allowance and the Permanent Impairment Allowance Supplement, which he signed. He was deemed TPI in late 2016 or early 2017.

[46] Mr. Cundell states that he first heard about SRB in September 2019, when he received a letter from VAC advising him that the SRB would be terminated and that he was entitled to a lump sum SRB payment of $7,870.25 before deductions.

[47] Mr. Cundell attests that no one at VAC ever explained to him the interrelationship between the Rehabilitation Program, ELB, TPI and SRB.

III. The Preliminary Issue: Systemic Negligence or Negligent Misrepresentation and Whether the Plaintiff Should be Granted Leave to Amend the Further Amended Statement of Claim

[48] At the hearing of this motion, the Defendant argued that the Plaintiff had raised a new cause of action in negligent misrepresentation in the Plaintiff's Reply submissions. The Defendant noted that the Plaintiff had amended his Statement of Claim as recently as April 29, 2022, yet had not pleaded negligent misrepresentation. The Defendant noted the challenge of responding to a "moving target."

[49] The Plaintiff argued that he had set out the elements of negligent misrepresentation and relevant facts in support of a cause of action for negligent misrepresentation in his Further

Amended Statement of Claim (April 2022). The Plaintiff disputed that the Defendant had been taken by surprise given the Defendant's argument that the systemic negligence claim was in essence a claim for negligent misrepresentation.

[50] The Plaintiff also argued that he could seek to amend his Further Amended Statement of Claim to alternatively and specifically plead negligent misrepresentation given that the Defendant had not yet filed a Statement of Defence and the pleadings were not closed.

[51] Following oral submissions, the Court agreed that the Defendant could provide short written submissions, post hearing, to address the alternative claim for negligent misrepresentation. The Plaintiff was requested to provide a Proposed Further Amended Statement of Claim in order for the Defendant to respond to the specific pleading.

[52] It was understood that if the Court concluded that the Plaintiff's systemic negligence claim is not a reasonable cause of action, the Court could then consider whether the Plaintiff had already set out the requisite elements of negligent misrepresentation in his Further Amended Statement of Claim and could also consider the Plaintiff's request to further amend his pleadings. In the event that the Court were to grant leave to the Plaintiff to file the Proposed Further Amended Statement of Claim, the Court would then determine whether the alternative claim for negligent misrepresentation is a reasonable cause of action.

[53] As agreed, the Plaintiff submitted a Proposed Further Amended Statement of Claim, dated June 27, 2022, which specifically pleads an alternative cause of action of negligent

misrepresentation. The Defendant provided brief post-hearing submissions on the alternative pleading of negligent misrepresentation.

IV. Overview of the Parties' Positions

A. *The Plaintiff*

[54] The Plaintiff submits that members of the CAF voluntarily sign up and risk their lives for the benefit of Canadians and others through their service and, in doing so, expect that Canada will support them if they suffer physical or mental health related injuries. The Plaintiff alleges that veterans have not been sufficiently supported.

[55] The Plaintiff asserts that Canada has undertaken to ensure that veterans who are ill and injured in service are compensated in a way that benefits their value to the country and that "part of VAC's mandate is to advise veterans about the benefits available to them and to explain those benefits and how to apply in order to maximize the benefits."

[56] The Plaintiff points to the response by one of the Defendant's affiants on cross-examination, who stated, "I would say it is true that the Government of Canada wants to ensure that veterans who are ill or injured in service to the country are compensated and cared for in a way that befits their stature and value to the country." The Plaintiff regards this as Canada's, and more particularly, VAC's undertaking to do so.

[57] The Plaintiff describes the proposed class members—who may exceed 10,000—as veterans that were determined by VAC to be totally incapacitated or to have diminished earning capacity. The Plaintiff submits that this group has the most complex needs and are the most vulnerable. The Plaintiff adds that this group is no longer able to earn the income they would have otherwise earned in the CAF and has been unable to save for their retirement in the same way as other veterans.

[58] The Plaintiff claims that VAC's conduct was systemic; VAC consistently wrongly advised proposed class members about their eligibility for benefits and, more particularly, VAC advised them that it would be pointless to apply for ELB upon becoming eligible because any ELB payment would be offset by CAF-LTD, which was initially the very same amount. The Plaintiff adds that VAC also consistently failed to inform proposed class members how the SRB would be calculated or that the SRB depended upon ELB eligibility and approval, even if the ELB payable was offset by CAF-LTD.

[59] The Plaintiff further submits that VAC's acts and omissions were institutional and contrary to VAC's mandate, as described by the Defendant's affiant: to ensure that veterans are compensated in a manner that reflects their value to the country, which includes advising veterans about the benefits available to them. The Plaintiff interprets this response as acknowledging that the mandate of VAC is to compensate and care for veterans. The Plaintiff further submits that VAC was aware that these vulnerable veterans – the proposed class members – did not understand the complex benefit regimes. More troubling, VAC's acts and omissions caused losses for the class members.

[60] The Plaintiff points to the May 13, 2020 Report of the OVO, "Supplementary Retirement Benefit (SRB) Payout Micro-Investigation" [OVO Report], that responded to his complaint and found, among other things: that it was unfair for VAC to calculate the SRB based on the ELB start date, given VAC's failure to provide clear and easy-to-understand information about the complex benefit scheme; that VAC front-line workers are not fully informed about the complex benefit programs; and, that it is unreasonable to expect veterans to understand the eligibility criteria. The Plaintiff also points to other reports, which found that VAC workers lacked awareness of the benefit programs.

[61] The Plaintiff argues that his claim of systemic negligence is a reasonable cause of action. However, if the Court disagrees, the Plaintiff relies on the alternative claim of negligent misrepresentation. As noted above, the Plaintiff submits that the essential elements of negligent misrepresentation were set out in the Further Amended Statement of Claim (April 2022). If the Court does not agree, the Plaintiff submits that the Court should grant leave to him to amend the claim as set out in the Proposed Further Amended Statement of Claim given that the pleadings are not closed.

[62] The Plaintiff further submits that the claims for breach of fiduciary duty and unjust enrichment are reasonable causes of action.

[63] The Plaintiff suggests that the Defendant's challenges to all the causes of action asserted are about their underlying merits, which is not the focus at the certification stage.

[64] The Plaintiff submits that the Further Amended Statement of Claim and the Proposed Further Amended Statement of Claim disclose reasonable causes of action and the Plaintiff's evidence provides some basis in fact for all other criteria for certification. The Plaintiff adds that this class action promotes the policy objectives of access to justice, behaviour modification, and judicial economy. The Plaintiff further submits that the issues raised are common to the class and should be determined by the Court on a full record.

B. *The Defendant*

[65] The Defendant acknowledges the importance of the role of CAF members and their commitment to Canada. The Defendant notes that the broad suite of benefits available to eligible veterans is not at issue; this action is only about the SRB.

[66] The Defendant submits that the Plaintiff's claim does not meet the criteria for certification as a class action. The Defendant argues that: there is no reasonable cause of action for systemic negligence, breach of fiduciary duty, or unjust enrichment; the original class definition does not disclose an identifiable class; the issues raised are not common because all or many require individual determinations; and, a class action is not the preferable procedure.

[67] As noted, the Defendant submits that any alleged negligence does not rise to the level of systemic negligence. The Defendant adds that the claim of systemic negligence is really a disguised claim for negligent misrepresentation and should be struck.

[68] The Defendant further submits that the proposed alternative claim of negligent misrepresentation will not work as a class action because its determination turns on the interaction between VAC and individual veterans and the individual issues overwhelm any possible common questions of law or fact.

[69] The Defendant notes that all the Plaintiff's affiants recounted different experiences and interactions with VAC and some acknowledged that they did not know whether they were "short changed" in their SRB payment.

[70] The Defendant submits that the Plaintiff cannot rely on the OVO Report or the other reports to support the cause of action for systemic negligence (*Canada v Greenwood*, 2021 FCA 186 at para 91 [*Greenwood*]) or to establish a basis in fact for the common questions related to the cause of action. The OVO Report can only provide context, not any basis in fact.

[71] The Defendant further submits that the Plaintiff's claims for breach of fiduciary duty and unjust enrichment are untenable.

V. The Amended Statement of Claim, Further Amended Statement of Claim and Proposed Further Amended Statement of Claim

A. *The Claims*

[72] As noted above, the Plaintiff claims that, as a result of their service in the CAF, he and other class members suffer from debilitating mental and physical injuries. The Plaintiff explains that he and class members are all either "totally disabled" (the term used for CAF-LTD) or TPI

or DEC and because of their disabilities, they are, by definition, vulnerable and marginalized. The Plaintiff alleges that VAC employees lack sufficient training, expertise, understanding, and awareness of programs in order to explain and communicate the programs and their eligibility requirements to veterans. He alleges that VAC failed to have the appropriate management and operations procedures that would reasonably have ensured the provision of accurate, timely, and reliable information about eligibility for the SRB. He also claims that there has been significant confusion and misinformation due to the lack of expertise, knowledge and awareness among VAC employees regarding the benefit programs, the complexity of the benefit programs, and the vulnerability of the veterans who are entitled to the benefits. He submits that, as a result, veterans have not received benefits to which they are entitled or received lower amounts than they would and should have if they had been properly advised of the eligibility criteria and the process to obtain the benefits. The Plaintiff alleges that VAC's conduct amounts to systemic negligence (or alternatively, negligent misrepresentation), breach of fiduciary duty, and unjust enrichment.

[73] The Plaintiff commenced his proceeding on September 16, 2020. His Statement of Claim dated September 15, 2020 was amended on May 20, 2021 (Amended Statement of Claim). He filed a Further Amended Statement of Claim on April 29, 2022.

[74] In the Further Amended Statement of Claim (April 2022) the Plaintiff seeks, on his own behalf and on behalf of proposed class members, the certification of the action as a class proceeding and his appointment as representative plaintiff. The Plaintiff seeks, among other things, a Declaration that VAC was systematically negligent and erred in failing to properly

advise the Plaintiff and the class members of the eligibility requirements for the SRB and the steps needed to maximize their benefit entitlements.

[75] The Proposed Further Amended Statement of Claim (June 27, 2022) is premised on the Court finding that systemic negligence may not be a reasonable cause of action and that the alternative claim of negligent misrepresentation was not previously sufficiently or specifically pleaded.

[76] In the Proposed Further Amended Statement of Claim (June 2022), the Plaintiff alternatively and specifically claims negligent misrepresentation by VAC. The Plaintiff asserts that a close and direct relationship of trust and confidence existed between VAC and the Plaintiff and class members; the relationship was one of proximity; and the injuries of the Plaintiff and class members were reasonably foreseeable to VAC.

[77] The Plaintiff asserts that VAC expressly or impliedly undertook the responsibility to provide the Plaintiff and class members with accurate information about their entitlement to the ELB and SRB, the interrelationship of benefit schemes and how the SRB was calculated. The Plaintiff also states that VAC undertook, expressly or impliedly, the responsibility not to provide the Plaintiff and other class members with erroneous and inaccurate information about the ELB and SRB programs. The Plaintiff asserts that the undertakings arise from VAC's statutory obligations and mandate to assist the Plaintiff and other class members to reintegrate into civilian life and from the special relationship owed by Canada via VAC to veterans and the close and

direct relationship existing between VAC—as administrator of the ELB and SRB programs—and the Plaintiff and class members—as beneficiaries of those programs.

[78] The Plaintiff asserts that there was a relationship of proximity with VAC and, therefore, a duty of care. He adds that given the facts set out in the whole of the claim, there are no policy reasons to negate this duty.

[79] The Plaintiff also asserts that VAC provided untrue, inaccurate or misleading representations to proposed class members with respect to the ELB and SRB.

[80] The Plaintiff states that he and his fellow class members relied on the misrepresentations and altered their position, thereby foregoing alternative and more beneficial courses of action that were available to them and that they suffered economic detriment as a consequence. He submits that it was reasonable for him and proposed class members to rely on VAC's representations, which they did to their detriment, and that this was foreseeable to VAC. The Plaintiff claims that if he and other class members had applied for ELB when first eligible, their SRB payment would have been greater than the SRB that they actually received (because ELB, whether "payable" or not, was used to calculate the SRB).

[81] The Plaintiff also seeks a Declaration that VAC breached the fiduciary duty owed to the Plaintiff and the class in failing to properly advise him and class members of the eligibility requirements for the SRB and the steps they needed to take to maximize their benefits.

[82] In addition, the Plaintiff seeks a declaration that Canada was unjustly enriched by not paying the benefits to which the class members were entitled.

[83] The Plaintiff essentially seeks, on behalf of each class member, an additional SRB payout calculated based on each veteran's earliest possible date of eligibility for the ELB, plus interest.

[84] More specifically, the Plaintiff and proposed class members seek arrears of payments and other losses resulting from Canada's and VAC's negligence and breach of fiduciary duties; general damages; special damages; exemplary and punitive damages; out of pocket expenses and disbursements; an order pursuant to Rule 334.28(1) and (2) for the aggregate assessment of monetary relief and its distribution; restitution of Canada's profits; pre and post-judgment interest; and, costs, including costs of notice and administering the distribution plan.

B. *The Proposed Class*

[85] The Further Amended Statement of Claim (April 2022) describes the proposed class as all former members of the Canadian Armed Forces (veteran(s)) who were approved for the Rehabilitation Program, deemed to be TPI or DEC, approved for "extended" ELB and those who "would have" met these criteria and who received or "would have" been eligible to receive a SRB.

[86] The Defendant objects to the proposed definition, noting that it lacks objectivity due to the use of vague terms, including "would have" with respect to the eligibility criteria.

[87] The Plaintiff now submits, based on information gleaned since the April 2022 amendment to his Statement of Claim and in the course of the hearing of this motion and on the Defendant's objections, that the proposed class can be described in a clearer and more objective way. The Plaintiff provides the following description in the Proposed Further Amended Statement of Claim;

> All former members of the Canadian Armed Forces ("Veteran(s)") who were:
>
> 1. approved to be in the VAC Rehabilitation Program sponsored and administered by the Defendant;
>
> 2. declared to be Totally and Permanently Incapacitated and/or suffering Diminished Earnings Capacity as defined in programs sponsored and administered by the Defendant including those Veterans approved for CAF-LTD and designated Totally Disabled; and
>
> 3. approved for and in receipt of an Earnings Loss Benefit (ELB) sponsored and administered by the Defendant, whether or not that payment [the ELB payable to them] would have been offset by other income or payments;
>
> and, as a result, received the Supplementary Retirement Benefit, and the survivors of Veterans, where those survivors received the Supplementary Retirement Benefit under the Defendant's legislative scheme and programs.

VI. The Statutory Provisions

[88] Part 5.1 of the *Federal Courts Rules*, SOR/98-106 governs class actions. Rule 334.16(1) sets out the criteria for certification;

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 the proceeding is progressing,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe 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

(iv) communique un sommaire des conventions relatives aux honoraires et

between the representative plaintiff or applicant and the solicitor of record.

débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

(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

(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) 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.

VII. The Issues

[89] The issue is whether the Plaintiff has established the criteria for certification of this action as a class action. This entails determining:

1) whether the pleadings disclose a reasonable cause of action (i.e., whether, if the facts pleaded are taken to be true, it is plain and obvious that the claim has no reasonable prospect of success); and,

2) whether the Plaintiff has established some basis in fact for all other requirements for certification (identifiable class, common questions, preferable procedure, and representative plaintiff).

[90] In *Canada (Attorney General) v Jost*, 2020 FCA 212 at paras 25–28 [*Jost*], the Federal Court of Appeal summarized the benefits of class actions and the established general principles:

> [25] As the Supreme Court has observed, class actions allow for improved access to justice for those who might otherwise be unable to seek vindication of their rights through the traditional litigation process. Class actions also enhance judicial economy, allowing a single action to decide large numbers of claims involving similar issues. Finally, class actions encourage behaviour modification on the part of those who cause harm: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 27-29; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 27; and *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184.
>
> [26] The Supreme Court has also held that an overly restrictive approach to the application of class action certification legislation must be avoided, so that the benefits of class actions can be fully realized: *Western Canadian Shopping Centres*, above at para. 46; *Hollick*, above at para. 15.

> [27] As this Court observed in *John Doe*, the focus at the certification stage is on the form of the action. The question at this point is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: above at paras. 23 and 24.
>
> [28] The onus is on the plaintiff in a certification motion to establish an evidentiary basis for certification: *Hollick*, above at para. 25; *John Doe*, above at para. 24. That is, the plaintiff must show some basis in fact for each of the certification requirements, apart from the requirement that the pleadings disclose a reasonable cause of action.

VIII. Do the Pleadings Disclose a Reasonable Cause of Action?

[91] The Plaintiff's Further Amended Statement of Claim (April 2022) pleads three causes of action: systemic negligence, breach of fiduciary duty, and unjust enrichment. The Proposed Further Amended Statement of Claim pleads negligent misrepresentation as an alternative to systemic negligence.

[92] The jurisprudence has established that to determine whether the pleadings disclose a reasonable cause of action, the issue is whether, assuming that the facts pleaded are true, it is plain and obvious that the pleadings disclose no reasonable cause of action, i.e., that there is no reasonable prospect of success: *Hollick v Toronto (City)*, 2001 SCC 68 at para 25 [*Hollick*]; *Canada v John Doe*, 2016 FCA 191 at para 23 [*John Doe*]; *Jost* at para 29; *Greenwood* at para 91. At this stage, the Court does not consider evidence: *John Doe* at para 23; *Greenwood* at para 91.

[93] In *John Doe* at para 23, the Court of Appeal explained:

> For the purposes of the first criterion - that the pleadings disclose a reasonable cause of action - the principles are the same as those applicable on a motion to strike. The facts alleged in the statement of claim are assumed to be true, and no evidence may be considered. The test is whether it is "plain and obvious" that the pleadings, assuming the facts pleaded to be true, disclose no reasonable cause of action. Or, to put it differently, the plaintiffs must establish that there is a reasonable prospect of success should the claim be permitted to proceed towards trial: see *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25 [*Hollick*]; *Pro-Sys*, at para. 63; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980, 74 D.L.R. (4th) 321 [*Hunt*]; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17, 70. While the facts alleged are assumed to be true, they must still be pleaded in support of each cause of action. Bald assertions of conclusions are not allegations of material fact and cannot support a cause of action: *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301, at para. 34; *Mancuso et al. v. Canada (Minister of National Health and Welfare) et al.*, 2015 FCA 227, 476 N.R. 219, at para. 27.

[94] In *Canada v Harris*, 2020 FCA 124 at para 23, the Court of Appeal noted that the test on a motion to strike "is generous to plaintiffs" and went on to clarify at para 24, that "[n]evertheless, a plaintiff must still plead sufficient facts to support the claim," noting that the pleadings frame the issues.

A. *Is Systemic Negligence—or Alternatively Negligent Misrepresentation—a Reasonable Cause of Action?*

(1) The Plaintiff's Submissions

[95] The Plaintiff submits that the facts disclose a claim of negligence that has a reasonable prospect of success, namely the existence of a duty of care, breach of the duty of care by VAC, and resulting damage to the Plaintiff.

[96] The Plaintiff submits that in this case, the class members—who are disabled and, therefore, among the most vulnerable veterans—were in a position of complete reliance on VAC for timely and accurate information about their entitlement to the SRB. As noted, the Plaintiff submits that VAC's mandate is to compensate and care for veterans, including to advise them about the available benefits so that they can maximize them, and that VAC has an obligation to be mindful of class members' interests when administering its programs and benefits.

[97] With respect to the cause of action in systemic negligence, the Plaintiff claims that VAC, as administrator of the benefits, through its management and operations or lack of adequate operations procedures, breached its duty to provide accurate information about the SRB and its calculation based on the ELB and breached its duty to not provide erroneous information regarding the ELB and SRB. The Plaintiff alleges that, as a consequence, class members lost out on benefits that they would have received. The Plaintiff argues that VAC's failings were "institutional" and contrary to its mandate.

[98] The Plaintiff relies on *Lin v Airbnb, Inc*, 2019 FC 1563 at para 59 [*Lin*], where the Court stated,

> [59] … In order to find that it is "plain and obvious" that no claim exists, there must be "a decided case directly on point, from the same jurisdiction, demonstrating that the very issue has been squarely dealt with and rejected" (*Arsenault* at para 27, citing *Dalex Co. v Schwartz Levitsky Feldman* (1994), 19 OR (3d) 463, 1994 CanLII 7290 (SC); see also *Finkel* at para 17).

[99] The Plaintiff submits that, as there are no decided cases on the issues he has raised, the Court cannot find that it is plain and obvious that the cause of action for systemic negligence has no chance of success.

[100] The Plaintiff also submits that the Court need not even engage in a proximity analysis to determine whether a duty of care exists on the part of VAC because an analogous duty of care has been established by *Jost*.

[101] The Plaintiff notes that in *Jost*, the Court of Appeal found that it was not plain and obvious that Canada, as the pension administrator, did not owe the class members a duty of care, noting the "substantial body of case law that has found the relationship between pension administrators and members of a pension plan to be sufficiently proximate as to give rise to a duty of care" (*Jost* at paras 67–71).

[102] The Plaintiff submits that the reasoning in *Jost* applies to his claims because the ELB and SRB are social benefits akin to the pension benefits; the ELB and SRB are not discretionary; ill and injured veterans are statutorily entitled to these benefits; and, Canada, as the administrator of the ELB and SRB, knew or ought to have known that the failure to take reasonable care to ensure that veterans understood the SRB and how it was calculated would result in harm to the proposed class members.

[103] The Plaintiff reiterates that the proposed class members are those with the most complex needs and are the most vulnerable; this group was in a position of reliance on VAC for accurate information about these benefits.

[104] The Plaintiff adds that whether *Jost* is relied on to establish the duty of care, or the Court engages in a proximity analysis, there is a close and direct relationship between VAC and the class members, which is a hallmark of the duty of care.

[105] The Plaintiff argues that given VAC's mandate, VAC cannot deny a proximate relationship with proposed class members. The Plaintiff argues that VAC's conduct fell below the standard of care required and that the harm was foreseeable; due to VAC's acts and omissions, class members suffered damages because they received a lower amount of SRB than they would have if they had received proper information. The Plaintiff adds that there are no residual policy considerations that could make it plain and obvious that no duty of care exists, particularly not at this stage where the Court does not weigh evidence.

[106] The Plaintiff also argues that his systemic negligence claim is not a claim for pure economic loss, but rather arises from VAC's conduct and the breach of his rights. However, if the claim—in particular, VAC's breach of the duty not to provide erroneous information—were viewed as a claim for pure economic loss, it would fall into the category of negligent misrepresentation (relying on *Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at paras 20–21 [*Maple Leaf*]). The Plaintiff adds that regardless of the type of negligence alleged, the test is the

same and begins with a relationship of proximity (*Maple Leaf* at paras 23, 30, 31), which he submits has been established.

[107] The Plaintiff submits that, even without another amendment to the Further Amended Statement of Claim, the pleadings disclose a reasonable cause of action in negligent misrepresentation.

[108] In the Proposed Further Amended Statement of Claim (June 2022), as more fully described above, the Plaintiff specifically claims negligent misrepresentation by VAC as an alternative to the claim of systemic negligence. The Plaintiff asserts that, based on VAC's mandate, a close and direct relationship of trust and confidence existed between VAC and class members; the relationship was one of proximity and his injuries and those of class members were reasonably foreseeable. The Plaintiff also asserts that VAC expressly or impliedly undertook the responsibility to provide the Plaintiff and class members with accurate—not erroneous—information about their entitlement to the ELB and SRB, the interrelationship of benefit schemes, and how the SRB was calculated.

[109] The Plaintiff asserts that VAC provided untrue, inaccurate or misleading representations to them with respect to the ELB and SRB. He again asserts that if he and other class members had applied for ELB when first eligible for it, their SRB payment would have been greater than the SRB that they actually received.

[110] The Plaintiff adds that given the facts set out in the whole of the claim, there are no policy reasons to negate the duty of care owed by VAC.

[111] In conclusion**,** the Plaintiff submits that it is not plain and obvious that his systemic negligence claim or, alternatively, his claim of negligent misrepresentation cannot succeed.

(2) The Defendant's Submissions

[112] The Defendant submits that the Plaintiff's claim in systemic negligence cannot succeed because: there is no duty to inform potential beneficiaries of a statutory scheme of their possible entitlements, the eligibility criteria, or how to maximize the benefits; and, the Plaintiff's allegation that VAC did not have "adequate management and operations procedures" does not give rise to a close and direct relationship between VAC and class members. The Defendant explains that the relationship between the Plaintiff and the administrators of benefits—who implement policies and procedures—is different from the relationship between the Plaintiff and VAC service representatives or case managers.

[113] The Defendant further argues that the claim for systemic negligence should be struck because it is really a claim for negligent misrepresentation "masquerading" as a general negligence claim. The Defendant submits that the Plaintiff has attempted to transform his claim into one of systemic negligence by alleging that there was a lack of internal controls or adequate procedures; however, there are no material facts to support this.

[114] The Defendant submits that the Plaintiff's claim fails to establish that class members relied to their detriment on any undertaking—implicit or explicit—to ensure that adequate management and operations procedures were in place or that this caused class members to suffer a loss. The Defendant argues that the Plaintiff's claim is simply that VAC told him there was no point to apply for the Rehabilitation Program or ELB while he was in receipt of CAF-LTD.

[115] The Defendant notes that the proximity analysis depends on the relationship and that something more than the relationship between the Government and the public affected by the Government's work is required to establish a close and direct relationship.

[116] The Defendant disputes that *Jost* establishes that a duty of care exists between VAC and proposed class members.

[117] The Defendant also submits that the Plaintiff's systemic negligence claim seeks damages for pure economic loss and such claims must fit into a recognized category, such as negligent misrepresentation. The Defendant disputes that the Plaintiff set out the elements of negligent misrepresentation in his Further Amended Statement of Claim.

[118] The Defendant adds that the Plaintiff's Proposed Further Amended Statement of Claim confirms that his claim for systemic negligence is really a disguised claim for negligent misrepresentation and also confirms that his initial pleadings did not plead the requisite elements to support an alternative cause of action in negligent misrepresentation.

[119] The Defendant acknowledges that the Plaintiff's Proposed Further Amended Statement of Claim pleads the requisite elements of negligent misrepresentation. However, the Defendant submits that the Plaintiff has not established facts to support all the elements of negligent misrepresentation, which were established in *Queen v Cognos Inc*, [1993] 1 SCR 87 at 88–89, 99 DLR (4th) 626 [*Cognos*]. The Defendant maintains that there is no relationship of proximity between VAC and proposed class members to establish a duty of care to ground a negligence claim.

(3) The Claim of Systemic Negligence has no Reasonable Prospect of Success

[120] As noted, the issue is whether the Plaintiff has pleaded material facts in support of each element of the causes of action claimed, and whether it is plain and obvious that the cause of action has no reasonable prospect of success. The Court must make this determination without considering evidence, but at the same time, the Court does not rely on bald assertions (*Bigeagle v Canada*, 2021 FC 504 at para 71).

[121] I find that the Plaintiff's claim for systemic negligence has no reasonable prospect of success and should be struck.

[122] The systemic negligence claim relies on the Plaintiff's assertion that VAC's conduct was institutional and systemic, that VAC failed to have adequate management and operations procedures in place, and that, contrary to its mandate, VAC failed to provide accurate information about the ELB and SRB in order for veterans to maximize their benefits and, instead, provided erroneous information about the ELB and SRB.

[123] The Plaintiff does not point to facts in support of his assertion that VAC lacked adequate management or operations procedures, which is the basis of his claim—or, as the Defendant submits, what the Plaintiff asserts in order to transform his claim into that of systemic negligence, i.e., that VAC routinely, consistently and systemically failed to inform veterans of their possible benefits, or provided erroneous information.

[124] I agree with the Defendant that the Plaintiff has not pleaded facts in support of a systemic negligence claim. The Plaintiff's assertion that VAC's mandate includes an obligation to advise veterans about the benefits available to them and to explain the benefits, how to apply and how to maximize their benefits is based only on the Plaintiff's own interpretation of VAC's mandate. The Plaintiff's reliance on the responses on cross-examination of one of the Defendant's affiants does not provide facts in support of any obligation or undertaking to ensure that procedures were in place to provide information for veterans to maximize their benefits. Moreover, the Court does not consider evidence at this stage. In addition, a response provided on cross-examination and interpreted in a particular manner by the Plaintiff cannot support finding that VAC had a particular mandate that is not set out in its governing statutes. At best, the affiant's response conveys the affiant's own understanding of VAC's role in the compensation of veterans.

[125] The Plaintiff does not plead that he or proposed class members relied on any undertaking—whether implicit or explicit—by VAC to have adequate management and operations procedures in place or that the lack of such procedures caused proposed class members to suffer a loss.

[126] The Plaintiff does not set out facts related to the alleged lack of adequate procedures at the institutional level. As the Defendant notes, the Plaintiff's claim is primarily that VAC representatives told him and others that there was no point to apply for ELB while in receipt of CAF-LTD because it would be offset.

[127] The Plaintiff cannot rely on the OVO Report or other government initiated reports as material facts to establish the systemic negligence claim.

[128] As noted, the Court does not evaluate and weigh evidence in determining whether a cause of action should be struck. The OVO Report and other reports cited by the Plaintiff may be considered only with respect to the other elements of the test for certification as "some basis in fact" (*Greenwood* at paras 91, 96).

[129] The Plaintiff also cannot rely on the affidavit evidence of veterans (as described at paras 19–47) as facts in support of the claim of systemic negligence given that these affiants all received information from VAC about their benefits, although they may have received the information at different times and in different ways. While the affiants describe some similar experiences with respect to information about the CAF-LTD offset, none of the affiants suggests that there was a systemic or institutional failure by VAC in the provision of information or that VAC failed to have adequate procedures in place to provide information and administer the benefits.

[130] I am mindful of the jurisprudence that establishes that the bar to establish a reasonable cause of action is low and that the Court should not take a narrow approach. On the other hand, it is not in anyone's interest for a claim to proceed that is destined to fail, or, as in this case, that can be addressed by an alternative claim.

[131] The Plaintiff's reliance on *Lin*, at para 59, in support of finding that it is not plain and obvious that the cause of action in systemic negligence cannot succeed because there is no other decided case from this court exactly on point "demonstrating that the very issue has been squarely dealt with and rejected", overlooks that the Plaintiff must still plead facts in support of the requisite elements of the cause of action and cannot rely on assertions.

[132] As noted, the Defendant also characterizes the Plaintiff's claim for systemic negligence as a claim for economic loss, which the Plaintiff disputes. However, it is not necessary to delve into the jurisprudence on economic loss (e.g. *Maple Leaf* at paras 18–23*)*. Both the Plaintiff and Defendant appear to agree that negligent misrepresentation is an alternative characterization of the claim.

(4) The Plaintiff may Amend the Pleadings to Specifically Claim an Alternative Cause of Action for Negligent Misrepresentation

[133] The Plaintiff's Further Amended Statement of Claim set out elements of negligence but did not specifically plead negligent misrepresentation. The Plaintiff's Proposed Further Amended Statement of Claim (June 27, 2022) specifically pleads negligent misrepresentation.

As noted by the Plaintiff, the pleadings are not yet closed. I find that the Plaintiff should be granted leave to amend the pleadings as proposed.

(5) Negligent Misrepresentation is a Reasonable Cause of Action

[134] Given the amended pleadings, the issue turns to whether it is plain and obvious that the cause of action in negligent misrepresentation has no reasonable prospect of success.

[135] As the Defendant notes, the required elements of the claim of negligent misrepresentation were established in *Cognos* at 88–89:

> (1) a duty of care based on a "special relationship" between the representor and the representee;
>
> (2) the representation in question must be untrue, inaccurate, or misleading;
>
> (3) the representor must have acted negligently in making said misrepresentation;
>
> (4) the representee must have relied, in a reasonable manner, on the alleged negligent misrepresentation; and,
>
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[136] Although the Defendant argues, among other things, that there is no duty of care between VAC and class members as there is no special or proximate relationship, and disputes that VAC provided untimely or misleading information, the Defendant's arguments relate more to the merits and strength of the Plaintiff's claim. The Court's role at this stage is to determine if it is plain and obvious that there is no proximate relationship and duty of care owed by VAC;

i.e., whether the facts as pleaded and taken as true support a duty of care by VAC to the class members.

[137] As noted by the Supreme Court of Canada in *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 66 [*Elder Advocates*], whether the pleadings support a duty of care, requires the Court to first determine whether the defendant and class members were in a relationship that gave rise to a *prima facie* duty of care, based on foreseeability and proximity, and if so, whether the duty is negated by policy considerations.

[138] More recently, in *Jost*, at para 66, the Court of Appeal noted the same test, citing *Cooper v Hobart*, 2001 SCC 79 [*Cooper*],

> [66] … There, the Supreme Court held that a two-stage test applies in determining whether a duty of care exists in a given case. The first question is whether the requirements of reasonable foreseeability and proximity have been met. If the Court concludes that a *prima facie* duty of care exists, it must then be determined whether there are residual policy reasons that militate against the imposition of a duty of care: at paras. 38-39.

[139] With respect to whether residual policy reasons would erode the duty of care, the Court of Appeal noted, at para 74,

> There is, however, jurisprudence holding that courts should be reluctant to dismiss a proposed class action as disclosing no reasonable cause of action "based on policy reasons at the motion stage before there is a record on which a court can analyze the strengths and weaknesses of the policy arguments": *Haskett v. Equifax Canada Inc.*, 224 D.L.R. (4th) 419, [2003] O.J. No. 771 at para. 52; See also *Williams v. City of Toronto*, 2011 ONSC 6987, 346 D.L.R. (4th) 173 at para. 47.

[140] As noted, the Plaintiff argues that the duty of care has already been recognized, relying on *Jost*, where a duty of care was found to exist between the pension administrator and pensioners. The Plaintiff argues that, by analogy, VAC as administrator of the benefits for veterans owes a duty of care to the proposed class members.

[141] I do not agree that the duty of care found in *Jost* is analogous or that it should be extended to the administrators of other social benefit schemes. Pensioners who have paid into a pension plan over many years and are entitled to collect their pension, but experience delays in its receipt, differ from the proposed class members who may or may not be eligible for various benefits depending on specific eligibility criteria.

[142] However, I find that the application of the test established in *Anns v Merton London Borough Council* (1977), [1978] AC 728 (HL (Eng)) [*Anns*] and adopted in *Cooper* [known as the *Anns/Cooper* test or analysis] leads to the conclusion that it is not plain and obvious that no duty of care is owed by VAC to the veterans that fall within the proposed class.

[143] The facts support finding a relationship of proximity between the proposed class members, all of whom were on ELB and all, or most of whom, had a VAC case manager or other regular contact with VAC representatives. As noted by the Plaintiff, VAC reached out to ELB recipients in 2016 when the top-up became available. Also, as noted by the Plaintiff, this group had high needs, as most were on extended ELB.

[144] The Plaintiff pleads (in the Further Amended Statement of Claim and in the Proposed Further Amended Statement of Claim) that there is a special relationship between the parties; that he and class members suffer from disabilities due to their service and that VAC has a statutory mandate and obligation to assist them in re-establishment to civilian life.

[145] As noted above, in the Proposed Further Amended Statement of Claim (June 2022), the Plaintiff specifically pleads negligent misrepresentation. The Plaintiff asserts that a close and direct relationship of trust and confidence existed between VAC and class members; the relationship was one of proximity and his injuries and those of class members were reasonably foreseeable.

[146] The Plaintiff also asserts that VAC provided untrue, inaccurate or misleading representations to them with respect to the ELB and SRB.

[147] The facts pleaded are that the Plaintiff and proposed class members received information from VAC in various ways, including from case managers. The facts pleaded, taken as true, support that the relationship was one of proximity—close and direct—and that it is reasonable to expect VAC to take reasonable care to prevent harm that could occur if VAC provided misinformation. (This is not a conclusion that misinformation was provided, only that it is not plain and obvious that there is no proximate relationship or duty of care.)

[148] I find that the Plaintiff has pleaded all the elements of negligent misrepresentation and facts in support of these elements, including that: VAC representatives made untrue, inaccurate

or misleading representations about the eligibility requirements for ELB and SRB; VAC representatives lacked expertise; the Plaintiff and class members relied on the representations by VAC; and, the Plaintiff and class members suffered damages because if they had received timely and complete information, they may have received a greater SRB payment.

[149] Given the facts pleaded and the low threshold to establish a reasonable cause of action and the jurisprudence that cautions that an overly restrictive approach should be avoided (*Jost* at para 66) and noting that, at this stage, the issue is only whether the action should proceed as a class action and not whether it will succeed, I cannot find that it is plain and obvious that VAC as administrator of the SRB and related benefits does not owe a duty of care to the proposed class members.

[150] I also cannot find, at this stage, that there are residual policy reasons to negate the imposition of a duty of care as there is no record before the Court with respect to the policy underlying the benefits at issue (*Jost* at para 74).

[151] In conclusion, the claim for negligent misrepresentation is a reasonable cause of action and can proceed.

B. *Breach of Fiduciary Duty*

(1) The Plaintiff's Submissions

[152] The Plaintiff submits that Canada (i.e., VAC) acted as a fiduciary *vis-à-vis* vulnerable and disabled veterans and has breached its fiduciary duty.

[153] The Plaintiff submits that he has pleaded the material facts necessary to establish the elements of a claim for breach of fiduciary duty; an undertaking by the fiduciary to act in the best interests of the beneficiary; a defined person or class of persons vulnerable to the fiduciary's control; and, a legal or substantial practical interest of the beneficiaries that stand to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[154] The Plaintiff again submits that VAC's mandate is to provide information and assistance to ill and injured veterans so that they can access and maximize their benefits. Therefore, by implication, Canada undertook to act in the best interests of this highly vulnerable group of veterans and to ensure that they understood the available programs. The Plaintiff argues that the unique position of the proposed class members—who became disabled as a result of their military service to Canada—gives rise to a special relationship which is capable of supporting this implicit undertaking to act in their best interests.

[155] The Plaintiff again relies on *Jost*, at para 41, to support finding a fiduciary duty. The Plaintiff submits that the basis for his claim of breach of fiduciary duty claim is stronger than in *Jost*, because of the unique relationship between the proposed class members and VAC.

(2) The Defendant's Submissions

[156] The Defendant notes that a claim of fiduciary duty must be based on clear language in the enabling legislation to create an undertaking to act in the best interests of a particular group over all others and at the expense of all others (*Elder Advocates* at para 44).

[157] The Defendant submits that the Plaintiff has not identified any undertaking by Canada or VAC arising from the applicable statutes to act in the best interests of this group of veterans over all other veterans. The Defendant argues that the eligibility for benefits as described in the statute does not treat ELB and SRB with prominence over other benefits or beneficiaries.

[158] The Defendant points to *Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2012 SCC 71 [*PIPSC*], regarding a pension surplus, where the Supreme Court of Canada confirmed, at paras 124–127, that the fiduciary must undertake to act in the best interests of the particular group and forsake the interests of all others. The Defendant reiterates that nothing in the 2006 Act or subsequent amendments supports such an undertaking to forsake the interests of all others in favour of the proposed class members.

[159] The Defendant further submits that there is no implied undertaking to act in the best interests of class members over and above others.

[160] The Defendant notes that fiduciary obligations rarely attach to the relationship between the government and those affected by government actions because the government has a duty to act in the best interests of society as a whole.

[161] The Defendant submits that *Jost*, which is based on different facts, does not support finding a fiduciary duty; the Court of Appeal found only that in the context of the pension plan at issue and the delay in paying pensioners, the "door was not closed" to finding a fiduciary duty on the part of the pension administrator. The Defendant argues that in the present case, the door is closed.

[162] The Defendant submits that a pleading cannot create an express or implied undertaking where none exists at law. The Defendant notes that the Plaintiff again relies on the response of one of the Defendant's affiants, which the Plaintiff has stretched and misinterpreted, regarding the scope of VAC's mandate as establishing an undertaking. The Defendant adds that evidence cannot be considered in assessing the cause of action.

[163] The Defendant further submits that the vulnerability of veterans is not enough to base an implied undertaking.

(3) The Claim for Breach of Fiduciary Duty is not a Reasonable Cause of Action

[164] In *Elder Advocates*, at para 36, the Supreme Court of Canada summarized the requirements to establish a fiduciary duty as follows,

> In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[165] The Court noted, at para 45, that the statutory language must clearly support the undertaking relied on, where it is alleged to arise from the statute.

[166] The Court explained why it would be rare—although not impossible—to find a fiduciary duty on the Government, noting,

> [44] Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178.

[167] In *PIPSC*, the Supreme Court of Canada addressed the fiduciary obligations of a pension administrator to members of certain pension plans regarding an actuarial surplus in the pension plan accounts. The Court found that the government had no fiduciary duty to the plan members with respect to the actuarial surplus. With respect to the nature of the undertaking, the Court noted at para 124,

> It is now definitely a requirement of an *ad hoc* fiduciary relationship that the alleged fiduciary undertake, either expressly or impliedly, to act in accordance with a duty of loyalty. It is critical that the purported beneficiary be able to identify a forsaking of the interests of all others on the part of the fiduciary, in favour of the beneficiary, in relation to the specific interest at issue.

[168] In *Jost*, relied on by the Plaintiff, the Federal Court of Appeal noted the principles set out in *Elder Advocates* and *PIPSC*. The Court of Appeal described the relationships that may give rise to a fiduciary duty, reiterating that there must be a clear undertaking to act in the best interests of the beneficiary (at para 34), and that the Government's responsibility to act in the public interest means that it will be rare to find a duty of loyalty to a particular person or group (at para 36).

[169] The Court of Appeal noted, at para 40, that although no fiduciary duty was found in *PIPSC*, the facts differed and that "the Court did not determine that a fiduciary relationship could never exist between the Government, as administrator of a pension plan, and the members of the plan. Indeed, the Court expressly stated that it was unnecessary to determine 'the precise ambit of any potential fiduciary duty that might arise between the government, as pension plan administrator, and the beneficiaries of the Plan or whether the relationship inherently carries with it some set of fiduciary obligations': *PIPSC*, above at para. 120" (emphasis added).

[170] The Court of Appeal concluded,

> [41] Given that the Supreme Court has expressly left the door open to the possibility that the administrator of a governmental pension plan may, in some cases, owe a fiduciary duty to plan members, and subject to the comments below, it cannot be said at

> this point that it is plain and obvious that Mr. Jost's fiduciary claim has no reasonable prospect of success.

[171] As noted above, I do not agree that *Jost* is analogous. Although the Court of Appeal found that the door was open to the "possibility" of finding "in some cases" that a fiduciary duty is owed by a government pension plan administrator to plan members, the facts in support of a reasonable cause of action for breach of fiduciary duty cannot be found in this case. Unlike the facts in *Jost*, the delivery of pension benefits is not at issue and the claims against VAC are not with respect to any role it may have as a pension plan administrator, but rather as administrator of various social benefits with specific eligibility criteria.

[172] In the present case, there is no undertaking in the statute to put the interests of the proposed class members above those of other veterans. There are also no material facts to support the Plaintiff's assertion of an implicit undertaking by Canada, i.e., VAC to do so. The Plaintiff bases this alleged implicit undertaking on his characterization of VAC's mandate as an undertaking "to ensure that veterans who are ill and injured in service are compensated in a way that benefits their value to the country," which includes advising veterans about the benefits available to them and how to apply in order to maximize their benefits, and on the "unique position" or vulnerability of proposed class members.

[173] Although the Plaintiff has pleaded that he and proposed class members are vulnerable due to their disability and he and other affiants have described their disabilities, their alleged vulnerability to VAC's control is not sufficient to establish a fiduciary duty (*Elder Advocates* at para 203). The Plaintiff has not established facts that point to any implied undertaking by VAC

to act in the best interests of this group over and above other veterans or others more broadly and to forsake the interests of all others. The Plaintiff's reliance on his interpretation of a response by the Defendant's affiant does not provide facts in support of any implied undertaking by VAC to care for and compensate veterans and to provide information to them so that they can maximize their benefits or as an undertaking to put their interests above all others. First, the Court does not consider and weigh evidence in determining if the cause of action has been established. Second, the Defendant's affiant does not suggest that VAC prioritizes this group over other veterans who are eligible for a range of benefits or services. Third, the circumstances are not like *Jost* where pensioners experienced delays in receiving their pensions, to which they were clearly entitled, from the pension administrator.

[174] In summary, the Plaintiff's cause of action for breach of a fiduciary duty has no reasonable prospect of success. The jurisprudence is clear that there must be a clearly worded undertaking in the applicable legislation. There is no such wording in the *Veterans Well-being Act* or its predecessor. There is also no implicit undertaking arising from VAC's broad mandate or the circumstances of proposed class members to prioritize their interests over the interests of all other veterans who may also be eligible for other benefits or assistance. The Plaintiff's pleading of an undertaking does not create the undertaking and the Plaintiff has not established sufficient facts to support the elements of the cause of action. As the Defendant notes, the Plaintiff's reliance on the vulnerability of this group of disabled veterans to support the undertaking is not enough (*Elder Advocates* at paras 28, 36, 57).

C. *Unjust Enrichment*

(1) The Plaintiff's Submissions

[175] The Plaintiff again submits that Canada, as administrator of the benefits, was in a special relationship with proposed class members and owed them a duty to act in their best interests. The Plaintiff alleges that Canada was enriched by spending less on SRB payouts than if VAC had properly advised and informed veterans to apply for ELB as soon as they were eligible in order to maximize their benefits. The Plaintiff argues that proposed class members suffered a corresponding deprivation because they did not receive the SRB or received a lower SRB payout than they should have received.

[176] The Plaintiff submits that VAC's conduct was contrary to the wording and intent of the legislative scheme, which did not specify any particular steps to be taken by veterans to obtain the SRB or require any approvals.

[177] The Plaintiff suggests that the only prerequisite to be eligible for ELB was the development of a rehabilitation plan. If the veteran could not engage in gainful employment due to being TPI or DEC, then the veteran was entitled to ELB. The Plaintiff adds that the Act and Regulations do not state that a veteran should apply for ELB even if the amount would be offset.

[178] The Plaintiff submits that *McCrea v Canada (Attorney General)*, 2015 FC 592 [*McCrea*], relied on by the Defendant, is limited to the context of the payment of employment insurance benefits to potential claimants and does not establish that there can never be enrichment when

funds come from the Consolidated Revenue Fund [CRF]. The Plaintiff submits that, if this were so, Canada could never be liable for unjust enrichment. The Plaintiff adds that whether Canada was enriched is not yet known because discovery on this issue is needed and much of the evidence is within VAC's control.

[179] The Plaintiff argues that Canada cannot rely on the statutory provisions as the juristic reason for Canada's enrichment and the class members' deprivation because, in the Plaintiff's view, the ELB and SRB were not administered in accordance with the statutory provisions. The Plaintiff argues that VAC's acts and omissions were negligent and in breach of the fiduciary duty owed.

[180] The Plaintiff further submits that it cannot yet be determined whether there was a valid juristic reason for the Defendant's enrichment and the class member's deprivation because issues of statutory interpretation must be determined.

(2) The Defendant's Submissions

[181] The Defendant submits that the claim for unjust enrichment cannot succeed; the Defendant has not been enriched and the legislation provides a juristic reason for any alleged enrichment.

[182] The Defendant notes that the funds to pay the SRB come from the CRF; Canada is not enriched by not paying out amounts from the CRF. The Defendant adds that, even if Canada had been enriched, the statutory provisions provide the juristic reason; the SRB was paid out in

accordance with the transitional provisions of the 2019 amendments to the *Veterans Well-being Act*. The statutory scheme provides a complete answer to the claim for unjust enrichment.

[183] The Defendant submits that the Plaintiff is mistaken in asserting that there is no requirement to be approved for the Rehabilitation Program or for TPI or DEC or that class members did not need to apply for ELB. The Defendant notes that the legislation sets out the eligibility requirements for the Rehabilitation Program and the benefits. The Defendant points to section 25 of the 2006 Act, which sets out the eligibility for SRB, and subsection 18(4) which gives the authority to the Minister to determine TPI, DEC, and extended ELB eligibility. The Regulations prescribe how SRB is calculated. The Defendant submits that the benefits were determined in accordance with the statutory provisions.

[184] The Defendant notes that the Plaintiff has not pleaded that information about how to apply for the SRB in order to maximize the benefit should have been set out in the legislation, and has not identified which statutory provisions led to the alleged unjust enrichment.

(3) The Claim for Unjust Enrichment is not a Reasonable Cause of Action

[185] The Plaintiff's cause of action for unjust enrichment has no reasonable prospect of success.

[186] In *Garland v Consumers' Gas Co*, 2004 SCC 25, the Supreme Court of Canada set out the elements of unjust enrichment at para 30:

> As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834, at p. 848; P*eel (Regional Municipality) v. Canada*, 1992 CanLII 21 (SCC), [1992] 3 S.C.R. 762, at p. 784).

[187] In *Gladstone v Canada (Attorney General)*, 2005 SCC 21 at para 18, the Supreme Court of Canada held that "[t]he operation of the statutory provisions provides a 'juristic reason' barring recovery."

[188] As noted by the Defendant, the Plaintiff has not pointed to any statutory provision that has led to Canada's alleged unjust enrichment. The Plaintiff does not plead that the statute should have set out how veterans could maximize their benefits.

[189] The Plaintiff's assertion that there was no requirement for approval in the Rehabilitation Program (or a rehabilitation plan) or for the ELB is inconsistent with the statutory provisions. (The benefits are described above at paras 8–17, with reference to the statutory provisions, and explain that there were "gateways"—i.e., eligibility criteria for the Rehabilitation Program—and approvals which then made a veteran eligible to apply for ELB.) The Plaintiff's assertion is also inconsistent with the Plaintiff's own account and that of other affiants, who attest that at some point they applied and were approved for the Rehabilitation Program and that they applied and were approved for ELB. In addition, the Plaintiff's proposed definition of the class refers to "former members … <u>who were approved</u> to be in the VAC Rehabilitation Program …. and <u>approved for</u> and in receipt of an Earnings Loss Benefit [ELB] …" (emphasis added).

[190] Nothing in the statute requires that information be provided to veterans to maximize their benefits, and that is their complaint; the Plaintiff does not claim that the SRB payouts in 2019 were not calculated based on the ELB received in accordance with the statutory provisions.

[191] With respect to the issue of whether there can be unjust enrichment where the funds come from the CRF, I agree with the Plaintiff that *McCrea* arose out of a different factual context. Whether there can never be unjust enrichment where the benefits or payments at issue are held in the CRF remains to be determined. However, the source of the SRB payments remains a relevant consideration.

[192] In this case, the SRB was paid to eligible veterans in accordance with transitional provisions that resulted in the payments being made before the veteran reached 65, as was originally intended. As noted above, the eligible veterans were not denied the SRB upon its termination. In addition, other benefit programs were launched to replace the ELB and SRB, for which this same group of veterans would also appear to be eligible. In this context, Canada's enrichment is not apparent.

[193] I agree with the Defendant that the SRB payments were made in accordance with the transitional provisions of the 2019 amendments to the *Veterans Well-being Act*. The Plaintiff's argument that the statutory provisions cannot provide a juristic reason because the Defendant failed to discharge its duties and acted negligently and in breach of a fiduciary duty is a circular argument. This type of argument would defeat a juristic reason in most cases.

IX. Has the Plaintiff Established "Some Basis in Fact" for the Remaining Certification Requirements?

A. *General Principles*

[194] In *Greenwood*, the Court of Appeal explained the four remaining criteria for certification, at para 94,

> For the final four criteria for certification (identifiable class, common questions, preferable procedure and character of the representative plaintiff(s)), plaintiffs bear the burden of adducing evidence to show "some basis in fact" that these criteria have been met: *Hollick*, at para. 25; *Pro-Sys*, at para. 99; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 [*Fischer*] at para. 40. This threshold is lower than the balance of probabilities as certification is not the appropriate stage to resolve conflicts in the evidence. That said, the lower standard does require the plaintiff to lead enough evidence to satisfy the certification judge that the requirements for certification have been met such that the proceeding should be allowed to be proceed: *Pro-Sys*, at paras. 102-105. As noted by Chief Justice Winkler in *McCracken v. Canadian National Railway Company*, 2012 ONCA 445, 111 O.R. (3d) 745, at paras. 75-76, cited with approval by the Supreme Court in *Fischer*, at para. 41:
>
> > The "some basis in fact" principle is meant to address two concerns. First, there is a requirement that, for all but the cause of action criterion, an evidentiary foundation is needed to support a certification order.
> >
> > Second, in keeping with the procedural scheme of the [Class Proceedings Act], the use of the word "some" conveys the meaning that the evidentiary record need not be exhaustive, and certainly not a record upon which the merits will be argued.

[195] In *Pro-Sys Consultants v Microsoft Corp*, 2013 SCC 57 at paras 101–102 [*Pro-Sys*], the Supreme Court of Canada explained that the threshold of "some basis in fact" does not require

that the plaintiff establish the certification requirements on a balance of probabilities, nor does it require "that the court resolve conflicting facts and evidence." The Court also noted, at para 104, that each case must be decided on its own facts.

[196] In other words, while the certification stage does not assess the merits of the claim, but rather focuses on whether the action can proceed as a class proceeding, some scrutiny of the sufficiency of the evidence is called for.

B. *An Identifiable Class*

[197] As noted above, the Plaintiff initially proposed a definition of the class which included members who "would be" or "would have been" deemed TPI or DEC and "would have been" eligible for ELB. The Defendant objected to the originally proposed class definition noting that it was not objective, as it incorporated several subjective assessments, including who would have been approved for the Rehabilitation Program and the ELB and who would have been deemed TPI or DEC. The Defendant argued that putative class members would be unable to self-identify, and that there is no evidence that VAC has the necessary information to determine class membership based on this subjective definition.

[198] At the hearing of this motion, the Plaintiff acknowledged the Defendant's concerns and proposed a revised class definition that is set out in the Plaintiff's Proposed Further Amended Statement of Claim.

[199] The Plaintiff submits that similar classes have been certified on behalf of members and veterans of the CAF. The Plaintiff also submits that class membership should be capable of determination with reference to government-issued documents and records and notes, for example, that VAC data indicates that 10,884 veterans or survivors were identified for the SRB payout in 2019.

[200] The Plaintiff also points to his affidavit and that of the other veterans who attest to receiving incomplete or misinformation from VAC about their eligibility for the SRB. Counsel for the Plaintiff advised that they have been in contact with several other veterans across Canada who report that they fall within the proposed class.

[201] In *Paradis Honey v Canada*, 2017 FC 199 [*Paradis Honey FC*], the Court noted the criteria for an identifiable class, at paras 23–25:

> [23] In *Hollick v Toronto (City)*, 2001 SCC 68 [*Hollick*], a case issued shortly after *WCSC*, above, the Supreme Court of Canada stated that there were three criteria for finding the existence of an "identifiable class": (1) the class must be defined by objective criteria; (2) the class must be defined without reference to the merits of the action; and (3) there must be a rational connection between the common issues and the proposed class definition.
>
> [24] The burden is on the proposed representative plaintiff to show that the class is defined sufficiently narrowly, such that it meets these criteria (*Hollick*, above at para 20). Interpreting the legislative history of class actions, the Supreme Court of Canada stated that class action legislation should be interpreted generously (*Hollick* at para 14); therefore, the representative's burden is not an onerous one. The representative does not need to show that "everyone in the class shares the same interest in the resolution of the asserted common issue[s]", only that the class is not "unnecessarily broad [emphasis in original]" (*Hollick* at para 21).

> [25] Further, *WCSC* [*Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46], makes it clear that the criteria of a rational connection between the common issues and the proposed class is to be approached purposively, such that it is "not essential that that the class members be identically situated vis-à-vis the opposing party, but that the resolution of the common issues are necessary to the resolution of each class member's claim" (*WCSC* at para 39).

[202] I find that the Plaintiff has met his burden of defining the proposed class in a manner that reflects the criteria established in the jurisprudence. The definition set out in the Proposed Further Amended Statement of Claim provides objective criteria to permit class members to easily determine whether they fall within the class. The criteria are sufficiently narrow; former members of the CAF, approved to be in the Rehabilitation Program, declared TPI or DEC, approved for ELB, and as a result, received the SRB, as well as their survivors who received the SRB. Although the numbers remain to be determined, the class exists now, and exists without regard to the outcome of this litigation. In addition, there is a rational connection between the common issues proposed and the class definition. Not all class members have had exactly the same experience, but there is some basis in fact that proposed class members have had similar experiences in their interaction with VAC regarding their benefits.

[203] The Plaintiff and Defendant also agree that the proposed class period is April 1, 2006 to October 1, 2016 (the date when the ELB was increased to 90% and the top-up became available) rather than March 31, 2019, as originally proposed.

C. *Do the Claims Raise Common Questions of Law or Fact?*

(1) The Plaintiff's Submissions

[204] As noted, the Plaintiff's primary position is that VAC's conduct was systemic. The Plaintiff submits: that VAC failed to implement a proactive outreach campaign to inform recipients of CAF-LTD that they should apply for the ELB; and, that front-line workers were inadequately trained and, therefore, lacked understanding of the interlocking programs, which resulted in the consistent provision of misinformation or poor advice, in particular, that there was no benefit for CAF-LTD recipients to apply for ELB.

[205] The Plaintiff submits that the commonality of the questions stems from the systemic nature of VAC's conduct; therefore, the questions can be determined in a general manner without reference to individual circumstances. The Plaintiff argues that the resolution of the common questions is necessary to the resolution of each proposed class member's claim and will avoid duplicative fact-finding and legal analysis, notwithstanding individual issues that will remain to be determined.

[206] The Plaintiff disputes that each class member will be required to prove reliance on a representation by VAC. Rather, all class members relied on VAC to provide advice and information.

[207] As noted, the Plaintiff argues that VAC's acts and omissions are contrary to VAC's undertaking to assist veterans to acquire the benefits to which they were entitled. The Plaintiff

further submits that VAC workers and case managers did not understand the ELB Program or how the SRB was calculated. The Plaintiff submits that he has established some basis in fact that the claim raises common questions and points to his affidavit and those of other affiants, the OVO Report, the VAC 2010 Report—*New Veterans Charter Evaluation, Phase II*, other government initiated reports, and the expert report of Mr. Errol Soriano on possible methodologies for calculating aggregate damages.

[208] The Plaintiff argues that the Government's response to the OVO Report is of no consequence: the OVO Report provides some basis in fact that there were systemic or widespread problems in providing information to veterans about their benefits. The Plaintiff cautions that the Court cannot weigh evidence in assessing whether the certification criteria have been met.

[209] The Plaintiff adds that, even without relying on the OVO Report or other reports, his affidavit and the affidavits of other veterans establish a basis for his claim that their experiences were not isolated.

[210] The Plaintiff submits that all claims of class members share common ingredients. All the questions arise due to the failure of VAC to provide advice to veterans to ensure they understood the SRB and how it would be calculated.

[211] The Plaintiff further submits that the questions relating to the duty of care turn on the systemic or widespread conduct of VAC and are determinable without regard to the

circumstances of each class member. The common questions regarding the fiduciary duty and whether it was breached also turn on this systemic and widespread conduct, and are determinable in a general manner. The questions regarding unjust enrichment involve the class as a whole.

[212] The Plaintiff also submits that the issue of whether damages were suffered and whether the Court can make an aggregate assessment of damages is determinable without individual assessments. The Plaintiff relies on the report of Mr. Soriano that describes possible methodologies to assess the aggregate damages, and notes that the methodology can be refined as the litigation progresses.

[213] The Plaintiff proposes the following common questions:

a) Did the Defendant, as the sponsor and administrator of the SRB program, owe a duty of care to class members to properly advise them of the eligibility requirements for SRB and the steps they needed to take in order to maximize the SRB payable to them?

b) If the Defendant owed class members a duty of care, did the Defendant breach the standard of care?

c) If the Defendant breached the standard of care, did the class members suffer damages as a result?

d) Can causation of any damages incurred by class members be determined as a common issue?

e) Did the Defendant, as the sponsor and administrator of the SRB program, owe a fiduciary duty to class members to properly advise them of the eligibility requirements for SRB and the steps they needed to take in order to maximize the SRB payable to them?

f) If the Defendant owed a fiduciary duty to the class members, did the Defendant breach its fiduciary duty to class members?

g) Was the Defendant enriched by failing to properly advise class members of the eligibility requirements for SRB and the steps they needed to take to maximize the SRB payable to them?

h) If the Defendant was enriched, did the class suffer a corresponding deprivation?

i) If the Defendant was enriched and the class suffered a corresponding deprivation, was there a juristic reason for this enrichment and corresponding deprivation?

j) Should the Defendant be required to pay restitution to the class?

k) Is the class entitled to an award for interest?

l) Does the conduct of the Defendant merit an award for punitive damages, and if so, in what amount?

m) Can damages for the class be assessed in the aggregate, and if so, in what amount?

n) Should distribution of monetary relief to class members be ordered, and if so, what methodology of distribution should be used?

(2) The Defendant's Submissions

[214] The Defendant submits that the Plaintiff has not met his onus to show that a class proceeding would resolve issues of law or fact common to all class members.

[215] The Defendant reiterates that there is no factual foundation to support the claim that VAC's conduct was systemic; i.e., that there was a lack of management and operations procedures and that VAC's representatives routinely and consistently advised veterans on CAF-LTD that there was no benefit to apply for the ELB.

[216] The Defendant notes that the OVO Report refers to a "possible systemic issue," but was based on a single complaint from Mr. Bruyea. The Defendant also notes that the Minister of Veterans Affairs did not accept the OVO Report and its recommendations. The Minister provided a complete response, noting the valuable work of the OVO, but finding that, with respect to the issues addressed by the OVO, VAC had made extensive efforts to make veterans aware of their benefits, including the SRB.

[217] The Defendant adds that several of the other reports submitted by the Plaintiff do not refer to the SRB and others include caveats about their statistical significance.

[218] The Defendant submits that the only possible basis in fact for common questions is set out in the affidavits of possible class members. However, the affiants' descriptions underscore

the individual nature of each claim; all the affiants described different interactions with VAC, including one affiant who does not even know whether he should have received other benefits.

[219] The Defendant submits that if the Court finds that there is a reasonable cause of action in negligent misrepresentation, the duty of care analysis will be based on the representations made by VAC to individual class members and their reliance on the representations. This requires a case-by-case analysis.

[220] The Defendant submits that the allegation that VAC misrepresented the eligibility requirements for SRB lacks any single and common representation to all class members. The Defendant notes that veterans accessed information in various ways at various times and that VAC provided information at different times and in different ways to various groups of veterans (including, for example, in publications). This suggests that the alleged misinformation would have varied. No commonality exists to resolve the issues of fact and law.

[221] The Defendant also submits that issues of causation and damages turn on findings of fact that are specific to each claimant and cannot be determined on a common basis. The Defendant adds that the Plaintiff has failed to provide a viable means of assessing damages in the aggregate. The report of the Plaintiff's expert, Mr. Soriano, does not set out a feasible methodology and is based on his insufficient understanding of the benefits and the claims.

[222] The Defendant adds that the proposed Litigation Plan—which fails to explain a process to determine the common issues and the remaining individual issues—is further evidence that the

Plaintiff has not met the criteria to establish common issues or that a class proceeding is the preferable procedure.

(3) Common Questions Exist

[223] In *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 72, the Federal Court of Appeal cited the test set out in *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 39 [*WCSC*], and described the Court's task at this stage of the certification process:

> Further, the task under this part of the certification determination is not to determine the common issues, especially not without a full record and full legal submissions on the issue, but rather to assess whether the resolution of the issue is necessary to the resolution of each class member's claim. Specifically, the test is as follows:
>
> > The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significant [*sic*] of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

[224] The Plaintiff's proposed common questions stem from his initial claims of systemic negligence, breach of fiduciary duty and unjust enrichment. As noted above, I have found that the only reasonable cause of action is for negligent misrepresentation. However, the common questions proposed by the Plaintiff and the rationale advanced in the context of the systemic allegations also support some common questions with respect to whether VAC's conduct amounts to negligent misrepresentation.

[225] Although the Defendant has pointed out that the OVO Report was based on only one complaint and was not accepted, and more generally that the other reports relied on by the Plaintiff lack relevance or statistical significance, the Court's role at this stage is not to assess and weigh the evidence. The reports can be relied on to establish some basis in fact for the certification criteria—other than the requirement to establish a reasonable cause of action (*Greenwood* at paras 91 and 96). The reports do provide some basis in fact that some veterans may not have received necessary information, some veterans found the information confusing, or some veterans misunderstood the information they received. Without assessing the veracity or probative value of the reports, the reports at least highlight that there was a concern with respect to the provision of information to veterans.

[226] Even without considering the reports, the affiants' descriptions of their interactions with VAC case managers or other representatives provide some basis in fact for the common questions relating to the class members' overall relationship with VAC: whether any duty was owed by VAC to class members, the scope of any such duty, and whether any damages or loss were incurred by the class members. As noted in the summary of the affiants' evidence, the

affiants all describe their contacts with VAC, some attest to being unaware of the link between ELB and the calculation of the SRB, and several attest to being advised, or concluding, that there was no point to apply for ELB as it would be offset by the CAF-LTD.

[227] Common questions will advance the litigation and resolve key aspects of the class members' claims, in particular whether a duty of care was owed. Although the assessment of each class member's relationship with VAC, the information sought and provided, their reliance on the information and their specific entitlements, if any, will be required, the class members' claim share "common ingredients."

[228] The common questions are set out in the Order below. The common questions relate only to the cause of action in negligent misrepresentation. The Plaintiff's proposed questions relating to the alleged breach of fiduciary duty and unjust enrichment are not included because those causes of action have no reasonable prospect of success.

[229] The questions proposed by the Plaintiff regarding whether restitution and punitive damages should be awarded are not common questions, as the Plaintiff has not addressed these issues.

[230] With respect to the assessment of aggregate damages, the Plaintiff relies on the Report of Mr. Soriano, who attests that there is a method to determine the losses on an individual and aggregate basis. I acknowledge the Defendant's concerns regarding the vagueness of the proposed methodology and Mr. Soriano's possible misunderstanding of the benefits at issue.

However, I find that Mr. Soriano has provided some basis in fact that the damages can be assessed in the aggregate. This methodology can be revised with additional data that is likely available from VAC.

[231] As noted by the Defendant, common questions regarding the application of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, must be included, in particular, whether section 9 bars some or all of the class members' claims, and the applicable limitation period.

[232] The common questions may require revision as the litigation proceeds. This can be accomplished through the case management process. As noted in *Buffalo v Samson Cree Nation*, 2010 FCA 165 at para 12,

> I accept that in certification motions, and in the post-certification period, courts can be quite active, and flexible because of the complex and dynamic nature of class proceedings: for example, they must always remain open to amendments to such matters as the class definition, the common issues and the representative plaintiff's litigation plan, and they can play a key role in case management.

D. *Is the Class Proceeding the Preferable Procedure?*

(1) The Plaintiff's Submissions

[233] The Plaintiff submits that pursuing this action as a class proceeding provides a means for the class members to overcome the obstacles they face to seek access to justice, including their psychological, cognitive and physical disabilities, and the prohibitive cost of individual litigation. The Plaintiff argues that individual actions would be duplicative and inefficient and would risk inconsistency. The Plaintiff contends that the common questions will predominate

over individual issues. The Plaintiff further argues that a class proceeding is necessary to promote behaviour modification and to highlight Canada's longstanding failure to properly support and provide for ill and injured veterans.

[234] The Plaintiff adds that the Defendant has not provided any viable or preferable alternatives to a class proceeding.

(2) The Defendant's Submissions

[235] The Defendant disputes that the Plaintiff has established some basis in fact that a class proceeding is fair, efficient and manageable, and is preferable to other reasonable means of resolving the class members' claims with regard to the goals of judicial economy, access to justice, and behaviour modification.

[236] The Defendant submits that the common issues must be considered in relation to the claim as a whole.

[237] The Defendant argues that a class action is not the preferable procedure for a claim of negligent misrepresentation. The Defendant submits that there are too many differences between class members' individual circumstances. A significant number of individual trials would be required on the issues of reliance, causation, damages, and limitation defences—all of which require individual fact-finding. The Defendant further submits that it will be necessary to determine what representations were made, when, and by whom. In addition, it will need to be determined how each proposed class member understood this information and whether they

acted on the information, sought further advice, delayed making an application, or did not meet the criteria for the ELB or SRB. These individual determinations will overwhelm and erode the benefits of a class action, in particular, judicial economy and access to justice.

[238] In oral submissions, the Defendant suggested that veterans could have applied for an individual review of their decisions regarding their eligibility for the Rehabilitation Program, ELB or SRB. The Defendant also suggested that, in accordance with the *Federal Courts Rules*, individual actions could be pursued, then consolidated and heard together, or that one action could proceed while others were held in abeyance. The Defendant also suggested that a common question of law could be proposed and determined which could guide further actions. The Defendant noted that access to justice considerations do not always justify pursuing a class action, where it is otherwise not the preferable procedure.

(3) The Plaintiff has Established Some Basis in Fact That a Class Proceeding is Preferable Procedure

[239] Rule 334.16(2) (set out above) guides the Court to consider all relevant matters in determining whether a class proceeding is the preferable procedure to resolve the common questions justly and efficiently, and sets out a non-exhaustive list of considerations.

[240] In *Paradis Honey FC*, the Court noted Rule 334.16(2) and summarised the principles established in the jurisprudence regarding the preferable procedure, at para 96,

> [96] The Supreme Court of Canada, in *AIC Limited v Fischer*, 2013 SCC 69 at paragraphs 19 to 23 [*AIC*], set out a number of principles to be used in determining whether a class action is the preferable procedure:

> 1) The starting point is the relevant statutory provision. The preferability requirement is broad enough to take into account all available means of resolving the class members' claims including avenues of redress other than court actions.
>
> 2) The court must look at the common issues in the context of the action as a whole, and when comparing possible alternatives with the proposed class proceeding, it is important to adopt a practical cost-benefit approach, and to consider the impact of a class proceeding on class members, the defendants, and the court.
>
> 3) The preferability analysis considers the extent to which the proposed class action serves the goals of class proceedings. The three principle goals of class actions are (1) judicial economy, (2) behaviour modification, and (3) access to justice. This is a comparative exercise, and the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals.

[241] The consideration of all relevant matters, including those set out in Rule 334.16(2), supports finding that the proposed class action will serve the goal of judicial economy and access to justice, and perhaps behaviour modification. The Plaintiff has established some basis in fact that the class proceeding is the preferable procedure, although it may not be the perfect procedure.

[242] There appear to be no feasible alternatives. The Defendant's suggestion that the class members could seek a review of individual decisions with respect to their SRB payment is not feasible. The time for such a review is limited and has passed. In addition, given the Plaintiff's allegations that class members did not fully understand how the SRB was calculated and had not applied for ELB at the first opportunity due to the alleged lack of information, misinformation or misunderstanding, the suggestion that class members should have sought a review of the SRB payment at the relevant time appears to miss the point of their underlying complaint.

[243] The Defendant's suggestion that class members could now bring individual actions, which could be consolidated, does not address the costs or burden of individual actions on the class members. As the Plaintiff notes, some class members would likely not pursue an action due to the cost and stress of doing so, and therefore, would forego the benefits that they may be entitled to.

[244] I agree with the Plaintiff that the Defendant has not provided any viable or preferable alternatives to a class proceeding. None of the alternatives suggested by the Defendant—only in their oral argument—would address the obstacles to access to justice or would result in effective redress to the same extent that the class proceeding could.

[245] Although there still may be other alternatives available to resolve at least some issues underlying the action, such alternatives have not been proposed.

[246] A class proceeding is not a perfect procedural approach as there will remain several individual issues to be resolved and individual assessments will be required, including about the interactions between VAC and class members and whether class members met the criteria for extended ELB and SRB and at what point. I acknowledge that individual determinations of a class member's reliance on a particular representation, the causation of loss, and the applicable limitation periods, among other issues, would also be required. However, in the context of the action as a whole *(Paradis Honey FC* at para 96), in comparison with the other suggested alternatives, which appear to not be feasible, and in consideration of the cost-benefits and practicalities, the class action is the preferable procedure.

[247] As noted above, the resolution of key common issues, including whether VAC owed a duty of care to class members, will pave the way for the individual assessments to be conducted. Otherwise, every class member who pursues an individual action—if this is even possible—would be required to establish all elements of their claim. If a class member were successful in the long run, their award would likely be a very modest amount in comparison to the expense of the litigation and the time and stress that accompanies the litigation process.

(4) Mr. Bruyea is an Appropriate Representative Plaintiff

[248] Mr. Bruyea submits that he would fairly and adequately represent the interests of the class and has shown a commitment to acting in the best interests of the class. He states that he does not have a conflicting interest with other class members on the common issues, and he has provided a proposed litigation plan and the fee agreement with counsel.

[249] He adds that the Litigation Plan meets the requirements of Rule 334.16(1)(e)(i), noting that it remains a work in progress that can be revised as needed through the case management process.

[250] The Defendant does not dispute that Mr. Bruyea is an appropriate representative plaintiff if the other requirements for certification are found to be met. However, the Defendant notes the need for the Litigation Plan to account for, among other things, possible motions, and more reasonable timelines for the production of documents.

[251] In *WCSC* at para 41, the Supreme Court of Canada stated:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interest of the class.

[252] The Court agrees that Mr. Bruyea is an appropriate representative plaintiff. Mr. Bruyea has established that he meets the criteria set out in Rule 334.16(1)(e) and reflects the description in *WCSC*.

[253] With respect to the proposed Litigation Plan, as the Defendant notes, the schedule of next steps requires modification as it does not reflect reasonable timelines, including for production from the Defendant and does not address the possibility of motions by the Defendant. The Litigation Plan is best described as "a work in progress." At this stage of the litigation, it is sufficient in mapping out the next steps in a general way. The Litigation Plan will require amendment as the litigation progresses, which can be accomplished through the case management process.

X. Conclusion

[254] In conclusion, I find that the requirements for certification have been met. The Court's Order reflects the requirements of Rule 334.17(1). The Order includes the common questions that are certified, restricted to the questions related to the cause of action in negligent misrepresentation, and adds questions regarding whether the *Crown Liability and Proceedings*

Act bars some or all of the claims and the relevant limitation periods. The Class definition is that set out in the Plaintiff's Proposed Further Amended Statement of Claim. The relevant period is April 1, 2006 to October 1, 2016. The time and manner for class members to opt out of the class proceeding will be addressed in the case management process and a further Order may be issued.

[255] The common questions and Litigation Plan and other procedural matters may be addressed and revised as necessary in the case management process post-certification. For example, the Litigation Plan must provide for motions by the Defendant and reasonable timeframes for the production of documents.

ORDER IN T-1106-20

THIS COURT ORDERS that

1. This action is hereby certified as a class proceeding against His Majesty the King, pursuant to Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106.

2. The Class is defined as,

> All former members of the Canadian Armed Forces ("Veteran(s)") who were:
>
> 1. approved to be in the VAC Rehabilitation Program sponsored and administered by the Defendant;
>
> 2. declared to be Totally and Permanently Incapacitated and/or suffering Diminished Earnings Capacity as defined in programs sponsored and administered by the Defendant including those Veterans approved for CAF-LTD and designated Totally Disabled; and
>
> 3. approved for and in receipt of an Earnings Loss Benefit (ELB) sponsored and administered by the Defendant, whether or not that payment [the ELB payable to them] would have been offset by other income or payments;
>
> and, as a result, received the Supplementary Retirement Benefit, and the survivors of Veterans, where those survivors received the Supplementary Retirement Benefit under the Defendant's legislative scheme and programs.

3. The general nature of the claims made on behalf of the Class relates to the Defendant's alleged negligence in informing Class members about the Earnings Loss Benefit and Supplementary Retirement Benefit [SRB].

4. The relief claimed by the Class is as follows:

    a) arrears of payments and other losses;

    b) general damages;

c) special damages;

d) out of pocket expenses and disbursements;

e) an order for the aggregate assessment of damages/monetary relief and its distribution to the Plaintiff and Class members;

f) prejudgment and post-judgment interest;

g) costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes; and

h) costs.

5. The following common questions of law or fact are certified;

a) Did the Defendant, as the sponsor and administrator of the SRB owe a duty of care to Class members to properly advise them of the eligibility requirements for SRB and the steps they needed to take in order to maximize the SRB payable to them?

b) If the Defendant owed Class members a duty of care, did the Defendant breach the standard of care?

c) If the Defendant breached the standard of care, did the Class members suffer damages as a result?

d) Can causation of any damages incurred by Class members be determined as a common issue?

e) Does section 9 of the *Crown Liability and Proceedings Act* bar some or all of the claims advanced by Class members?

f) What is the applicable limitation period for the claims of Class members?

g) Are Class members entitled to an award for interest?

h) Can damages for the Class be assessed in the aggregate, and if so, in what amount?

i) Should distribution of monetary relief to Class members be ordered, and if so, what methodology of distribution should be used?

6. Sean Bruyea is appointed as the representative Plaintiff.

7. Murphy Battista LLP is appointed as Class Counsel.

8. The time and manner for Class members to opt out of the Class proceeding are reserved to be addressed through the case management process.

9. The form, manner, and content of the notice of certification will be determined by further Order of the Court.

10. This Order is made on a without costs basis pursuant to Rule 334.39.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1106-20
STYLE OF CAUSE:	SEAN BRUYEA v HIS MAJESTY THE KING
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 6, 7 AND 8, 2022 - POST HEARING SUBMISSIONS RECEIVED JULY 20, 2022
ORDER AND REASONS:	KANE J.
DATED:	OCTOBER 17, 2022

APPEARANCES:

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