Federal Court Cour fédérale

**Date: 20230106**

**Dockets: T-2111-16**
**T-460-17**

**Citation: 2023 FC 28**

**Ottawa, Ontario, January 6, 2023**

**PRESENT: The Honourable Mr. Justice Fothergill**

**Docket: T-2111-16**

**BETWEEN:**

**SHERRY HEYDER**
**AMY GRAHAM**
**NADINE SCHULTZ-NIELSEN**

**Plaintiffs**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Defendant**

**Docket: T-460-17**

**AND BETWEEN:**

**LARRY BEATTIE**

**Plaintiff**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Defendant**

**ORDER AND REASONS**

## I. Overview

[1] On November 25, 2019, this Court certified two class proceedings and approved a Final Settlement Agreement [FSA] negotiated between the Plaintiffs and the Defendant Attorney General of Canada. The proceedings and the FSA encompass two Classes consisting of women and men who experienced sexual misconduct while serving in the Canadian Armed Forces, in the Department of National Defence, and as Staff of the Non-Public Funds, Canadian Forces.

[2] The FSA established an Individual Application Deadline of 18 months from the implementation date of May 25, 2020. It also provided for an additional period of 60 days within which Class Members could continue to submit claims, provided the Administrator was satisfied they were delayed "due to disability" or "due to other exceptional circumstances" [Extension Period].

[3] In addition, the FSA conferred upon this Court a discretion to grant leave to permit further late claims after the expiry of the Extension Period:

> 7.08 Late Individual Applications
>
> […] No Individual Application shall be accepted for substantive review by the Administrator more than 60 days after the Individual Application Deadline without leave of the Court.
>
> [Late Claims Provision]

[4] At the time this motion was heard, counsel for the Plaintiffs estimated that the Administrator had received approximately 640 late claims after the expiry of the Extension

Period. This amounts to 3.3% of the approximately 19,000 claims received before the end of the Extension Period.

[5] The parties have brought a motion before the Court for directions regarding the implementation of the Late Claims Provision. They disagree about the test to be applied by the Court in granting leave to permit late claims, and the manner in which the Late Claims Provision should be administered.

[6] The Plaintiffs also seek leave on behalf of 13 Class Members to submit their claims after the expiry of the Extension Period.

[7] For the reasons that follow, the Administrator shall decide whether to accept 12 of the late claims for which leave of the Court is sought in this motion, and all other claims received after the expiry of the Extension Period, in accordance with the directions provided in the Order that accompanies these Reasons.

[8] The Court will issue a separate Order granting leave to the lone claimant whose leave application is not contested by the Defendant, and addressing the confidentiality of all 13 leave applications that accompany this Motion for Directions.

## II. Positions of the Parties

### A. *Plaintiffs*

[9] The Plaintiffs note that the Late Claims Provision in the FSA specifically authorizes this Court to grant leave to late claimants. The Court is not being asked to rewrite the agreement between the parties, but only to provide directions regarding the manner in which an existing clause is to be interpreted and implemented.

[10] The Plaintiffs say this Court has jurisdiction to appoint the Administrator, or alternatively the Lead Assessor and the Roster Assessors, to decide whether to admit late claims. Doing so will permit late claims to be adjudicated efficiently within the existing and ongoing claims process.

[11] The Order approving the FSA maintains a supervisory role for the Court, and anticipates that Class Counsel and the Administrator will report regularly to the Court on the administration of the FSA:

> **J. Continuing Jurisdiction and Reporting**
>
> 21. The Settlement shall be implemented in accordance with this Order and further orders of this Court.
>
> 22. This Court, without in any way affecting the finality of this Order, shall have exclusive and continuing jurisdiction over this action, the Plaintiffs, all of the Class Members, and the Defendant for the limited purposes of implementing and enforcing and administering the Settlement and this Order, subject to the terms of the Settlement.

> 23. Class counsel and the Administrator shall report to the Court on the administration of the Settlement at reasonable intervals not less than semi-annually, as requested by the Court, and upon the completion of the administration of the FSA in accordance with Schedule "Q" of the FSA.

[12] The Plaintiffs also rely on the *Federal Courts Rules*, SOR/98-106 [Rules], in particular Rule 8, which allows the Court to extend any period fixed by an order of the Court. A motion may be granted under Rule 8 whenever it is in the "interests of justice" to do so (citing *Alberta v Canada*, 2018 FCA 83 [*Alberta*] at paras 44-45; *Canada (Attorney General) v Hennelly* (1999), 244 NR 399 (FCA) [*Hennelly*] at para 3).

[13] The Plaintiffs note that the "interests of justice" test has previously been applied by other courts to extend deadlines in settlement agreements in class proceedings (citing *Pelletier v Baxter Healthcare Corporation*, 1999 CanLII 11080 (QCCS) [*Pelletier*] at paras 42-43; *Guglietti v Toronto Area Transit Operating Authority*, [2000] OJ No 2144 (ONSC) [*Guglietti*] at para 10).

B. *Defendant*

[14] The Defendant says that a supervising court's jurisdiction to administer a settlement agreement is limited to filling a gap or applying a term of the agreement (citing *JW v Canada (Attorney General)*, 2019 SCC 20 [*JW*] at paras 27, 31-32, 35). A supervising court has no jurisdiction to rewrite the terms of the settlement unless this power is expressly conferred by the terms of the settlement. Once a settlement is concluded, no provision in the agreement or the settlement approval order should be changed unless all parties agree or the provision is invalid.

[15] According to the Defendant, the directions requested by the Plaintiffs do not address any gap in the settlement. Rather, the Plaintiffs' recommended disposition of this motion would constitute a significant change to the express terms of the FSA. This would have cascading effects, and would directly or indirectly alter other provisions of the FSA.

[16] The Defendant maintains that the parties applied their minds to the Individual Application Deadline of 18 months, and contemplated an Extension Period of just 60 days to address circumstances where delay was "due to disability" or "due to other exceptional circumstances". To the extent the parties conferred a residual discretion upon this Court to permit further claims after the expiry of the Extension Period, this was intended to be a "safety valve" to prevent miscarriages of justice arising from circumstances beyond those contemplated by the parties.

[17] The Defendant therefore argues that the Court should permit further claims following the expiry of the Extension Period only where the delay was beyond the claimant's control, and may be wholly attributed to the acts or omissions of third parties such as Class Counsel, the Administrator, or the Assessors.

## III. Issues

[18] The issues raised by this Motion for Directions are:

A. What test should this Court apply when determining whether to grant leave to submit late claims?

B. How should the Late Claims Provision be administered?

C. Should this Court grant leave to 13 Class Members to submit their claims after the expiry of the Extension Period?

## IV. Analysis

### A. *What test should this Court apply when determining whether to grant leave to submit late claims?*

[19] The Individual Application Deadline established by the FSA was November 24, 2021. Thereafter, Late Individual Applications could be accepted by the Administrator only during the 60-day Extension Period ending on January 23, 2022. In effect, Class Members were given a 20-month period within which to submit their claims.

[20] The FSA confers upon the Court a general discretion to permit further late claims after the Extension Period. However, the FSA is silent about the test to be applied by the Court. Nor is it clear whether the discretion must be exercised by the Court on a case-by-case basis, or whether the Court may provide directions to the Administrator or Assessors regarding the circumstances in which further late claims may be accepted after the expiry of the Extension Period.

[21] None of the precedents relied upon by the parties perfectly captures the situation here. In *Pelletier*, the relevant clause of the settlement agreement set a deadline for the receipt of claims, but also included the words “or such other date as may be approved by the Courts”. Justice Irving Halperin of the Quebec Superior Court found that the parties had intended to confer a

discretion on the Court to fix the claims deadline at, and also after, the settlement approval hearing (at paras 23-24).

[22] In *Lavier v MyTravel Canada Holidays Inc*, 2011 ONSC 3149 [*Lavier*], Justice Paul Perell of the Ontario Superior Court of Justice held that "in a claims made, no-cap settlement, unless the settlement agreement provided for an extension of the deadline for making claims, an extension of time for making claims would vary the settlement and not be a permissible administrative adjustment because the defendant would not be indifferent to having to pay more claims" (at para 35, citing *Gray v Great-West Lifeco Inc et al*, 2011 MBQB 13 [*Gray*] at paras 41-42, 63).

[23] The settlement agreement in *Lavier* did not contain a clause similar to s 7.08 of the FSA conferring upon a court the power to admit further claims after the deadlines agreed to by the parties. The decision of the Court of Queen's Bench of Manitoba in *Gray* may be distinguished on the same basis (para 73).

[24] The settlement agreement in *Parsons v Canadian Red Cross Society*, 2013 ONSC 7788 concerned "tainted blood" and Hepatitis-C infections. The settlement agreement did not include a late claims provision or any provision that might empower a court to grant leave to submit claims beyond the specified deadline. Justice Perell nevertheless achieved a similar result by relying on a clause that allowed the distribution of unallocated assets in the settlement fund, concluding that it was "entirely permissible to extend the benefits of the settlement to the late claimants" (at para 93). Here, there is no similar provision in the FSA permitting the Court to order the distribution of unallocated funds.

[25] The authority that bears the closest resemblance to this case is the Ontario Superior Court of Justice's decision in *Guglietti*. That case concerned a class action against the Toronto Area Transit Operating Authority following a train collision. The clause of the settlement agreement that set the claims deadline also provided that the deadline could be extended by the Court in accordance with s 25(5) of the Ontario *Class Proceedings Act, 1992*, SO 1992, c 6, which provides as follows:

> 25(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section <u>except with leave of the court</u>. [Emphasis added]

[26] Justice Warren Winkler applied the "interests of justice" test to grant leave to a late claimant (*Guglietti* at para 10):

> […] in light of the court's broad intervention powers under the *Code of Civil Procedure* and pursuant to the parties' Class Action Settlement Agreement, the ends of justice are best served by permitting an extension of time for filing the claims in appropriate circumstances. I am satisfied that on the present facts and in the interests of justice, good cause exists so as to justify the court's intervention to grant the relief sought.

[27] As in *Guglietti*, the FSA in this case contemplates that further claims may be submitted after the expiry of the Extension Period "with leave of the Court". I see no reason to depart from Justice Winkler's application of "the interests of justice" test in comparable circumstances. Rule 3.02(1) of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, referred to in Justice Winkler's decision, is broadly consistent with Rule 8.

[28] When applying "the interests of justice" test under Rule 8, the Court considers whether the party seeking leave has established: (1) a continuing intention to pursue the matter; (2) that the application has some merit; (3) that no prejudice arises from the delay; and (4) that there is a reasonable explanation for the delay (*Hennelly* at para 3). The failure to establish one of the preceding criteria is not determinative, as "the real test is ultimately that justice be done between the parties" (*Alberta* at para 45).

B. *How should the Late Claims Provision be administered?*

[29] The parties have adduced no evidence of their intentions in conferring a general discretion upon this Court to grant leave to claimants to submit claims beyond the expiry of the Extension Period. The Defendant characterizes this clause as a "safety valve" to prevent miscarriages of justice. The Plaintiffs accept this characterization.

[30] It is reasonable to infer that the parties anticipated the number of claims submitted after the Individual Application Deadline and the Extension Period to be small. In reality, the number exceeds 640. While this represents only 3.3% of the approximately 19,000 claims submitted during the 20-month claims period, it is still a significant number. The Defendant nevertheless maintains that the Court must decide each of more than 640 potential leave applications on a case-by-case basis.

[31] I have considerable difficulty with the proposition that the parties intended to inundate the Court with hundreds of applications for leave to submit claims after the expiry of the Extension Period. The most plausible inference is that the parties did not anticipate so many

claimants would be unable to comply with the 20-month claims period established by the FSA, and judicial intervention would only rarely be required.

[32] According to the Defendant, an order delegating authority to decide leave applications to a third party would constitute a fundamental change to the terms of the FSA, and would exceed this Court's supervisory jurisdiction. The FSA constitutes a complete code for the receipt, substantive review and assessment of all claims, whether they are submitted (a) before the Individual Application Deadline, (b) during the Extension Period, or (c) after the Extension Period. A claim submitted after the expiry of the Extension Period may be accepted for substantive review by the Administrator only with leave of the Court.

[33] The parties agree that applications for leave of the Court to submit late claims must be determined in accordance with the Rules. As occurred in the 13 leave applications presently before the Court, claimants must submit affidavits in support of their requests for leave. Claimants are potentially subject to cross-examination, although to date the Defendant has not availed himself of that opportunity. The claimants must request confidentiality orders from the Court to safeguard the sensitive personal information contained in their individual leave applications.

[34] This must be contrasted with the many aspects of the FSA that suggest the parties never intended the Court to adjudicate multiple applications for leave to submit late claims. Numerous provisions of the FSA are crafted to ensure the claims process is trauma-informed, non-adversarial, confidential, and restorative in nature.

[35] According to the General Principles contained in Schedule Q of the FSA dealing with the claims process and administration:

> The claims process is not meant to be adversarial. It aims to provide just compensation for meritorious claims and at the same time ensure that Claims are properly, fairly and expeditiously assessed on the basis of adequate and sufficient validation, wherever possible. To the extent possible, the claims process should be restorative in nature.

[36] The confidentiality of the claims process is addressed in s 20 of the FSA:

> Any information provided, created or obtained in the course of this settlement, whether written or oral, will be kept confidential by the Parties, the Parties' counsel, all Class Members, the Administrator and the Assessor(s) and will not be shared or used for any purpose other than this settlement unless otherwise agreed by the Parties or as otherwise provided for or required by law.

[37] The FSA also provides for a comprehensive "Restorative Engagement program" to allow interested Class Members to communicate their experiences of sexual misconduct in the military workplace to senior representatives of the Canadian Armed Forces or the Department of National Defence, in the hope of restoring their faith in those institutions (FSA, s 5.01).

[38] As the Supreme Court of Canada held in *JW* at paragraph 31, the obligations in a settlement agreement must be read in light of the agreement's spirit, to address the damage inflicted by, or as a result of, a defendant's conduct. It would be incompatible with the overarching principles of the FSA to resolve numerous applications for leave to participate in the settlement in the public and adversarial manner contemplated by the Rules.

[39] Furthermore, s 10.03 of the FSA states that the Administrator's duties include "(i) such other duties and responsibilities as the Court may from time to time by order direct". Section 10.04 similarly defines the Assessors' duties and responsibilities to include "(g) such other duties and responsibilities as the Court may from time to time by order direct".

[40] The Plaintiffs also rely on Rule 334.26 in support of their contention that the Court may appoint a third party to determine whether further late claims should be accepted. Rule 334.26(1) provides as follows:

| **Individual questions** | **Points individuels** |
| --- | --- |
| **334.26 (1)** If a judge determines that there are questions of law or fact that apply only to certain individual class or subclass members, the judge shall set a time within which those members may make claims in respect of those questions and may | **334.26 (1)** Si le juge estime que certains points ne sont applicables qu'à certains membres du groupe ou du sous-groupe, il fixe le délai de présentation des réclamations à l'égard des points individuels et peut : |
| **(a)** order that the individual questions be determined in further hearings; | **a)** ordonner qu'il soit statué sur les points individuels au cours d'autres audiences; |
| **(b)** appoint one or more persons to evaluate the individual questions and report back to the judge; or | **b)** charger une ou plusieurs personnes d'évaluer les points individuels et de lui faire rapport; |
| **(c)** direct the manner in which the individual questions will be determined. | **c)** prévoir la manière de statuer sur les points individuels. |

[41] The Defendant says that Rule 334.26 confers upon a judge a wide discretion to craft procedures for the resolution of individual issues that remain unresolved following a common issues trial. However, it is unclear whether the Rule has any application where the parties have

entered into a settlement agreement. The Plaintiffs respond that the Rules governing class proceedings give this Court considerable flexibility to resolve individual issues through numerous avenues, including the court-supervised individual assessment process under Rule 334.26 (citing *Salna v Voltage Pictures, LLC*, 2021 FCA 176 at para 103). The Plaintiffs note that the equivalent section of the Ontario *Class Proceedings Act, 1992* permits a court to delegate the determination of individual issues to a third party only with "the consent of the parties" (s 25(1)(c)), suggesting that the scope of Rule 334.26 is broader.

[42] Whether pursuant to the provisions of the FSA, or in accordance with Rule 334.26, I am satisfied that the Court may assign to either the Administrator or the Assessors the additional duty and responsibility of deciding whether further claims may be accepted following the expiry of the Extension Period. This additional duty and responsibility must be performed applying "the interests of justice" test in *Hennelly*, and in accordance with directions provided by the Court.

[43] In my view, the Administrator is best suited to perform this additional duty and responsibility. The Administrator has considered and accepted approximately 19,000 claims for determination by the Assessors. These include late claims that were brought in extenuating circumstances. The Administrator has a wealth of experience in determining whether claims may be accepted while respecting the need to maintain confidentiality, avoid an adversarial context, and promote restorative engagement.

[44] If at any time questions or concerns arise regarding the Administrator's assessment of claims submitted after the expiry of the Extension Period, these may be brought before the Court on application by Class Counsel, the Defendant, or the Lead Assessor.

C. *Should this Court grant leave to 13 Class Members to submit their claims after the expiry of the Extension Period?*

[45] The Plaintiffs' Motion for Directions is accompanied by 13 applications for leave to submit claims beyond the Individual Application Deadline and Extension Period. The grounds for leave fall into the following five categories: (a) technical issues relating to the submission of the claim form; (b) physical, emotional or psychological issues impeding the claimant's ability to make a timely claim; (c) misunderstanding, being misled, or a lack of adequate knowledge regarding eligibility under the FSA, the claims procedure, or the confidentiality provisions; (d) fear of reprisal or negative consequences; and (e) lack of notice.

[46] The Defendant has not cross-examined any of the 13 leave applicants on their affidavits, and their factual assertions are therefore uncontested. The Defendant nevertheless maintains that all but one of the leave applications should be dismissed.

[47] According to the Defendant, claimants had many avenues to submit a claim, and an isolated technical issue is not a sufficient excuse for failing to submit a claim in a timely manner. The 20-month claims period was unusually long, and was specifically intended to accommodate any physical, emotional or psychological impediments to a claimant's ability to submit a claim within the prescribed deadlines.

[48] The Defendant emphasizes that the notice plan was approved by the Court, and the Plaintiffs do not argue the plan was inadequate. External and internal communications to Class Members, including from the Chief of Defence Staff and Deputy Minister of National Defence, were clear and unambiguous, and encouraged all Class Members to take advantage of the

settlement. The Defendant says a bald assertion that a claimant was misled, or did not understand the terms of the FSA, is insufficient justification for granting leave to submit a claim after the Extension Period.

[49] The Defendant concedes that one of the 13 leave applications should be granted. This concerns a claimant who submitted a claim before the Individual Application Deadline, but used an incorrect e-mail address. The claimant did not receive an alert that the claim had not been transmitted. However, the Administrator subsequently acknowledged receipt of supporting medical records, and assured the claimant that the documents would be added to the file. The Defendant therefore accepts that this claimant was given a false assurance that the claim had been accepted for filing, and it is in the interests of justice to permit the claim to proceed.

[50] Otherwise, the Defendant says the remaining 12 leave applications should all be refused, because the reasons advanced were all contemplated by the parties when they negotiated the Individual Application Deadline and the Extension Period. The primary benefits to the Defendant of agreeing to the FSA were certainty and finality. The Defendant therefore argues that permitting more than "a handful" of claims after the Extension Period will have cascading effects that will cause prejudice to the Defendant.

[51] The FSA sets a cap of $900,000,000 for the settlement of all claims, with the possibility of some reallocation of funds among the different Classes in specified circumstances. According to the Plaintiffs, there is no danger that this cap will be reached, even if all of the approximately 640 late claims are ultimately accepted. This is due in part to the high success rate of referrals of

the most serious category of FSA claimants to the disability pensions program administered by the Department of Veterans Affairs.

[52] The FSA does not prescribe an end date for the adjudication of claims. The Plaintiffs therefore argue that the Defendant's concern about "cascading effects" is misplaced. While it may be necessary to extend the terms of the Administrator and Roster Assessors, this will not unduly interfere with the bargain struck between the parties.

[53] The parties agree that certainty and finality are important considerations in the interpretation and implementation of the FSA. There must ultimately be an end date for the acceptance of claims. While the Defendant has not demonstrated that permitting further claims beyond the Extension Period will currently result in prejudice, I accept that prejudice will result unless the Court provides clear directions on the acceptance of late claims and sets a final date by which all claims must be submitted. Only then can the administration of the FSA be finally concluded and all successful claimants compensated for the harms they have suffered.

[54] The 13 claimants who requested leave of the Court to submit claims after the Extension Period did so without knowing the test that would be applied to the determination of their applications. The Administrator is better placed than the Court to decide whether late claims should be accepted, while preserving confidentiality, avoiding an adversarial context, and promoting restorative engagement. The 12 contested applications will therefore be referred to the Administrator for assessment, together with all other claims received after the expiry of the Extension Period.

## V. Conclusion

[55] The Administrator shall decide whether to accept the 12 late claims for which leave of the Court has been sought in this motion, and all other claims received after the expiry of the Extension Period, in accordance with the directions provided in the Order that accompanies these Reasons. The Administrator shall not accept any further late claims 30 days beyond the date of the Order.

[56] The Court will issue a separate Order granting leave to the lone claimant whose leave application is not contested by the Defendant, and addressing the confidentiality of all 13 leave applications that accompanied this Motion for Directions.

# ORDER

**THIS COURT ORDERS that** the Administrator shall decide whether to accept the 12 late claims for which leave of the Court was sought in this motion, and all other claims received after the expiry of the Extension Period, in accordance with the following directions:

1. The Administrator shall accept a claim submitted after the expiry of the Extension Period only if the claimant establishes: (1) a continuing intention to pursue the matter; (2) the claim has some merit; (3) no prejudice arises from the delay; and (4) there is a reasonable explanation for the delay.

2. The failure to establish one of the four preceding criteria is not determinative. However, it will ordinarily be necessary for the claimant's explanation to account for the totality of the delay, up to and including the date on which the claim is submitted.

3. The Administrator shall not accept any further late claims more than 30 days beyond the date of this Order.

4. Class Counsel, the Defendant or the Lead Assessor may apply to the Court at any time for further directions regarding the acceptance of late claims.

"Simon Fothergill"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKETS:** | T-2111-16<br>T-460-17 |
| **STYLE OF CAUSE:** | SHERRY HEYDER, AMY GRAHAM AND NADINE SCHULTZ-NIELSEN v THE ATTORNEY GENERAL OF CANADA<br><br>LARRY BEATTIE v THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | TORONTO, ONTARIO AND BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | DECEMBER 8 AND 9, 2022 |
| **ORDER AND REASONS:** | FOTHERGILL J. |
| **DATED:** | JANUARY 6, 2023 |

**APPEARANCES:**

| | |
|---|---|
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| Christine Mohr<br>Diya Bouchedid<br>Marilyn Venney | FOR THE DEFENDANT |

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