



**EDITOR'S NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Federal Courts Reports*.

## PRACTICE

### CLASS PROCEEDINGS

Motion for directions regarding implementation of late claims provision (Late Claims Provision) in final settlement agreement (FSA) negotiated between plaintiffs, defendant in two class proceedings — Proceedings, FSA encompassing two classes consisting of women, men who experienced sexual misconduct while serving in Canadian Armed Forces, in Department of National Defence, and as Staff of the Non-Public Funds, Canadian Forces — FSA established individual application deadline (Individual Application Deadline) of 18 months from implementation date of May 25, 2020 — Also provided for additional period of 60 days within which class members could continue to submit claims, provided Administrator was satisfied they were delayed “due to disability” or “due to other exceptional circumstances” (Extension Period) — In addition, FSA conferred upon Federal Court discretion to grant leave to permit further late claims after expiry of Extension Period referred to as Late Claims Provision — At time motion heard, estimated that approximately 640 late claims had been received by Administrator after expiry of Extension Period — Parties herein disagreeing about test to be applied in granting leave to permit late claims, manner in which Late Claims Provision should be administered — In addition to motion for directions, plaintiffs seeking leave on behalf of 13 class members to submit their claims after expiry of Extension Period — Plaintiffs noting that Late Claims Provision in FSA specifically authorizing the granting of leave to late claimants; stating that Federal Court having jurisdiction to appoint Administrator to decide whether to admit late claims — Plaintiffs also relying on *Federal Courts Rules*, SOR/98-106, in particular rule 8, which allows for the extension of any period fixed by order — Motion may be granted under rule 8 whenever it is in “interests of justice” to do so — Defendants stating in particular that supervising court’s jurisdiction to administer settlement agreement is limited to filling gap or applying term of agreement; that supervising court has no jurisdiction to rewrite terms of settlement unless this power is expressly conferred by terms of settlement — Also arguing that once settlement is concluded, no provision in agreement or settlement approval order should be changed unless all parties agree or provision is invalid — According to defendant, directions requested by plaintiffs not addressing any gap in settlement — Issues were: what test should be applied when determining whether to grant leave to submit late claims?; how should Late Claims Provision be administered?; should leave be granted to 13 class members to submit their claims after expiry of Extension Period? — FSA confers general discretion to permit further late claims after Extension Period — However, FSA silent about test to be applied — Nor clear whether discretion must be exercised on case-by-case basis or whether directions may be provided to administrators or assessors regarding circumstances in which further late claims may be accepted after expiry of Extension Period. — Authority that had closest resemblance to this case was Ontario Superior Court of Justice’s decision in *Guglietti v. Toronto Area Transit Operating Authority*, [2000] O.J. No. 2144 (Sup. Ct.) (QL) — In that case, “interests of justice” test to grant leave to late claimant applied — FSA in this case contemplating that further claims may be submitted after expiry of Extension Period with leave — No reason to depart from application of “interests of justice” test in *Guglietti* in comparable circumstances — When applying interests of justice test under rule 8, necessary to consider whether party seeking leave has established: (1) continuing intention to pursue matter; (2) that application has some merit; (3) that no prejudice arising from delay; (4) that there is reasonable explanation for delay — Failure to establish

one of preceding criteria is not determinative, as real test is ultimately that justice be done between parties — Regarding administration of late claims provision, reasonable to infer that parties anticipated number of claims submitted after Individual Application Deadline, Extension Period to be small — However, in reality, number was significant — Obligations in settlement agreement must be read in light of agreement's spirit, to address damage inflicted by, or as result of, defendant's conduct — Would be incompatible with overarching principles of FSA to resolve numerous applications for leave to participate in settlement in public, adversarial manner contemplated by Rules — Furthermore, FSA, s. 10.03 stating that Administrator's duties include "such other duties and responsibilities as the Court may from time to time by order direct" — As to whether, pursuant to provisions of FSA, or in accordance with rule 334.26, Administrator or assessors may be assigned additional duty, responsibility of deciding whether further claims may be accepted following expiry of Extension Period, Administrator is best suited to perform this additional duty, responsibility — Administrator has considered, accepted approximately 19,000 claims for determination by assessors, including late claims that were brought in extenuating circumstances — With respect to late claims of 13 class members, FSA not prescribing end date for adjudication of claims — Must be end date for acceptance of claims — While defendant not demonstrating that permitting further claims beyond Extension Period will result in prejudice, prejudice will result unless clear directions provided on acceptance of late claims, final date set by which all claims must be submitted — Thirteen claimants who requested leave to submit claims after Extension Period did so without knowing test that would be applied to determination of their applications — Administrator better placed to decide whether late claims should be accepted — Therefore, Administrator shall decide whether to accept 12 late claims for which leave sought in this motion, all other claims received after expiry of Extension Period, in accordance with directions provided in Order accompanying reasons — Administrator shall not accept any further late claims 30 days beyond date of Order — Separate Order to be issued granting leave to lone claimant whose leave application not contested, addressing confidentiality of all 13 leave applications accompanying present motion.

HEYDER V. CANADA (ATTORNEY GENERAL) (T-2111-16, T-460-17, 2023 FC 28, Fothergill J., reasons for order dated January 6, 2023, 20 pp.)