Federal Court  Cour fédérale

Date: 20240913

Docket: T-2111-16

Citation: 2024 FC 1447

Ottawa, Ontario, September 13, 2024

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SHERRY HEYDER
AMY GRAHAM
NADINE SCHULTZ-NIELSEN

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

and

CORPORAL ELVIRA JASZBERENYI

Petitioner/Moving Party

ORDER AND REASONS

I. Overview

[1] On November 25, 2019, this Court certified a class proceeding brought on behalf of women and men who experienced sexual misconduct while serving in the Canadian Armed Forces [CAF], the Department of National Defence [DND], and as Staff of the Non-Public Funds, Canadian Forces (*Heyder v Canada (Attorney General)*, 2019 FC 1477 [*Heyder 1*]. The proceeding was certified in accordance with a Final Settlement Agreement [FSA] negotiated on behalf of the parties and approved by the Court.

[2] The FSA provided for compensation in an aggregate amount of up to $900 million through an efficient and non-adversarial claims process, accompanied by numerous systemic changes and programs (*Heyder 1* at para 6). The claims period continued for 18 months following implementation of the FSA, with the possibility of a 60-day extension in exceptional circumstances.

[3] Class members who wished to opt out of the class proceeding were required to do so within 90 days following the Court's certification and approval of the FSA. The deadline for opting out was therefore February 24, 2020.

[4] Phase I of the Notice Plan was approved by this Court on July 18, 2019 (*Heyder v Canada (Attorney General)*, 2019 FC 956). Notices issued in accordance with Phase 1 informed

Class members of their ability to opt out if they did not wish to be bound by the FSA. Phase II of the Notice Plan was approved by this Court on November 25, 2019. The notices issued in accordance with Phase II again explained to Class members their right to opt out and the consequences of failing to do so.

[5] On January 6, 2023, this Court ordered that late claims could be accepted after the extension period, provided that claimants established: (1) a continuing intention to pursue the matter; (2) the application had some merit; (3) no prejudice arose from the delay; and (4) there was a reasonable explanation for the delay (*Heyder v Canada*, 2023 FC 28 [*Heyder 2*]). The final date for the acceptance of late claims was February 6, 2023.

[6] The Petitioner is a former member of the CAF who falls within the class definitions contained in the FSA. The Petitioner submitted this motion to opt out of the class proceeding in December 2023, almost four years after the time in which to do so expired.

[7] The FSA does not authorize this Court to grant extensions of time for class members to opt out of the class proceeding after the 90-day period prescribed by the FSA. Even if the Court did possess this authority, the Petitioner has not provided a reasonable explanation for her delay, or demonstrated that the Defendant will not suffer prejudice if she is permitted to opt out at this late stage.

[8] The motion for leave to opt out of the class proceeding is therefore dismissed.

II. Background

[9] The Petitioner alleges that she was sexually assaulted by another member of the CAF while undergoing training at Canadian Forces Base Borden in 2018. She says that the subsequent investigation by the Canadian Forces National Investigation Service was inadequate. In November 2018 she submitted a complaint to the Military Police Complaints Commission [MPCC]. The MPCC dismissed most of her complaint as unsubstantiated. She commenced an application for judicial review of the MPCC's decision, but discontinued it in October 2022.

[10] The Petitioner did not submit a claim under the FSA before the end of the late claims period. Nor did she opt out of the class proceeding before the prescribed 90-day deadline.

[11] The Petitioner maintains that she always intended to bring a civil action against the Defendant, but believed she should wait until the conclusion of criminal proceedings before doing so. Her alleged assailant has been charged, but his trial has yet to take place. She says she was not aware of the need to opt out of the class proceeding in order to preserve her right to pursue an individual action.

[12] The Petitioner does not dispute that she received notice of the class action under Phase I of the Notice Plan. She acknowledges that she may have received notice under Phase II, but she says she was not monitoring her CAF e-mail account at the time and she does not recall receiving it. She says that mental and physical health conditions prevented her from fully understanding the implications of the notice she received.

[13] The Petitioner consulted legal counsel, and was advised that an individual civil action against the Defendant would be foreclosed by s 9 of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50. She was further advised that a civil action against her assailant would be expensive, time-consuming and stressful, and was unlikely to result in meaningful compensation. The Petitioner says that her former counsel encouraged her to submit a claim under the FSA, but did not inform her of the need to opt out if she wished to pursue an individual action against the Defendant.

[14] The Petitioner has commenced a civil action in the Ontario Superior Court against her former legal counsel in which she seeks redress for the allegedly negligent advice she received (*Jasberenyi et al v Drapeau et al*, Court File No CV-24-00095135-0000).

III. Issues

[15] This motion for leave to opt out of the class proceeding raises two issues:

A. Does this Court have jurisdiction to permit class members to opt out of the class proceeding after expiry of the 90-day period prescribed by the FSA?

B. If so, should the Petitioner be granted leave to opt out?

IV. Analysis

A. *Does this Court have jurisdiction to permit class members to opt out of the class proceeding after expiry of the 90-day period prescribed by the FSA?*

[16] A supervising court's jurisdiction to administer a settlement agreement is limited to filling a gap or applying a term of the agreement. 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 (*JW v Canada (Attorney General)*, 2019 SCC 20 at paras 27, 31-32, 35; *Fontaine v Canada (Attorney General)*, 2018 ONSC 103 at para 154; *Gray v Great-West Lifeco Inc*, 2011 MBQB 13 at paras 48, 57-80).

[17] In *Waldron v Canada (Attorney General)*, 2024 FCA 2 [*Waldron*], a class member under the Indian Day Schools Settlement Agreement [IDSSA] sought an order requiring the claims administrator to consider the further documentation of abuse she submitted following the filing of her original claim for compensation, and increase the level of compensation to which she was entitled. She also sought a declaration recognizing a similar entitlement on the part of other members of the class. The motions judge refused to grant the order requested. The Federal Court of Appeal (*per* Laskin JA) affirmed the decision, holding as follows (at para 84):

> […] There may be an implicit right to amend in some litigation or administrative proceedings (though I note that in the former context, the Federal Courts Rules are explicit in conferring the right, and also in most cases require leave before amendments may be made: see rules 75-76 and 200-201). But the claims process

> under the IDSSA is a different kind of proceeding; it is prescribed by contract, so that the rules governing litigation do not apply. To recognize an implicit right to amend the IDSSA would also run counter to the "entire agreement" and the "no amendment without consent of the parties" clauses of the IDSSA, and would ignore the binding nature of the Agreement and its judicial approval. It would, in addition, deprive class action settlements of any certainty.

[18] The Petitioner relies on the Federal Court of Appeal's decision in *Salt River First Nation #195 v Tk'emlúps te Secwépemc First Nation*, 2024 FCA 53 [*Salt River*] for the proposition that a court may exercise its discretion to permit a class member to opt in (and by analogy to opt out) of a class proceeding after the time in which to do so has expired. However, in that case the applicant sought to opt in to the proceeding before the settlement agreement had been approved by the Court. The respondents argued that the Court's jurisdiction on the settlement approval hearing was limited to approving or denying the settlement agreement as it stood, and that even if the Court had the necessary powers, it would be inappropriate to add the applicant to the class at that time (*Salt River* at para 25). The Federal Court of Appeal (*per* Rennie JA) found fault with the motion judge's analysis of the applicant's evidence and arguments, but ultimately found it could grant no useful remedy. The decision is of limited assistance in the present motion.

[19] As in *Waldron*, the FSA in this case contains "entire agreement" and "no amendment without consent of the parties" clauses:

> 19.04 Amendments
>
> Except as expressly provided in this FSA, no amendment or supplement may be made to the provisions of this FSA and no restatement of this FSA may be made unless agreed to by the Parties in writing and any such amendment, supplement or

> restatement is approved by the Court without any material difference.
>
> 21.03 Entire FSA
>
> Subject to Section 19.04 regarding amendments, this FSA constitutes the entire agreement among the Parties with respect to the subject matter of this FSA and cancels and supersedes any prior or other understandings or agreements between or among the Parties with respect thereto, including the [Agreement in Principle, dated March 15, 2019]. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between or among the Parties with respect to the subject matter of this FSA other than as expressly set forth or referred to in this FSA.

[20] The opt-out provision in the FSA may be contrasted with the late claims provision considered by this Court in *Heyder 2*:

> 7.08 Late Individual Claims
>
> […] 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.

[21] The late claims provision prohibits the acceptance of claims after the prescribed deadline except by "leave of the Court". However, the parties did not confer upon the Court a similar discretion to permit class members to opt out of the FSA after the prescribed deadline has expired (FSA, s 1.01; 3.06):

> **1.01 Definitions**
>
> "Opt Out Period" means the ninety (90) day period commencing on the Approval Date
>
> **3.06 Opt Out Process and Form**

> Class Members who wish to Opt Out of the proceeding may do so during the Opt Out Period. […]

[22] Granting the Petitioner's motion would constitute a significant change to the express terms of the FSA. The parties applied their minds to the opt-out period of 90 days, presumably taking into account that class members, by definition, would have suffered some degree of hardship or trauma due to their experience of sexual misconduct.

[23] This Court therefore lacks the authority to grant the Petitioner leave to opt out of the class proceeding at this late stage.

[24] Should I be wrong in this conclusion, I will address whether the Petitioner has met the test for obtaining leave to opt out of the class proceeding after the time in which to do so has expired.

B. *Should the Petitioner be granted leave to opt out?*

[25] Rule 334.21(1) of the *Federal Court Rules*, SOR/98-106 provides that:

> (1) A class member involved in a class proceeding may opt out of the proceeding within the time and in the manner specified in the order certifying the proceeding as a class proceeding.

[26] Class members can opt out after a deadline only exceptionally, such as where the evidence shows they could not make a fully informed and voluntary decision about whether or not to remain a member of the class (*Hébert v Wenham*, 2020 FCA 186 at para 22).

[27] In *Johnson v Ontario*, 2022 ONCA 725 [*Johnson*], the Ontario Court of Appeal acknowledged that "[t]he right to opt out is fundamental not just to a class member, but to the integrity of the class proceedings scheme" (at para 48). Nevertheless, "Court-imposed deadlines have purposes, are meant to be treated seriously, and are intended to have consequences" (at para 51).

[28] The test in *Johnson* is derived from the American case of *Re PaineWebber Limited Partnerships Litigation*, 147 F (3d) 132 (2d Cir 1998), and is applied as follows (*Johnson* at para 52):

> […] a court grants extensions only where (i) the delay in opting out is due to excusable neglect – in good faith and with a reasonable basis – and (ii) the court has considered whether any prejudice will accrue to participating class members, the defendant, or the integrity of the process, from permitting the late opt-out.

[29] The test "balances, on the one hand, the importance of the right to opt out, and, on the other, the importance of there having been a court-ordered deadline for doing so" (*Johnson* at para 46). The Court in *Johnson* continued (at para 51):

> Were there no deadline, or if it could be flouted, cavalierly ignored, or strategically treated as an invitation to "wait and see" … these matters would be an uncertain and moving target, to the potential prejudice of those with carriage of the class proceeding who must make decisions as to how to conduct it on behalf of the participating class members, and to defendants in deciding how to respond to it. [Footnote omitted]

[30] The first criterion under the *Johnson* test is that the delay be the result of excusable neglect, and the claimant's acts or omissions be in good faith with a reasonable basis.

[31] The Petitioner says that she had an honest, if mistaken, belief that she should await the outcome of criminal proceedings against her assailant before launching a civil suit, based in part on advice she received from her former counsel that she might appear "greedy" if she testified at the criminal trial while pursuing a civil claim. She was under the impression that if she did not submit a claim under the FSA, then she would retain her right to pursue an individual claim. Neither DND nor her former counsel told her otherwise.

[32] The Petitioner also asserts that the sexual assault adversely affected both her physical and mental health. She says there were aspects of DND's conduct that may have exacerbated her condition, and may provide additional grounds for permitting her to opt out late (citing *Robinson v Rochester Financial Limited*, 2012 ONSC 911 at para 11). The Petitioner notes that her civil claim would not be subject to any statutory limitation period (citing s 16(1)(h)-(h.3) of the Ontario *Limitations Act, 2002*, SO 2002, c 24, Sched B).

[33] In *Johnson*, a class member was permitted to opt out late because he had been incarcerated throughout the opt-out period and had not received notice. Here, the Petitioner acknowledges that she received the Phase I notice, although she does not recall receiving the Phase II notice. She says that the Defendant's radio announcements in English and French did not mention the need to opt out of the class action before pursuing an individual action, but there is no evidence that the Petitioner ever heard anything about the class proceeding on the radio. In any event, the Defendant says that the sufficiency of the notice plan must be assessed holistically, and the Petitioner did in fact receive the requisite notice.

[34] Furthermore, the Petitioner had legal representation throughout the relevant period. She discussed different legal options with her counsel, including advancing a claim under the FSA. She submitted a complaint to the MPCC, and sought judicial review of its subsequent dismissal. She initiated a private criminal prosecution, and then applied to have a publication ban rescinded after the Attorney General of Ontario assumed responsibility for the prosecution.

[35] Even if the Petitioner may have received incomplete advice, she had "readily available information about the possible benefits of the class proceeding through the court-approved notice of certification" (*1250264 Ontario Inc v Pet Valu Canada Inc*, 2013 ONCA 279 at para 71). The Defendant notes that the Petitioner has not provided any medical records or reports to substantiate her physical or mental health conditions during the relevant time.

[36] The Defendant says that the process to opt out was not complicated. It involved checking four boxes on a form to confirm membership in the class and awareness of the implications of opting out. The form could be submitted by mail or email, and the Administrator was available to answer any questions that claimants or their counsel might have.

[37] I agree with the Defendant that the Petitioner's circumstances are not materially different from those of many other class members, and therefore neither exceptional nor excusable. The kinds of challenges she faced were not unique among class members, and were squarely before the parties when they negotiated the FSA. This is reflected in the confidential and non-confrontational claims process that was specifically designed to avoid re-traumatization.

[38] One of the goals of class proceedings is judicial economy (*Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 27). This inevitably requires that reasonable deadlines be imposed on both claims and opt-outs. Judicial economy will be frustrated if timelines are made flexible according to the priorities and preoccupations of individual claimants.

[39] Nor has the Petitioner demonstrated that the Defendant will not suffer prejudice if the motion is granted. Permitting the Petitioner to opt out at this late stage will enable her to avoid the binding effect of the FSA, including the full and final release approved by the Court. It will deprive the Defendant of the finality promised by the FSA. It will also prejudice "those with carriage of the class proceeding who must make decisions as to how to conduct it on behalf of the participating class members", and will harm the administration of justice (*Johnson* at para 51).

[40] In *Romeo v Ford Motor Co*, 2019 ONSC 1831, Justice Edward Morgan of the Ontario Superior Court of Justice refused a motion by five class members to opt out of a class proceeding after the time in which to do so had expired. His comments bear repeating here (at paras 20-21):

> I sympathize with these individuals and acknowledge that, taking each one on its own, there would be little cost to waiving the deadline and allowing the opt-out. As counsel point out, however, there are precedential ramifications of making such an allowance. If one can permit a flexible deadline for a week or two then why not for a month or two or even for a year or two, provided that the person making the request is *bona fide* in his or her claim not to have known about the settlement earlier? This would be unduly cumbersome for the administration of the claims, but at the same time there is no principled reason why such late claims should be distinguished from the 5 that I have before me.

> This is a case where all of the potential class members were known to the Defendants, and they opened their data banks to the claims administrator to ensure that everyone received notice of the settlement. The only truly principled way to address class members' opt-out is to enforce the deadline for all claimants. If the cut-off date cannot be overlooked for all, it cannot be overlooked for any one.

[41] The parties agree that nothing in the FSA prevents the Petitioner from applying for an award or benefits under the *Pension Act*, RSC 1985, P-6 and/or the *Veterans Well-being Act*, SC 2005, c 21.

V. Conclusion

[42] The Petitioner's motion for leave to opt out of the class proceeding is dismissed.

[43] Consistent with Rule 334.39(2), no costs are awarded.

ORDER

THIS COURT ORDERS that the Petitioner's motion for leave to opt out of the class proceeding is dismissed without costs.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2111-16
STYLE OF CAUSE:	SHERRY HEYDER, AMY GRAHAM AND NADINE SCHULTZ-NIELSEN v THE ATTORNEY GENERAL OF CANADA CORPORAL ELVIRA JASZBERENYI, PETITIONER/MOVING PARTY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 5, 2024
ORDER AND REASONS:	FOTHERGILL J.
DATED:	SEPTEMBER 13, 2024

APPEARANCES:

Marilyn Venney Julie De Marco Sara Quinn-Hogan	FOR THE DEFENDANT
Guy Lavergne	FOR THE PETITIONER/MOVING PARTY

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT
Guy Lavergne Barrister and Solicitor Saint-Lazare, Quebec	FOR THE PETITIONER/MOVING PARTY