



Court File: T-72-15

FEDERAL COURT

PROPOSED CLASS PROCEEDING

BETWEEN:

FERNAND KENNEY

Applicant

- and -

ATTORNEY GENERAL of CANADA

Respondent

**APPLICATION pursuant to section 18.1 of the *Federal Courts Act*,
R.S.C. 1985, c. F-7**

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on page 3 herein.

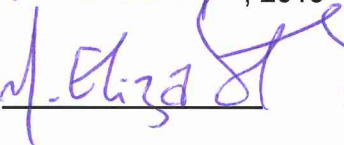
THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this Application be heard at Halifax, Nova Scotia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the Application or to be served with any documents in the Application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this Notice of Application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Dated: 19 January, 2015

Issued by:  Elizabeth Caverly
Director - Directrice

Address of local office:

Federal Court Registry
1720 – 1801 Hollis Street
Halifax, NS B3J 3N4

APPLICATION

Proposed Class

1. This is an application for judicial review brought by Fernand Kenney on his own behalf and on behalf of the proposed Class. Mr. Kenney proposes the following Class:

All former Canadian Forces members who meet the following criteria:

- a) was medically released from the Canadian Forces on or after December 1, 1999;
- b) receives, or received, a *Pension Act* disability pension; and
- c) is not a class member in *Manuge v. Canada*, T-463-07 because they purportedly were not approved for long term disability benefits.

Decision Under Review

2. This is an application for judicial review in respect of the December 18, 2014 decision (received January 2, 2015) ("Decision") of a SISIP Financial Services Vice President that Mr. Kenney, similar to members of the proposed Class, is a "late claim applicant" under the post-December 1999 SISIP Policy 901102 and therefore must meet the more onerous criteria of "totally disabled" and "provide evidence to support that he was prevented by a medical condition from applying within the required 120 day timeline to be eligible for benefits."

Order Sought

3. Mr. Kenney hereby applies, and on behalf of the proposed Class, for the following:
 - a) An Order pursuant to Rules 334.16(1) and 334.17 of the *Federal Courts Rules* (the "Rules") certifying this action as a class proceeding and providing any ancillary directions;
 - b) An Order pursuant to Rules 334.12(3), 334.16(1)(e) and 334.17(b) appointing Mr. Kenney as the representative applicant for the Class;
 - c) An Order that the Decision be set aside;
 - d) An Order declaring that Mr. Kenney and members of the Proposed Class be approved for 24 months of long term disability benefits from their release date, and more if the member is medically eligible, under SISIP Policy 901102; and
 - e) that the matter be disposed of in accordance with such directions as this Honourable Court deems appropriate.

Grounds of this Application

The grounds of this application are:

1. Mr. Kenney served in the Canadian Forces from 1976 until he was involuntarily medically released in October 2005.
2. Mr. Kenney was involuntarily medically released from the Canadian Forces due to his post traumatic stress disorder, which he suffers as a result of his deployment to Sarajevo during the Bosnian War in 1993.
3. Mr. Kenney receives a *Pension Act* disability pension from Veterans Affairs Canada in recognition of his service related PTSD. The *Pension Act* disability pension is a non-pecuniary benefit intended to recognize the obligations of the people and Government of Canada to members who have been disabled as a result of their military service. The *Pension Act* disability pension is assessed based on the effect of the disability on a member's quality of life.
4. Throughout his CF service, Mr. Kenney paid premiums for the SISIP long term disability insurance policy. ("Insurance Policy") The purpose of the long term disability benefit was to replace a portion (75%) of the member's lost income if the member became disabled.
5. CF members medically released from the Canadian Forces on or after December 1, 1999 are entitled to 24 months of long term disability benefits under the Insurance Policy. This is akin to an "own occupation" insurance policy. In order to receive long term disability benefits after 24 months, the member must be "totally disabled", or unable to perform "any occupation" as defined in the Insurance Policy.
6. All members that were released from the Canadian Forces were informed by the Canadian Forces and SISIP that their monthly long term disability benefit would be calculated as 75% of their monthly pre-release salary less certain offsets, including an offset for their *Pension Act* disability pension.
7. Furthermore, all members were required to sign a Conditions of Benefits Agreement prepared by SISIP in order to receive their long term disability benefit, where they were required to agree that all benefits paid to them from the following sources would be paid over to SISIP: "benefits from the other relevant sources including the Canada Pension Plan, Quebec Pension Plan, Canadian Forces Superannuation Act, Government Employee Compensation Act (GECA), Worker's Compensation Act, Automobile Insurance and the Pension Act."
8. However, the offset of many of the above purported "relevant sources" was clearly not permitted by the actual terms of the Insurance Policy.
9. On May 1, 2012, in the class action *Manuge v. Canada*, the Federal Court ruled that the offset of the *Pension Act* disability pension was not permitted under the terms of the Insurance Policy. On behalf of the Respondent, the Honourable Peter MacKay, the then-Minister of National Defence, accepted the Federal Court's decision.

10. Mr. Kenney and all medically released members of the Canadian Forces were misinformed of their rights and benefits under the Insurance Policy by their employer and insurer, the Canadian Forces and SISIP. SISIP is a division of the Canadian Forces.
11. As a result of being misinformed, Mr. Kenney believed that he was not entitled to receive any benefits under the Insurance Policy. As a result, he made the rational decision not to complete the lengthy application form, pay for a medical examination and sign a flawed Conditions of Benefits Agreement.
12. On August 30, 2005, Mr. Kenney wrote to the administrator of the plan that he believed that he was not eligible for the benefit due to the offsets:
 - 1...Mon salaire à la sortie des FAC était de \$58,000.
 - 2...Mon salaire à la retraite est de \$31,511 (pension des FAC)
 - 3...Pension des ACC est \$28,000 (non imposable)
 - 4...Donc je ne rencontre pas les norme admissible à une demande de prestations d'invalidité prolongée no : 533088.
13. Following the *Manuge* decision, Mr. Kenney attempted to claim his long term disability benefits.
14. SISIP has taken the position that Mr. Kenney is now outside of the purported deadline of 120 days to apply under the Insurance Policy. Mr. Kenney has unsuccessfully pursued the internal SISIP appeal process to its conclusion, which was the Decision.
15. In rendering the Decision, the decision maker committed an error of law by failing to consider any of the following equitable and common law legal principles: relief from forfeiture, repudiation, and estoppel by representation.
16. In rendering the Decision, the decision maker committed an error of law and fact by asserting that there was a contractual requirement in the Insurance Policy that a member make a claim within 120 days of his release.
17. In rendering the Decision, the decision maker committed an error of law and fact by failing to consider that all the required information was provided to the insurance administrator within the purported 120 day deadline.

Documentary Evidence

This application will be supported by the following material:

1. affidavit on behalf of Mr. Kenney; and
2. such other material as counsel may advise and this Honourable Court permit.

Documentation Requested

Pursuant to subsections 317(1) and (2) of the *Federal Courts Rules*, the Applicant requests that the Respondent send to the Registry and to the Applicant a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Respondent:

All documentation of the Respondent concerning Mr. Kenney's application for a long term disability benefit and the reasons for its denial.

Dated: January 19, 2015



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TO: Registrar