Federal Court Cour fédérale

Date: 20160331

Docket: T-72-15

Citation: 2016 FC 367

Ottawa, Ontario, March 31, 2016

PRESENT: The Honourable Mr. Justice Martineau

PROPOSED CLASS PROCEEDING

BETWEEN:

FERNAND KENNEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] This is a motion made by Mr. Fernand Kenney [applicant] to certify as a class proceeding the underlying judicial review application in respect of the class which is defined as follows:

> All former Canadian Forces [Forces] members who meet the following criteria:
>
> a) was medically released from the Forces on or after December 1, 1999;

b) receives, or received, a disability pension under the *Pension Act*, RSC 1985, c P-6 [*Pension Act*]; and

c) is not a class member in *Manuge v Canada*, T-463-07 [*Manuge*].

[2] The subject matter of this judicial review proceeding concerns the legal consequences for the applicant and members of the proposed class of their late submission – or absence of filing – of a timely claim for long term disability [LTD] benefits under Part III (B) Post-November 30, 1999 Long Term Disability Insurance Plan [the LTD Plan], which is found in the SISIP Insurance Policy 901102 [SISIP Policy]. The SISIP Policy is a contract between the Chief of the Defence Staff [CDS], as the Policy owner, and Manulife, as the Insurer.

[3] Under section 18 of the *National Defence Act*, RSC 1985, c N-5 [*National Defence Act*], the CDS is charged with the control and administration of the Forces. The Service Income Security Insurance Program [SISIP] is a division of the Forces, created under the authority of section 39 of the *National Defence Act*, which has provided financial and insurance services to serving and retired Forces members since 1969. SISIP personnel are considered "Staff of the Non-Public Funds", listed as a "Separate Agency" under Schedule V of the *Financial Administration Act*, RSC 1985, c F-11.

[4] The LTD benefits to which members of the Forces are entitled, as well as the requirements to qualify for these benefits, are set out in the terms of the current LTD Plan, which applies to insured members of the Forces who were released from the Forces after November 30, 1999 (section 22). Part III (A) of the SISIP Policy (former Part III) applies to insured members of

the Forces who were released from the Forces before December 1, 1999. All LTD benefits are payable to a member or a beneficiary on a strictly contractual basis. Staff at SISIP do not have any discretion to alter or vary the terms of the SISIP Policy.

[5] Pursuant to section 22 of the LTD Plan, an insured member will be eligible to receive a monthly benefit for up to twenty-four (24) months, immediately following his date of release from the Forces, if (i) the insured member is medically released from the Forces on or after December 1, 1999; and (ii) there is clear, objective medical evidence, satisfactory to the Insurer that, at the time of release, the insured member suffers from an active, medically determinable physical or mental impairment. As provided by section 23, subject to section 1.g.(iv) and section 24, the monthly income benefit will be 75% of the member's monthly pay.

[6] However, an insured member's eligibility to receive LTD benefits is contingent on the filing of a written proof of claim, within 120 days after the member's date of release from the Forces. Section 36 of the LTD Plan prescribes:

> a. Written proof of claim in a form satisfactory to the Insurer, covering the occurrence, character and extent of loss for which a claim for benefits is made, must be furnished to the Insurer within 120 days after the member's date of release from the Canadian Forces. Upon receipt of such proof, satisfactory to the Insurer, the Insurer will commence payment.
>
> b. Written proof of the continuance of such claim must be furnished, to the Insurer, at such intervals as it may reasonably require and at no cost to the Insurer.
>
> c. The Insurer shall have the right to require, as part of the proof of claim, satisfactory evidence:
>
> > (i) that the member either is not eligible or has made an application for all benefits referred to in Section 24; and

(ii) that he has furnished all required proofs for such benefits; and

(iii) of the amount of such benefits payable.

[7] The class proposed by the applicant, who would act as designated representative, includes all former Forces members medically released on or after December 1, 1999, who receive or received a *Pension Act* disability pension, and who are not *Manuge* class members. It is not challenged in this proceeding that the applicant and members of the proposed class have no immediate cause of action against the Crown on the basis of *Manuge*, which, according to the Order rendered by the Court on May 20, 2008, applies to "all former members of the Canadian Forces whose long-term disability benefits under S.I.S.I.P Policy No. 901102 were reduced by the amount of their VAC [Veterans Affairs Canada] Disability benefits received pursuant to the *Pension Act* (the "Class") from April 17, 1985 to date" (*Manuge v Canada,* 2008 FC 624 [*Manuge 2008*]).

[8] What about the legal issues decided in *Manuge*?

[9] In 1976, in recognition of the inadequacy of the monthly *Pension Act* benefits, SISIP LTD coverage was expanded to include service-related disabilities. The *Manuge* class action relates to the legality and proper interpretation of section 24(a)(iv) of Part III(B) of the LTD Plan, which reduces monthly LTD benefits payable under section 23 by "the total monthly income benefits payable to the member under the *Pension Act*". In 2007, in his action against the Crown, instituted under section 17 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], Mr. Dennis Manuge sought various forms of relief, including a declaration that

section 24(a)(iv) was unlawful pursuant to the provisions of the *Pension Act*, that it was *ultra vires* the legislative authority of the Crown, that it breached the public law duty owed by the Crown, and that it violated section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The plaintiff also sought an order that the members of the class be reimbursed in an amount equal to the amount of LTD benefits illegally deducted, as well as liability and general damages against the Crown.

[10] In 2008, Justice Barnes dismissed the Crown's objection that the legality of the impugned provision of the applicable LTD Plan and its application by SISIP personnel could only be challenged by way of a judicial review application under sections 18 and 18.1 of the *Federal Courts Act*. Finding that "this proceeding seems […] to be ideally suited to certification as a class action", my colleague allowed the plaintiff's motion for certification (*Manuge 2008* at para 42). However, considering that the action instituted by the plaintiff amounted to a collateral attack either against the initial decision to add subparagraph (iv) to subsection 24(a) of the SISIP Policy or the monthly decisions to reduce the LTD benefits received by the plaintiff by the sum of the VAC disability benefits received under the *Pension Act*, the Federal Court of Appeal reversed the order made by Justice Barnes: *Manuge v Canada*, 2009 FCA 29 [*Manuge 2009*].

[11] In 2010, the Supreme Court of Canada allowed the plaintiff's appeal and reinstated the certification order: *Manuge v Canada*, [2010] 3 SCR 672, 2010 SCC 67 [*Manuge 2010*]. Under subsection 17(1) of the *Federal Courts Act*, the Federal Court has concurrent jurisdiction to entertain to the plaintiff's claim against the Crown as an action for damages (*Canada (Attorney*

General) v TeleZone Inc, [2010] 3 SCR 585, 2010 SCC 62). Furthermore, the Supreme Court of Canada refused to stay the action and dismissed the Crown's argument that, in essence, the plaintiff's pleadings constituted a judicial review under sections 18 and 18.1 of the *Federal Courts Act*. The parties in *Manuge* later agreed to have the contractual aspect of their dispute resolved on a preliminary basis by summary judgment. On May 1, 2012, Justice Barnes ruled that the *Pension Act* disability pension offset was in breach of the "Parliamentary intent that is inherent in the *Pension Act* which is to provide modest financial solace to disabled CF members for their non-financial losses" and not contractually justified under section 24(a)(iv) of the current LTD Plan: *Manuge v Canada*, 2012 FC 499 at para 63 [*Manuge 2012*]. The parties agreed to settle the monetary claims of the some 7500 members (or their families).

[12] On January 9, 2013, the applicant made contact with SISIP, after becoming aware of the *Manuge 2012* decision. On March 11, 2013, a SISIP Services class action administrator advised the applicant that his option at that time was to file a late claim. On March 20, 2013, the applicant's portion of the LTD benefits application was received by SISIP. The claim was then reviewed and it was determined that the applicant had in fact been medically capable of making an application for LTD benefits within 120 days of his release from the Forces. As a result, his claim was denied on September 4, 2013.

[13] The underlying judicial review application is in respect of a final decision made by the Senior Vice President Commercial Services [decision-maker] of SISIP Financial Services, dated December 18, 2014 [impugned decision]. The decision-maker denied the second level appeal in

respect of the applicant's claim to receive LTD benefits. The letter of refusal, addressed to the applicant's counsel, provided the following rationale:

> Thank you for your letter dated September 10, 2014 on behalf of Mr. Kenney. I apologize for the delay in providing the response.
>
> As per previous interpretation of similar cases and direction provided on these from the Civil Litigation & Advisory Group, Department of Justice Canada Atlantic Regional Office to the Bruneau Group, we provide the following response to your appeal on behalf of Mr. Kenney.
>
> The right to appeal only exists by virtue of the Settlement Order and is only available to Class Members. The class is defined in the Settlement Order as: all former members of the Canadian Forces whose Long Term Disability (LTD) benefits under SISIP Policy No. 901102 were reduced by the amount of their Veterans Affairs Canada (VAC) disability benefits received pursuant to the Pension Act from June 1, 1976 to the date of this order. Anyone who does not fit within this definition is not a member of the class, is not covered by the Settlement Order, and does not have a right to appeal.
>
> As Mr. Kenney does not fit within the definition of a Class Member as defined in the Settlement Order, his claim is assessed as a late claim applicant under the Post-December 1999 policy as he is applying beyond 120 days after his date of release. Under the terms of the policy, he must qualify as "totally disabled" at the time of his release, 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.
>
> As a result of our review of information on file, we conclude that while Mr. Kenney may have been suffering a degree of disability at the time of his release, there is no evidence to support that he was prevented by a medical condition from applying within the required timeline. However, should there be additional medical evidence that would support that Mr. Kenney was medically incapable at the time of his release to apply for LTD, I would be pleased to review and reconsider his claim.
>
> With respect to the VAC award and Quebec Pension Plan (QPP) benefits, as indicated by SISIP Services/Manulife in the 22 August 2014 letter, "the assessment and eligibility requirements of each agency, including SISIP are independent of one another".

> Taking into account all of the facts available to me regarding Mr. Kenney's file, I conclude that his claim has been administered in accordance with the SISIP policy and I hereby deny the second level appeal.

[14] The applicant maintains today that he and all disabled members of the Forces who are not included in the *Manuge* class have the contractual right to receive LTD benefits under sections 22 and 23 of the LTD Plan, despite the fact that they have not submitted a claim to the Insurer within 120 days after their date of release from the Forces, as long as they were medically released from the Forces on or after December 1, 1999 and are receiving or received a disability pension under the *Pension Act*. The applicant now seeks, on his behalf and on behalf of the proposed class, an order of the Court under section 18.1 of the *Federal Courts Act* that the impugned decision be set aside, as well as a general declaration or order declaring that the applicant and members of the proposed class be approved for twenty-four (24) months of LTD benefits from their release date, and more if the member is medically eligible, under the current LTD Plan.

[15] The Attorney General of Canada [respondent] opposes the present motion. In addition to submitting that the usual conditions to certify a judicial review application as a class proceeding are not met, the respondent directly questions the power of this Court to certify the present judicial review application as a class proceeding, since there is no evidence that the decision-maker has made a determination that affects the rights of any class member, other than the representative applicant himself. Furthermore, since the cause of action and the relief sought by the applicant are essentially based on an alleged (mis)representation by the Crown or its agents, as well as on equity, the present judicial review application is not the proper procedure to resolve

the issues of fact and law raised, nor to grant the relief sought by the applicant on behalf of the members of the proposed class.

[16] Should the Court certify the present judicial review application as a class proceeding?

[17] Class proceedings are governed by Part 5.1 of the *Federal Courts Rules*, SOR/98-106 [Rules]. Rules 334.16 set out the conditions for certification. Besides, the use of the word "solely" or "*uniquement*" in Rule 334.18 suggests that while the enumerated factors may indeed be relevant considerations on a motion for certification, none of these factors, either singly or combined with the other factors mentioned in Rule 334.18, will, by themselves, provide a sufficient basis to decline certification (*Buffalo v Samson Cree Nation*, 2008 FC 1308 at para 37, affirmed 2010 FCA 165). Rules 334.16 and 334.18 are reproduced in Annex A to the Reasons.

[18] A reasonable prospect of success must be made out on the pleadings alone, as no additional evidence may be considered (*Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, 1990 CanLII 90 (SCC) at para 33; *R v Imperial Tobacco Canada*, [2011] 3 SCR 45, 2011 SCC 42 at paras 68-70). Furthermore, in order for a class proceeding to be certified, all members of the class must benefit from the successful prosecution of the action or application, although not necessarily to the same extent (*Pro-Sys Consultants Ltd v Microsoft Corporation*, [2013] 3 SCR 477, 2013 SCC 57 at para 108 [*Pro-Sys Consultants*]).

[19] An applicant will satisfy the first requirement mentioned in Rule 334.16(1)(a) in a judicial review application unless "the cause of action is so clearly improper as to be bereft of

any possibility of success" (*King v Canada*, 2009 FC 796 at para 17). The applicant affirms that the proposed class proceeding discloses a "reasonable cause of action" allowing the Court to set aside the impugned decision and to declare or order under sections 18 and 18.1 of the *Federal Courts Act* that the applicant and all members of the proposed class be approved by SISIP for twenty-four (24) months of the LTD benefits – and more if the member is medically eligible – under sections 22 and 23 of the LTP Plan.

[20] The applicant enrolled in the Forces in 1976 at the age of 17 and served until he was involuntarily medically released. The applicant was diagnosed with a post-traumatic stress disorder [PTSD], which he suffered as a result of his deployment in Sarajevo during the Bosnian War in 1993. The applicant was put on sick leave on March 12, 2003 due to his disability, and was medically released from the Forces on October 23, 2005. Under the *Pension Act*, the applicant receives a monthly disability pension and exceptional incapacity allowance from Veterans Affairs Canada in recognition of his service-related PTSD (sometimes called VAC benefits). The *Pension Act* disability pension is a non-pecuniary, non-taxable benefit that recognizes the obligation of the people and Government of Canada to provide compensation to those members of the Forces who have been disabled or have died as a result of military service, and to their dependants (*Pension Act* at section 2). The *Pension Act* disability pension is assessed based on the effect of the disability on a member's quality of life.

[21] Veterans Affairs Canada has assessed the applicant's disability at 101%. The applicant alleges that on March 23, 2005, he contacted SISIP Services/Manulife and indicated that he had received a SISIP application package but did not wish to apply, as he would be making well over

what he made in the Forces with his *Canadian Forces Superannuation Act* pension and employment income. The SISIP Service/Manulife case manager with whom he spoke apparently explained to the applicant that if he chose to apply and was approved he would have SISIP as a backup. The case manager then requested that the applicant forward a letter confirming that he did not wish to apply and requesting that SISIP close his file. The file notes in regard to the applicant indicate that on August 18, 2005, the case manager sent the applicant a follow up letter encouraging him to apply for benefits under the LTD Plan. The applicant wrote back to SISIP on or around August 30, 2005, indicating that the combination of his Forces pension and Veterans Affairs (*Pension Act*) pension was in excess of the amount of his salary at his time of release from the Forces, and that he did not meet the requirements for LTD benefits. His file was subsequently closed.

[22] Despite the fact that he did not make a timely claim in 2005, the applicant submits in this respect that three distinct causes of action individually and collectively exist: (1) relief from forfeiture, (2) repudiation, and (3) estoppel by representation. The applicant readily admits that such causes of action are based solely on the non-respect of the LTD Plan, which is a contract, and that the late submission of his claim for LTD benefits was caused by past "representations" made by Crown agents which was found to be erroneous in *Manuge 2012*. These misrepresentations became known to the applicant when the Court ruled in *Manuge 2012* that the offset of VAC benefits was not contractually justified under section 24(a)(iv) of the current LTD Plan.

[23] Moreover, with respect to each of the proposed common questions, the applicant submits the following:

i. Relief from forfeiture:

- The "conduct" or "breach" by the class members was the same, i.e. they did not submit the common SISIP claims package within 120 days of their medical release. In addition, SISIP has acknowledged that it made representations to all medically released Forces members, which explained that their LTD benefits would be reduced as a result of their *Pension Act* disability pension.

ii. Repudiation:

- The repudiation is common to all class members, as SISIP acknowledged that it made representations to all medically released Forces members explaining that their LTD benefits would be completely or partially reduced as a result of their *Pension Act* disability pension. Now SISIP insists on the same strict compliance with the 120-day deadline for all class members.

iii. Estoppel by representation:

- SISIP made the same representation to all of the proposed class members. SISIP required class members to complete the same Claims Form with the same Conditions of Benefit Agreement. The class members all acted to their detriment, as they did not submit the Claims Form for LTD benefits.

[24] With respect to the existence of an identifiable class of two or more persons (Rule 334.16(1)(b)), the applicant submits that, in this regard, the inquiry is limited to determining whether two or more people qualify within the proposed class definition, and whether the class has been defined by reference to objective criteria. The applicant maintains that the proposed class definition is objective and clear. The applicant notes that there are already

seventeen (17) other individuals who indicate that they meet the proposed class definition. Furthermore, the applicant claims that the respondent had the ability to determine how many individuals meet the three requirements of the class definition, and yet failed to provide the number of proposed members, in spite of Rule 334.15(5)(c), which stipulates that each party set out in its affidavit "to the best of the person's knowledge, the number of members in the proposed class."

[25] Regarding the issue of whether the claims of the class members raise common questions of law and fact pursuant to Rule 334.16(1)(c), the applicant states that the underlying question is whether allowing certification as a class proceeding will avoid duplication of fact-finding or legal analysis. Moreover, the common questions need not be determinative (*Sivak v Canada*, 2012 FC 271 at para 4). The fact that other individuals may not have received a decision letter similar to that received by the applicant does not negate the proposed common questions, as all members of the proposed class are similarly prevented from having their LTD benefits considered because of the 120 day deadline strictly applied by SISIP despite its misinterpretation of the LTD Plan.

[26] With respect to the class proceeding being the preferable procedure for the just and efficient resolution of the common questions, pursuant to Rule 334.16(1)(d), the applicant maintains that neither the applicant's claim nor the claims of the proposed class are individually viable. The applicant could not afford to pursue this claim on his own, absent a class proceeding. As the Federal Court held in *Manuge 2008* at para 28, "[t]he issue of access to justice is an important consideration in determining whether a proceeding ought to be certified." In addition,

in the present case, members of the proposed class are a particularly vulnerable population, with each member suffering at least some form of disability, which must be taken into consideration along with the interests of judicial economy. While the "representations" alleged in the applicant's pleadings can well be raised in an action against the Crown claiming monetary relief under section 17 of the *Federal Courts Act*, applicant's counsel explained at the hearing that they can also be invoked under the public law to set aside any illegal decision made by a federal board or challenged in a judicial review proceeding.

[27] Finally, the applicant notes that in the present proceedings, the common questions constitute the heart of the litigation, and will be determinative of all or most of the claims advanced by the class members (Rule 334.16(2)(a)); that there is not a significant number of class members with a valid interest in individually controlling the prosecution of separate proceedings (Rule 334.16(2)(b); that to the applicant's knowledge, no single class member has been able to justify the solitary exercise and expense of bringing a claim in an individual action or judicial review, meaning that a class proceeding is the only way these claims can be heard (Rule 334.16(2)(c)); that under the circumstances, a class proceeding is the preferable procedure because it provides a fair, efficient and manageable method to answer the common questions, and there are no alternative means of resolving the claim or granting the requested relief (Rule 334.16(2)(d) and (e)); and that the representative applicant is appropriate (Rule 334.16(1)(e)).

[28] Nevertheless, I conclude that the present motion must be dismissed, as I find the applicant's evidence and arguments with respect to certification unconvincing. I have considered all relevant factors mentioned in the Rules, as well as the numerous cases cited by the parties

(although not necessarily mentioned in these Reasons). In determining pursuant to Rule 334.16(1)(a) whether the applicant's pleadings disclose a reasonable cause of action, I have assumed for the purposes of the present motion for certification that the facts as pleaded in the Notice of Application filed on January 19, 2015 by the applicant are true. For the remaining certification requirements mentioned in Rule 334.16(1), the party seeking certification must present evidence that there is "some basis in fact" for each requirement. I have considered the totality of the affidavit evidence and material submitted by the parties in their respective motion records, while ignoring the third sentence in paragraph 3, as well as the entirety of paragraphs 4 and 5 of the affidavit of Mr. Phil Marcus, since the latter purports to explain the Federal Court's decision in *Manuge*, which is not proper affidavit evidence (*Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at paras 2-3).

[29] Despite the low evidentiary standard (*Pro-Sys Consultants* at paras 99 and 104), I am not satisfied that all the conditions mentioned in Rule 334.16(1) are met in this case and that the Court should exercise its discretion to certify the present application for judicial review as a class proceeding. In particular, I am not satisfied that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact – if any – raised in the present judicial review application, considering all relevant matters in light of the elements mentioned in Rule 334.16(2).

[30] Pursuant to subsection 18.1(1) of the *Federal Courts Act*, an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. Rule 301 provides that the Notice of Application for

judicial review must specify the tribunal in respect of which the application is made and the date and details of the decision in respect of which judicial review is sought. I am ready to assume, for the sake of argument, that the impugned decision made on December 18, 2014 by the SISIP Vice President can be reviewed by the Court under sections 18 and 18.1 of the *Federal Courts Act* (*Manuge 2009* at para 44), but the fact remains that no other class member would have an individual right to have the impugned decision set aside, as no other class member was before the decision-maker or is the subject of the decision for which review is sought by the applicant.

[31] While the applicant alleges that there are eighteen (18) known putative class members including himself, there is no evidence before the Court indicating that SISIP has made a final decision denying LTD benefits to any of these other class members, either on a basis identical or similar to the circumstances in which the applicant was denied benefits. Moreover, the present judicial review application lacks a rational connection to the proposed common issues (*Hollick v Toronto*, [2001] 3 SCR 158, 2001 SCC 68 at paras 19-20). In the present case, the specific relief sought by the applicant – that is, that the impugned decision be set aside – deals only with the applicant's specific circumstances and not with those of any other potential claimant. As no other class member has pursued the internal appeal process to its conclusion, there is no one in the class whose circumstances mirror those of the applicant or whose interests can be affected by the decision under review. For example, the proposed class would include those who voluntarily chose not to apply for LTD benefits for reasons unrelated to any offset, those who were able to find alternative employment for a period extending beyond the 120 days following their release, as well as those who became totally disabled within the meaning of the policy at a later date. As a result, the proposed class definition is overbroad.

[32] Moreover, the record before the decision-maker, upon which the judicial review will rely, deals exclusively with the individual situation of the applicant and the grounds for refusing his claim under the LTD Plan. Accordingly, there is no reasonable prospect of success for the proposed class as a whole, based on the pleadings before the Court. At best, the applicant may be entitled under subsection 18.3(3) of the *Federal Courts Act* to obtain an order setting aside the impugned decision with respect to his eligibility to submit a late claim for LTD benefits under the terms of the LTD Plan. There is no general power under subsection 18.3(3) of the *Federal Courts Act* – except in rare cases of bad faith on the part of the decision-maker – to render the decision that should have been rendered by the decision-maker on the merits of a claim. This is especially so where, as in the present case, the claim was even not considered on its merits, since it was found to have been made late under the contract. Furthermore, an award in damages cannot be made against the Crown in a judicial review application.

[33] As far as some sort of a *mandamus* order that could be sought in the alternative, this would require an amendment to the present Notice of Application, as the evidence would need to show that there are a number of unprocessed and outstanding claims submitted to the decision-maker or SISIP. It is apparent that the vast majority of the members of the proposed class are not members of the Forces who have submitted late claims and were refused, but rather, members of the Forces released on or after December 1, 1999 who did not make any claim. Furthermore, the proposed class includes members who receive or have received a disability pension under the *Pension Act*. While the Court is authorized to create subclasses, in the present case, this would defeat the whole purpose of an application for judicial review, which is to be heard and determined summarily without delay.

[34] True, if it considers it appropriate, the Court can direct that an application for judicial review be treated and proceeded with as an action (such request has not been made by the applicant), but it must be remembered that the evidence in a judicial review application is limited in principle to the tribunal's record (except where there are allegations of bias or a breach of natural justice). Reasonableness is presumed and the Court cannot make its own evaluation of the evidence on record, or consider new evidence, in order to determine whether the impugned decision is reasonable. The applicant does not seek a general declaration that the contractual requirement to submit a proof of claim within the 120 day time bar (section 36 of the current LTD Plan) is contrary to the law or the Constitution, but basically that each and all members of the class have a claim against the Crown on the basis of its previous "misrepresentations". This poses the question of why the applicant has not chosen in the first place to pursue an action against the Crown under section 17 of the *Federal Courts Act*, since the ultimate aim of the members of the proposed class is to obtain monetary relief from the Crown, as though they were all individually approved under section 22(a) of the SISIP Policy for 24 months of LTD benefits from their release date, and more if the member would have been medically eligible under section 22(b) of the SISIP Policy because he was totally disabled.

[35] The parties agree that the determination of the common issues raised by the applicant is not governed in this case by public law principles, but solely by contract law (in the field of insurance) or equity. There are no allegations in the pleadings that the decision-maker breached a principle of procedural fairness or rendered a decision that is not authorized by law or would be unreasonable in light of any jurisdiction or powers conferred to the decision-maker "by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown"

(*Federal Courts Act*, subsection 2(1)). In the present case, the impugned decision of the Senior VP of SISIP was made in the course of SISIP Financial's day-to-day operations, and involved the private function of adjudicating a late claim under the SISIP policy. While I do not make a final determination on this issue, I note that this Court has already held that the "jurisdiction or powers" referred to in the definition of "federal board" do not include private powers that are merely incidents of legal personality exercisable by federal entities (*DRL Vacations Ltd v Halifax Port Authority*, 2005 FC 860 at paras 51-55). In *Peace Hills Trust Co v Moccasin*, 2005 FC 1364 at para 61, this Court also held that "[a]dministrative law principles should not be applied to the resolution of what is, essentially, a matter of private commercial law […]." It is clear that while the Court would have the power to grant *certiorari* and a declaration, it would not have the power to grant monetary damages, which appears to be the ultimate aim of the applicant's "catch-all" request for relief.

[36] I would also add that with respect to the issue of relief from forfeiture, one of the factors to consider in determining whether such relief should be granted is the conduct of the applicant, which would be impossible to determine on a class-wide basis. In addition, the common issue of whether the breach was reasonable is not confined to the failure to submit a completed claim form within 120 days of the date of discharge, but must also be considered in the context of the conduct of the applicant and his or her individual circumstances, including his or her medical condition and whether it may have reasonably rendered the claimant incapable of applying within the 120 day period prescribed by the policy.

[37] Certification should also be refused where numerous individual issues overwhelm common issues, and where the issues are intrinsically individualistic; a common issue cannot be dependent upon findings of fact that have to be made with respect to each individual claimant (*578115 Ontario Inc v Sears Canada Inc*, 2010 ONSC 4571 at para 43). Furthermore, I am not satisfied in this case that the applicant has shown some basis in fact that a class proceeding would be the preferable procedure for resolving common issues, as set out in Rule 334.16(2). Indeed, the Court has the power under Rule 105 to order, in respect of two or more proceedings, that they be consolidated, heard together or heard one immediately after the other, and also, that one proceeding be stayed until another proceeding is determined. This is what the Court did in a recent immigration case that disposed of some ninety-five (95) judicial review applications, each seeking a *mandamus* order against the Minister of Citizenship and Immigration, while more than one thousand similar applications were held in abeyance (*Jia v Canada (Minister of Citizenship and Immigration)*, 2014 FC 596 at paras 4-10).

[38] In addition, the principal goals of the class proceeding must be engaged, including judicial economy, access to justice, and behaviour modification, and the class proceeding must offer an efficient and fair procedure to all parties, including the Court (*Markson v MBNA Canada Bank*, 2007 ONCA 334 at para 70; *AIC Limited v Fischer*, [2013] 3 SCR 949, 2013 SCC 69 at para 16). I doubt very much that a class proceeding would meet these goals in the present case. Another consideration is the number of potential class members (*Gary Jackson Holdings Ltd v Eden*, 2010 BCSC 273 at para 69). While the “matter” (*Krause v Canada*, 1999 CanLII 9338 (FCA) at para 21) raised by the applicant in his judicial review application questions the application of 120 day requirement found in section 36 of the LTD Plan, contrary to *Manuge*, the

applicant does not ask that the Court declare the impugned provision illegal or *ultra vires* of the powers granted to the CDS, including to the Insurer or any Crown agent or SISIP officer acting under the authority of the *National Defence Act* or the SISIP Policy.

[39] For the above reasons, the motion to certify the present judicial review application as a class proceeding is therefore dismissed. The parties do not request costs and none will be awarded to the respondent.

ORDER

THIS COURT ORDERS that the motion made by the applicant to certify the present application for judicial review as a class proceeding is dismissed without costs.

"Luc Martineau"
Judge

ANNEX A

Federal Courts Rules, SOR/98-106, Rule 334.16:

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	(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

as to how the proceeding is progressing,

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

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

(3) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass members requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who

(3) Si le juge constate qu'il existe au sein du groupe un sous-groupe de membres dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe de sorte que la protection des intérêts des membres du sous-groupe exige qu'ils aient un représentant distinct, il n'autorise l'instance comme recours collectif que s'il existe un représentant demandeur qui :

(a) would fairly and adequately represent the interests of the subclass;

a) représenterait de façon équitable et adéquate les intérêts du sous-groupe;

(b) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;

b) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du sous-groupe et tenir les membres de celui-ci informés de son déroulement;

(c) does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other subclass members; and

c) n'a pas de conflit d'intérêts avec d'autres membres du sous-groupe en ce qui concerne les points de droit ou de fait communs;

(d) provides a summary of any agreements respecting fees and

d) communique un sommaire des conventions relatives aux

disbursements between the representative plaintiff or applicant and the solicitor of record.	honoraires et débours qui sont intervenues entre lui et l’avocat inscrit au dossier.

Federal Courts Rules, SOR/98-106, Rule 334.18:

334.18 A judge shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:	334.18 Le juge ne peut invoquer uniquement un ou plusieurs des motifs ci-après pour refuser d’autoriser une instance comme recours collectif :
(a) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact;	a) les réparations demandées comprennent une réclamation de dommages-intérêts qui exigerait, une fois les points de droit ou de fait communs tranchés, une évaluation individuelle;
(b) the relief claimed relates to separate contracts involving different class members;	b) les réparations demandées portent sur des contrats distincts concernant différents membres du groupe;
(c) different remedies are sought for different class members;	c) les réparations demandées ne sont pas les mêmes pour tous les membres du groupe;
(d) the precise number of class members or the identity of each class member is not known; or	d) le nombre exact de membres du groupe ou l’identité de chacun est inconnu;
(e) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members.	e) il existe au sein du groupe un sous-groupe dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Daniel Wallace Robert Mroz	FOR THE APPLICANT
Paul Vickery Lori Rasmussen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McInnes Cooper Halifax, Nova Scotia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT