Federal Court Cour fédérale

**Date: 20170706**

**Docket: T-1499-16**

**Citation: 2017 FC 658**

**Ottawa, Ontario, July 06, 2017**

**PRESENT: The Honourable Madam Justice McDonald**

**BETWEEN:**

**BRUCE WENHAM**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

## ORDER AND REASONS

[1] On this motion, Bruce Wenham seeks an order certifying his judicial review application as a class proceeding. In the underlying application, Mr. Wenham seeks review of the August 12, 2016 decision denying him compensation under the Thalidomide Survivors Contribution Program [TSCP].

[2] In the proposed class proceeding, Mr. Wenham seeks to certify an application on behalf of all individuals who had claims for compensation denied by the TSCP for failing to provide the

required proof of eligibility. He argues that a class proceeding is the most efficient manner to bring forward these claims and he submits that is the best way to ensure access to justice.

[3] The Respondent's position is that the conditions necessary to certify this judicial review as a class proceeding are not met. Relying upon this Court's recent decision in *Fontaine v Canada (Attorney General),* 2017 FC 431 [*Fontaine*], the Respondent argues that the underlying judicial review does not raise a justiciable issue.

[4] For the reasons that follow, this motion to certify this application for judicial review as a class proceeding is denied.

## I. Background

[5] Mr. Wenham was born on July 14, 1958, with bilateral deformities to his arms. He claims that his mother was provided with thalidomide by Dr. Shapiro at Mount Sinai Hospital in Toronto.

[6] In 1959, Mr. Wenham and his family relocated in England. He was not registered by the Canadian government as a thalidomide victim. His parents and Dr. Shapiro have all passed away and medical records are apparently no longer available.

[7] In 1990, the federal government established a compensation program for Canadian thalidomide victims pursuant to an Order in Council titled the *HIV-infected persons and Thalidomide Victims Assistance Order,* P.C 1990-4/872 [OIC]. The program created under this

Order in Council, the Extraordinary Assistance Plan for Thalidomide Victims [EAP], provided lump sum payments to eligible applicants.

[8] In August 1991, Mr. Wenham, who was then living in Canada, submitted an application under the EAP. His application was refused as the information he provided did not establish that his mother had taken thalidomide during her pregnancy.

[9] In March 2015, the Minister of Health announced a new package of financial assistance for those affected by thalidomide, the aforementioned TSCP, which provides compensation for:

- Individuals who received payments in 1991 pursuant to the EAP program; and
- Individuals who submitted TSCP applications before May 31, 2016, and who met the criteria of the 1991 EAP

[10] Health Canada appointed Crawford & Company as the TSCP Administrator [the Administrator] and provided direction on the documentary proof necessary to establish eligibility pursuant to the EAP program. The evidence required to establish eligibility was set by Health Canada. Neither the OIC nor the EAP make reference to eligibility requirements.

[11] The evidence necessary was medical or pharmacy records confirming the maternal ingestion of thalidomide (known by the brand names Kevadon or Talimol) in Canada during the first trimester of pregnancy. The following documents were identified as being acceptable to establish eligibility:

- Copies of doctor's prescription; or
- Hospital birth records or other medical / pharmacy records; or
- If no records are available, proof in the form of a sown statement (affidavit) from persons with direct knowledge of the event may be acceptable, e.g. physician stating that he / she prescribed the drug to the individual's mother

[12] On July 4, 2016, Mr. Wenham submitted an application with supporting documentation to the Administrator for assessment of his eligibility to receive compensation under the TSCP.

[13] On August 12, 2016, his application was denied by the Administrator on the basis that he failed to provide the specific documentary evidence required to establish the maternal ingestion of thalidomide.

[14] Pursuant to the TSCP, there is no review or appeal process of the Administrator's decision.

## II. Issue

[15] The only issue for determination is whether the underlying application for judicial review should be certified as a class proceeding pursuant to Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [the *Rules*].

## III. Applicable Rules

[16] Rule 334.11 provides that the class proceeding rules are applicable to both actions and applications.

[17] Rule 334.16 outlines the conditions for certification as a class proceeding as follows:

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| **(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, |

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| **(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 as to how the proceeding is progressing, | **(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 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. |

## IV. Analysis

### A. *Reasonable Cause of Action*

[18] The threshold which the Applicant must meet in order to establish a reasonable cause of action is low (*Manuge v Canada*, 2008 FC 624 [*Manuge*] at para 38). On an application for certification as a class proceeding, the Court is not required to make a decision on the merits, but rather the Court need only determine whether a reasonable case exists.

[19] As this is an application for judicial review, the test to be applied for assessing the first condition is the same test as applied for striking out applications for judicial review, namely, "whether the alleged cause of action is so clearly improper as to be bereft of any possibility of success" (see *King v Canada*, 2009 FC 796 at para 17) [*King*].

[20] In his judicial review application, Mr. Wenham argues that the evidentiary criteria and the documentary proof requirements fettered the discretion provided for in the EAP program. He argues that the application of the evidentiary criteria and of the documentary proof requirements imposed by the Respondent were unlawful.

[21] These issues were recently addressed in *Fontaine*, a decision of this Court concerning the eligibility criteria under the TSCP program. The Applicant in *Fontaine* argued that the "Administrator unreasonably limited its assessment to the 1991 EAP criteria" (para 28). The Court in *Fontaine* concluded that the TSCP's eligibility criteria could not be subject to judicial review, as it constitutes a Ministerial policy decision rooted in the Crown's prerogative power over the expenditure of public funds.

[22] In *Fontaine*, Justice Strickland states that the "Crown's decision to make *ex gratia* payments, including its stipulation as to who will be eligible to receive those payments by the effecting of eligibility criteria, derives from and is an exercise of the Crown's prerogative power" (see para 37) and this Court does not have "jurisdiction to assess the reasonableness of the existing criteria or to impose different or new criteria" (see para 39).

[23] As Justice Strickland explains in *Fontaine*, "[w]hether the criteria are well-founded or not, whether they are fair or reasonable or whether the policy's impact upon the Applicant was just or unjust is not the subject of this judicial review which is only concerned with the decision of the Administrator. The Court does not have jurisdiction to review the Program nor to reformulate or add criteria" (see para 43).

[24] Mr. Wenham argues that the decision in *Fontaine* is not applicable to the consideration of the suitability of this matter to continue as a class proceeding, because that would engage in a consideration of the merits of his underlying application, which is outside the scope of this motion.

[25] However, on this Motion, the Court is called upon to make a preliminary assessment of the strength of the proposed class proceeding. It is clear based upon review of the Notice of Application that Mr. Wenham is raising the same or similar issues with the TSCP program as were considered in *Fontaine*. The Court in *Fontaine* concluded that the issue of the reasonableness of the eligibility criteria of the TSCP is not justiciable (para 53). Considering this decision, and the test in *King* (para 17), and though this is not a final determination of the merits of the underling judicial review, I nonetheless conclude that Mr. Wenham's Motion does not meet the first condition of Rule 334.16 (a).

B. *Identifiable Class*

[26] According to the evidence (para 41 of the affidavit of Cindy Moriarty, Executive Director at Health Canada, affirmed on February 23, 2017), 168 individuals were refused support from the TSCP. Mr. Wenham proposes the following class definition: "all individuals whose applications to the Thalidomide Survivors Contribution Program were rejected on the basis of failing to provide the required proof of eligibility." He argues that the class should include all applicants, regardless of whether they have commenced or could have commenced individual applications for judicial review.

[27] The Respondent argues that the proposed class should exclude anyone who has not commenced an application for judicial review of their refusal decisions within 30 days of receiving the decision. This would be a much smaller number of potential Class Members.

[28] The relief sought by Mr. Wenham is to set aside the August 12, 2016 decision to refuse his eligibility for support through the TSCP. This specific relief would not apply to other members of the proposed class, as decision dates would vary across the proposed class. Furthermore, the basis upon which the other denials were made is not known, and they may vary significantly from, or have no connection to, the reasons for the denial of Mr. Wenham's claim.

[29] The decision under review deals uniquely with Mr. Wenham's claim and his specific circumstances. That is the only record before this Court. Therefore, I am not satisfied that there is an identifiable class with sufficient connection to Mr. Wenham's circumstances in order to meet the requirements of Rule 334.16 (b).

C. *Common Issues*

[30] The common issues of fact and law represents the "substantial ingredient" of each Class Member's claim (*Hollick v Toronto (City),* 2001 SCC 68 [*Hollick*] at para 18). It allows the claim to proceed as a representative one and avoids duplication of fact-finding or legal analysis (*Rumley v British Columbia*, 2001 SCC 69 at para 29).

[31] In *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1, the Supreme Court of Canada stated that "the threshold that must be met to find that there are common questions is a low one" (see

para 72). In *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57, the Supreme Court of Canada confirmed at para 108 that a Court should take a purposive approach in assessing common issues. Additionally, it stated that Class Members do not need to be identically situated vis-à-vis the opposing party, nor is it necessary that the common issues predominate over non-common issues.

[32] Here, Mr. Wenham proposes the following common questions:

a. Is the establishment and / or application of the Evidentiary Criteria or Documentary Proof Requirements by Canada in the Thalidomide Contribution Program unlawful pursuant to subsection 18.1(4) of the *Federal Courts Act*?
b. If the answer to (a) is affirmative, what remedies are the Class Members entitled to?

[33] As indicated above, the issue raised in (a) has been answered by the decision in *Fontaine*. Furthermore, without more information as to the basis for the denials of the other proposed Class Members, which may or may not have been based upon the application of evidentiary criteria or documentary proof, it is impossible to determine if there is any commonality with Mr. Wenham's claim.

[34] Further, the common issue posed in (b) appears to seek a remedy outside the jurisdiction of the Court on a judicial review application where the ordinary remedy, if a party is successful, would be to send the matter back for redetermination.

[35] I am not satisfied that the common issue element has been established here.

D. *Preferable Procedure*

[36] Mr. Wenham claims that proceeding by way of individual hearings would be far less practical and less efficient than a class proceeding which, he argues, is the best way to accommodate access to justice for the proposed Class Members.

[37] In this context, the preferability analysis must take into consideration the principal goals of class actions as outlined in *Hollick* as follows:

> [15] First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

[38] Here, the consideration is whether the certification of this application as a class proceeding would achieve the objectives explained by the Supreme Court of Canada in *Hollick*, or if other means of resolving the claim would be preferable.

[39] The judicial review process itself already embodies access to justice features. It is a summary proceeding with specific timelines. Mr. Wenham's application is ready for adjudication.

[40] If this matter were to proceed as a “class” application, it is clear the Respondent will take the position that the limitation period has run for many of the proposed Class Members. This may entail various court applications and appeals.

[41] Further, other options are available under the *Rules*, such as a consolidation of proceedings pursuant to Rule 105 or a representative proceeding pursuant to Rule 114(1), which may be better suited to the particular circumstances of this application.

[42] Considering the circumstances of this present case, I am not satisfied that a class proceeding would be the preferable procedure for the just and efficient resolution of the common issues proposed by the Applicant.

E. *Representative Applicant*

[43] Although I am satisfied that Mr. Wenham would fairly and adequately represent the interests of the proposed Class Members, the proposed litigation plan demonstrates that the Applicant has not considered the challenges of moving this application forward as a class proceeding. There are a number of issues that a class proceeding would introduce to this matter, such as limitation periods and the applicable evidentiary record.

[44] Here, the litigation plan submitted on behalf of Mr. Wenham does not meet the requirements outlined in the Rule 334.16 and as outlined in *Buffalo v Samson First Nation*, 2008 FC 1308 at para 148.

## V. Conclusion

[45] Notwithstanding the low evidentiary threshold, I am not satisfied that the conditions of Rule 334.16 have been met or that this is an appropriate matter to go forward as a class proceeding. While this Motion is not a determination of the merits of Mr. Wenham's application, in light of the decision in *Fontaine*, I am not satisfied that Mr. Wenham has established that his application has a reasonable chance of success. In any event, I am also not satisfied that a class proceeding is the preferable procedure for this application as it would appear to add elements of complexity and delay to an application that is otherwise ready for adjudication. Accordingly, a class proceeding in this instance would not fulfill the class proceeding objectives of judicial economy, access to justice, and a fair and efficient procedures to all parties, including the Court (see *AIC Limited v Fischer*, 2013 SCC 69 at para 16.)

[46] For the reasons stated above, this motion for class certification is dismissed. Pursuant to Rule 334.39(1), no costs are awarded.

**ORDER in T-1499-16**

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

"Ann Marie McDonald"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1499-16 |
| **STYLE OF CAUSE:** | BRUCE WENHAM v THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MAY 9, 2017 |
| **ORDER AND REASONS:** | MCDONALD J. |
| **DATED:** | JULY 06, 2017 |

**APPEARANCES:**

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