Federal Court Cour fédérale

Date: 20170329

Dockets: T-1584-16
T-1712-16

Citation: 2017 FC 331

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 29, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

Docket: T-1584-16

BETWEEN:

CLAUDIE BRIAND

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1712-16

AND BETWEEN:

DENIS RODRIGUE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] Both of these cases involve a motion to strike certain paragraphs (4 to 10 and 23) and certain exhibits (A to F) or parts of exhibits (G, M and N) from an affidavit sworn in each record by a representative of Health Canada, Cindy Moriarty, as part of applications for judicial review filed in each case against decisions made by an agent of the Minister of Health tasked with administering the most recent compensation program implemented by the Government of Canada for victims of thalidomide.

[2] Should they not obtain the desired strike, each moving party is alternatively applying for leave to file reply evidence.

[3] Given that the same questions are being asked about the same affidavit, these motions were heard together on March 8, 2017. At the end of the hearing, the parties agreed to try to settle the dispute that is the subject of each motion, and, in order to accommodate the parties, the Court agreed to suspend the proceedings. On March 21, 2017, the parties informed the Court of the partial settlement of the dispute, which settlement was recorded in a written agreement bearing that date. Following that agreement, the only dispute that remained was the presence of paragraphs 8 to 10 of Ms. Moriarty’s affidavit and, by the same token, that of exhibits E and F, to which those paragraphs refer.

[4] Given the estoppel of the issues raised in both motions, the dispute will be settled in a single judgment that will be filed in each docket. Before beginning the analysis of these issues, a brief background is required. The applicant, Claudie Briand, was born in June 1959 with a certain number of defects that she attributes to the fact that her mother, afflicted by severe nausea during her pregnancies, allegedly took samples of thalidomide that she received from her attending physician while she was pregnant with her. The other applicant, Denis Rodrigue, was born on November 9, 1958, also with a certain number of defects that he also attributes to the fact that his mother allegedly took thalidomide samples on the advice of her attending physician while she was pregnant with him.

[5] Thalidomide was removed from the Canadian market in 1962, but it had enough time to create many victims. Ms. Briand and Mr. Rodrigue (collectively, the applicants) feel that they should be counted among those victims.

[6] In 1990, the Government of Canada implemented its first financial support program for thalidomide survivors. In 2015, new measures were implemented through the *Thalidomide Survivors Contribution Program* (the Program), administered by a third party, Crawford & Company (Canada) Inc. (Crawford). To be eligible for financial aid under the Program, applicants must:

a) Provide valid proof of a settlement with the pharmaceutical company;

b) Provide documentary evidence (for example, medical or pharmacy records) that their mother used thalidomide (brand names Kevadon or Talimol) in Canada during the first trimester of pregnancy; or

c) Be listed on an existing government registry of thalidomide victims.

[7] In February 2016, Ms. Briand applied to the Program. Since she had not reached a settlement with a pharmaceutical company and was not listed on an existing government registry of thalidomide victims, she was required to provide documentary evidence establishing that her mother used thalidomide during the first trimester of pregnancy.

[8] On August 24, 2016, Crawford denied Ms. Briand's application for financial support on the grounds that the application did not meet any of the three Program criteria.

[9] As for Mr. Rodrigue, he applied to the Program in May 2016. He was also required to provide documentary evidence that his mother used thalidomide in Canada during the first trimester of pregnancy. As with Ms. Briand, Crawford rejected his application.

[10] With regard to the judicial reviews underlying their respective motions, the applicants make a series of allegations regarding Crawford's refusal to entitle them to financial support under the Program. Essentially, they allege that Crawford misinterpreted the eligibility criteria set forth in the Program, imposed an unreasonable standard of evidence on them, did not give reasons for its decision, and did not consider, in concluding as it did, either the objectives of the Program or the underlying values of the *Canadian Charter of Rights and Freedoms* (the Charter).

[11] The applicants conclude that Crawford's decision is both unreasonable and contrary to the rules of procedural fairness. In terms of relief, they are seeking to have the Court declare that they are eligible to receive the compensation set forth in the Program and order the Minister of Health to pay them the compensation to which they feel they are entitled. Alternatively, they are

seeking to have Crawford's decision set aside and their applications sent back for reconsideration in accordance with the instructions that the Court deems appropriate.

[12] The applicants initiated their respective judicial review proceedings on September 22, 2016, in Ms. Briand's case, and on October 12, 2016, in Mr. Rodrigue's case. The respondent served Ms. Moriarty's affidavit to Ms. Briand on December 19, 2016, and to Mr. Rodrigue on January 12, 2017.

[13] The applicants submit that paragraphs 8 to 10 of Ms. Moriarty's affidavit must be struck out because they contain information that was not available to Crawford when it made its decision. More specifically, they submit that these paragraphs imply, along with supporting reports (exhibits E and F), that the symptoms associated with thalidomide can be caused by other factors, thus suggesting, to their detriment, that they may not be thalidomide survivors.

[14] It is clear that on judicial review, a hearing that is by definition conducted in a summary way according to section 18.4 of the *Federal Courts Act*, RSC, 1985, c F-7, the Court will intervene only exceptionally to determine questions of the admissibility of evidence "where it is clearly warranted" (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 11 [*Access Copyright*]).

[15] I consider that to be the case here, especially since the parties have already done their part by trying to find common ground on what should or should not be included in Ms. Moriarty's affidavit. In other words, I am of the opinion, as the Federal Court of Appeal instructs in *Access Copyright*, that there are grounds to determine the issue of the admissibility of paragraphs 8 to 10

of Ms. Moriarty’s affidavit, in that this issue is first and foremost a question of law, is relatively clear cut, and its resolution should allow the hearing to proceed in a timelier and more orderly fashion (*Access Copyright*, at paragraphs 12–13).

[16] In principle, an application for judicial review must be assessed on the basis of the record that was before the original decision-maker. However, there are certain exceptions to this rule, one of which is cited in the case at bar, in which general information that might assist the Court in understanding the issues relevant to the dispute can be submitted in a judicial review, even if the original decision-maker did not have access to it (*Access Copyright*, at paragraph 20; *Canada (Attorney General) v. Zone3-XXXVI Inc.* 2016 FCA 242, at paragraph 23).

[17] The parties do not agree on the exact nature of the information contained in the three paragraphs in dispute. The respondent argues that these paragraphs contain only general information that might assist the Court in understanding the issues that it will have to decide on their merits and that this information is all the more useful and justified in this case in light of the declaratory relief and the nature of the *mandamus* sought by the applicants and their arguments based on the Charter.

[18] The applicants correctly point out that, in examining their admissibility, the Court must ensure that the paragraphs in dispute “[do] not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider” (*Access Copyright*, at paragraph 20). They add that, if these paragraphs are not struck out, they will likely be forced to file reply evidence, which will not

contribute to allowing the hearing to proceed in a timelier and more orderly fashion, contrary to the objective of subsection 18.4(1) of the *Federal Courts Act*.

[19] To be admissible, the information contained in paragraphs 8 to 10 of Ms. Moriarty's affidavit therefore must be likely to assist the Court in understanding the issues that it will have to decide on their merits, without providing evidence relating to the merits of the dispute. On that basis, the line can sometimes be thin between what is admissible and what is not. In certain respects, that is the case here, as illustrated by, among other things, the compromises the parties have made as to the portions of Ms. Moriarty's affidavit that are identified in the motion and on which they were able to agree.

[20] I therefore consider it necessary to apply these principles to paragraphs 8 to 10 while being as careful as possible not to alter those compromises, even though I am not bound by them. Some continuity in the approach seems desirable to me under the circumstances.

[21] First, it would be appropriate to specify what these three paragraphs are essentially conveying. Paragraph 8 briefly describes the initiatives taken by the Minister of Health in 1962 to understand and address the thalidomide problem. In particular, it refers to a federal-provincial conference on the topic. Paragraph 9 concerns the Canada-wide study that was conducted immediately after that federal-provincial conference. It refers to a document prepared in 1963 by Health Canada (exhibit E), which compiles the information that had been gathered on the issue up to that point. Lastly, in paragraph 10, Ms. Moriarty states that, based on a report from the World Health Organization published in 2014 (exhibit F), even today, it is difficult to distinguish the defects caused by thalidomide from those that are congenital or originate from other sources.

[22] I am of the opinion that the information in paragraph 8, which takes us back to 1962, is essentially of a historical and contextual nature and does not contain evidence relating to the merits of the dispute. It builds on the preceding paragraphs, particularly paragraph 7, in that it describes the first real efforts by the Canadian governments to identify and understand a problem of which the scale and effects were just beginning to be grasped, and that, years later, would justify the creation of a national compensation program for the victims.

[23] I would also retain paragraph 9, since it describes the study that was produced in the wake of the federal-provincial conference referred to in paragraph 8. That study dates back to 1963 and, once again, serves to provide background information. The fact that it mentions the existence of defects that may not be attributable to the ingestion of thalidomide does not, in my view, add any information that was not before the decision-maker. In fact, a document intended for the public entitled [TRANSLATION] "Thalidomide Survivors Contribution Program – Eligibility FAQs" and which is part of Crawford's specifications, reads as follows:

> [TRANSLATION]
>
> Q.6 Some individuals may have similar impairments, injuries and/or physical conditions typically associated with thalidomide survivors. Does that make them thalidomide survivors?
>
> Not necessarily. Each year, a certain number of children are born with spontaneous or otherwise unexplainable defects similar to those caused by thalidomide.
>
> To be considered a Canadian thalidomide survivor, individuals must meet one (1) of the three (3) criteria set out in 1991. Confirmed survivors have met the same criteria, which are:
>
> 1. Provide valid proof of an amicable settlement with the pharmaceutical company;

2. Provide documentary evidence (for example, medical or pharmacy records) that their mother used thalidomide (brand names Kevadon or Talimol) in Canada during the first trimester of pregnancy; or
3. Be listed on an existing government registry of thalidomide victims.

[24] Thus, it seems clear to me that this finding, that not all defects that have similarities to those generally associated with thalidomide are necessarily attributable to the ingestion of thalidomide, is one of the considerations that drive the Program, hence the presence of eligibility criteria, including that requiring proof of maternal use of thalidomide in the first trimester of pregnancy. That information was available to Crawford. There is no need to strike it out.

[25] However, exhibit E, to which paragraph 9 refers and which appears to be the full content of the study mentioned in that paragraph, does not appear necessary to me in order to assist the Court in understanding the issues it will have to decide on the merits. For all practical purposes, those issues concern the reasonableness of Crawford’s interpretation and application of the Program’s eligibility criteria in connection with the compensation applications filed by the applicants, particularly regarding the type of evidence required to establish maternal use of thalidomide. Since it was not available to Crawford and appears superfluous to me in terms of providing general background, this exhibit will therefore be struck out. I also note that, in their agreement dated March 21, 2017, the parties agreed on the withdrawal of exhibits (exhibits A and B), while the paragraphs that refer to those exhibits were retained in whole or in part.

[26] In my view, the same considerations apply to paragraph 10, in that it is intended to illustrate that the findings of the 1963 study still hold true today. The resulting finding, that not

all defects generally associated with thalidomide are necessarily attributable to the ingestion of thalidomide, is not, as we have just seen, information that was not before the decision-maker. Therefore, I see no cause to strike out this paragraph. However, for the same reasons as those cited regarding exhibit E, I see no need to produce the report to which this paragraph refers. Therefore, that exhibit (exhibit F) will be struck out.

[27] The motions filed in both cases will therefore be partially granted. Under the circumstances, and given that the parties were able to negotiate a partial settlement of these motions, no costs will be awarded. Each party will therefore need to assume their own costs.

[28] The respondent will have five (5) days from the date of this order to serve, in each case, an amended version of Ms. Moriarty's affidavit that complies with the partial settlement agreement that was reached by the parties in each case and with the conclusions of this order.

ORDER

THE COURT ORDERS that:

1. The motion is allowed in part;
2. Exhibits E and F, which are referred to in paragraphs 9 and 10 of Cindy Moriarty's affidavit dated December 15, 2016, are struck out;
3. Within five (5) days of the date of this order, the respondent shall serve to the applicants an amended version of Ms. Moriarty's affidavit that complies with the partial settlement agreement that was reached by the parties and with the conclusions of this order;
4. The time limits set out in the *Federal Courts Rules*, SOR/98-106, which apply to every subsequent step in these proceedings, shall begin to elapse once said time frame of five (5) days expires;
5. Without costs.

"René LeBlanc"

Judge

Certified true translation
This 2nd day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1584-16
STYLE OF CAUSE:	CLAUDIE BRIAND v. ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-1712-16
STYLE OF CAUSE:	DENIS RODRIGUE v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 8, 2017
REASONS FOR ORDER AND ORDER:	LEBLANC J.
DATED:	MARCH 29, 2017

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