Federal Court Cour fédérale

Date: 20200508

Docket: T-1499-16

Citation: 2020 FC 588

CLASS PROCEEDING

BETWEEN:

BRUCE WENHAM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER
(Settlement Approval)

PHELAN J.

I. INTRODUCTION

[1] This class action settlement concludes litigation by a group of survivors of the drug Thalidomide who were left with life long disabilities. Their struggle in this Court was to obtain better treatment and benefits from the Government of Canada [Canada].

[2] The initial judicial review proceeding commenced by Bruce Wenham [Wenham] was filed in September 2016 to challenge his denial of benefits under the Thalidomide Survivor Contribution Program [TSCP – sometimes called the "old program"]. He converted his action to a class action for all claimants who were denied benefits under the TSCP.

[3] The class action, certified in November 2018 by the Federal Court of Appeal, challenged the TSCP's evidentiary criteria and documentary proof requirements. Shortly after certification, Canada replaced the old program with an enhanced version and changed the name to the Canadian Thalidomide Survivors Support Program [CTSSP or the "new program"].

[4] This new program addressed issues raised by this litigation and raised in Parliament. The proposed settlement, executed October 22, 2019 [Settlement or Settlement Agreement] provides some additional procedural fairness protections and other benefits for the Class who are eligible for the CTSSP.

[5] The Settlement Agreement must be assessed in the context of this new program. The role of this litigation in the creation of the CTSSP is a matter of debate by the parties and will be addressed more specifically in respect to the motion for approval of Class Counsel fees.

[6] However, it is fair to say that the CTSSP mirrors much of what the class action sought to achieve. Class Members now have a priority opportunity to obtain financial support previously denied to them under the old program, and the new program has revised and improved

evidentiary criteria and a revised documentary proof regime, all of which were issues in this class action.

[7] The CTSSP has been available since June 2019 and will remain open until June 2024 to any person seeking recognition as a Thalidomide survivor. The Settlement Agreement provides certain procedural safeguards and other benefits to members of the Class found to be eligible under the CTSSP.

[8] Following the implementation of the CTSSP, the Class, having achieved much of what it sought in this litigation, seek to have the Court approve the Settlement Agreement as “fair, reasonable and in the best interests of the Class as a whole”. Canada consents to the Settlement and to this motion for approval.

[9] In addition to this motion to approve the Settlement, there is a motion to approve Class Counsel fees – a matter not resolved in the Settlement – and a motion by the Class for costs against Canada. Each of these other motions are the subject of separate decisions.

II. <u>BACKGROUND</u>

A. <u>*Thalidomide in Canada*</u>

[10] Thalidomide was originally developed and sold as a non-addictive sedative (and is still on the market as such) but it was also found to be effective in combatting symptoms associated

with morning sickness. It was prescribed off-label for that purpose. The drug was launched in Germany (West Germany) on October 1, 1957.

[11] In Canada, Thalidomide was distributed under the trade names Kevadon and Talimol and authorized for use in sample format on June 23, 1959. It was subsequently approved for prescription use from April 1, 1961 to March 2, 1962. The linkage between first trimester maternal ingestion of Thalidomide and miscarriages and birth defects was confirmed. The drug was recalled on April 10, 1962. Canada issued instructions to physicians to have all stocks of the Thalidomide drug destroyed or returned and all stocks in pharmacies were ordered seized.

The dates are important because of the limitations imposed in the CTSSP and the objections which the Court heard.

[12] A registry was established by Canada between 1964 and 1973 to identify the survivors of Thalidomide. It identified 115 affected children in this country. The Class Members in this litigation were not included on this list.

B. *Initial Support of Thalidomide Survivors – Extraordinary Assistance Plan [EAP]*

[13] By Order in Council of May 10, 1990, Canada established an *ex gratia* payment for "Thalidomide Victims".

[14] The support was distributed through the Extraordinary Assistance Plan [EAP]. The EAP required evidence 1) that an applicant had received a settlement from a drug company or 2) that

there had been "material ingestion of Thalidomide in Canada during the first trimester of pregnancy or listing on a government registry of Thalidomide victims".

A total of 109 people received support under this 1990 EAP.

[15] In 2014, Parliament passed a motion to provide additional support to Thalidomide survivors to address their increasing medical needs.

C. *Thalidomide Survivors Contribution Program [TSCP]*

[16] In 2015, Canada announced new support for Canadian Thalidomide survivors under the TSCP which was to provide payments to two classes of eligible recipients – (1) those who received payments pursuant to the earlier 1991 EAP; and (2) those who submitted applications before May 31, 2016, and who met one of the same criteria that had been applied in the 1991 EAP.

[17] The TSCP provided for a tax free lump sum payment of $125,000; ongoing lifetime support payments based on level of disability; and access to the Extraordinary Medical Assistance Fund for extraordinary health costs.

[18] In terms of documentary proof, the TSCP now required specific objective evidence:

- copies of a doctor's prescription or
- hospital birth records, or other medical/pharmacy records or

- if no records were available, proof in the form of a sworn 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.

[19] Despite being called by Canada "generous" at times in this litigation, the TSCP imposed a significant evidentiary barrier on proof of maternal ingestion of Thalidomide in Canada during the first trimester of pregnancy.

[20] This strict proof considered records of a doctor's prescription, hospital birth, medical or pharmacy records or, if they were unavailable, a sworn statement from a medical professional with direct knowledge of the event. A non-medical professional's (e.g. mother, father, relative, friend) evidence would not be sufficient.

[21] The evidence was not to be met simply on a balance of probabilities standard but on a much higher standard. In effect, it required near certitude or criminal law burden of proof – beyond a reasonable doubt.

All of these requirements imposed were without any right to a hearing.

[22] A significant aspect of the TSCP (and the 1991 EAP before it) eligibility criteria, and an issue which arises from its replacement, was the absence of time limitations on ingestion or birth periods – a matter raised by some of those opposed to the Settlement.

This absence of time limits allowed for the possibility of claims by persons whose mother ingested Thalidomide after the drug's withdrawal from the market.

[23] By October 2016, the TSCP Administrator had advised virtually all applicants under the TSCP whether they had met the eligibility criteria. Of the 193 TSCP applicants (and who had not received payments under the 1991 EAP), only 25 were approved.

D. *Bruce Wenham's Circumstances*

[24] Wenham's mother became pregnant in 1957. He was told his mother was provided Thalidomide to relieve her morning sickness during the first trimester of her pregnancy with him.

[25] Wenham was born on July 14, 1958, with bilateral malformations to his arms. He was the only child born with malformations in a family of five siblings.

[26] The family relocated to England in 1959. He was neither registered in Canada nor the UK as a Thalidomide survivor. His mother's hospital records had been destroyed and the consulting official was no longer available. Wenham failed in his 1991 EAP application because of this absence of records of his mother's Thalidomide ingestion.

[27] In 2016, Wenham applied under the TSCP and provided the following evidence:

- an affidavit of an expert geneticist as to the causal link between Wenham's malformations and Thalidomide exposure;
- an affidavit of a family physician attesting to the consistency between Wenham's condition and in utero Thalidomide exposure.
- Wenham's own affidavit which provided information about his mother's ingestion of Thalidomide, his birth, the absence of deformities in siblings, his

parents' deaths, and the consulting physician's presumed death and the lack of hospital medical records.

- an affidavit of a brother confirming his sibling's birth and confirming Wenham's evidence that he was the only one in the family born with disabilities.
- an affidavit of Wenham's wife which set forth what she had been told by Wenham's mother about taking Thalidomide when pregnant with Wenham.

[28] On August 12, 2016, the TSCP Administrator informed Wenham that his application was denied on grounds that he did not satisfy TSCP criteria.

E. *Class Proceedings History*

[29] On September 12, 2016, Wenham commenced an individual judicial review of the negative TSCP decision on the grounds that the criteria and requirements of the TSCP were *ultra vires* and procedurally unfair.

[30] His judicial review was in line with judicial reviews filed by others denied TSCP benefits (see *Fontaine v Canada (Attorney General)*, 2017 FC 431 [*Fontaine*]; *Briand v Canada (Attorney General)*, 2018 FC 279 [*Briand*]; *Rodrigue v Canada (Attorney General)*, 2018 FC 280 [*Rodrigue*]) which challenged the fairness of this program. A total of 168 individuals were denied eligibility under the TSCP.

[31] Wenham converted his individual judicial review into a class action judicial review. Canada opposed certification, an oppositional stance it adopted at virtually every step in this litigation.

[32] In the same timeframe, a similar judicial review (*Fontaine*) was denied on the basis that the TSCP criteria and evidentiary requirements were non-justiciable because the program was an "*ex gratia*" payment scheme. The issue of "justicability" was a running theme throughout this litigation.

[33] Pending a certification decision in the Federal Court, various steps to address the unfairness of the TSCP were initiated at the political level. In January 2017, a petition was circulated by an MP to change the TSCP. The Parliamentary Standing Committee on Health [HESA], following public hearings, made recommendations to the Health Minister to change the TSCP criteria and evidentiary requirements to include clinical evaluations and, importantly, to change the assessment of exposure to Thalidomide to a "balance of probabilities" standard.

[34] The certification motion was denied by the Federal Court on July 6, 2017.

[35] The Applicant's attempt to be involved in proposed changes to the program at the political level were rebuffed in July 2017 on the basis that Health Canada could not commit to "a hypothetical course of action, not yet crystallized in the legislative or Parliamentary realm and only the subject of parliamentary committee discussion".

[36] On February 27, 2018, the 2018 Budget acknowledged the problem of documentary proof and said that "the program will be expanded to help ensure that all eligible Thalidomide survivors receive the financial support they need". No further details of how this might be done were provided.

[37] The Applicant's attempts to be consulted were limited by Canada to permitting him to file written submissions in April 2018.

[38] The Federal Court of Appeal reversed the Federal Court certification decision and granted certification on November 1, 2018. After this the Applicant began the process of providing Notice of Certification to the Class as provided in this Court's Rules.

[39] On January 9, 2019, Canada announced a new program for Thalidomide survivors called the CTSSP. The CTSSP was created under an Order in Council of April 5, 2019.

[40] The Order in Council provided that persons found eligible for the 1991 EAP or the 2015 TSCP or listed on a Canadian government registry would be eligible for the CTSSP.

[41] The Order in Council set a birthdate framework for eligibility of December 3, 1957 to December 21, 1967, the use of a diagnostic algorithm to assist in assessing the probability of Thalidomide caused congenital malformations, and the involvement of a multi-disciplinary committee to provide their recommendation for eligibility.

[42] The birthdate framework was based on the time the drug was available and the relevant gestation period. It was also described as ensuring that only authorized use was to be compensated. For a program focused on compensation for damage to a fetus, how a fetus could be responsible for "unauthorized use" remains unclear.

III. SETTLEMENT

[43] Despite the vigorous defence mounted by Canada to this class action, the parties began arm's length negotiations in and about June 17, 2019, which culminated in the Settlement Agreement of October 22, 2019.

[44] The Settlement Agreement and its critical provisions must be considered in light of the CTSSP. Those critical provisions include a number of procedural and substantive safeguards.

[45] The key terms of Settlement, as seen by the parties, include:

> (a) procedural fairness safeguards with respect to the CTSSP application process, including:
>
> > (i) confirmation that the Administrator will use a balance of probability standard in its preliminary assessment at Stage 1 [a standard which was unclear from the OIC creating the CTSSP];
> >
> > (ii) at Stage 2, those who do not receive a "probable" finding by the Diagnostic Algorithm determining eligibility will be given opportunity to provide more information for the consideration by the Administrator before their application is denied;
> >
> > (iii) where a final decision is made to deny an application at any step of the three-step process, the Administrator will provide:

(1) reasons for the denial;

(2) an opportunity to provide additional information or submissions in writing for reconsideration; and

(3) the right to seek reconsideration upon presentation of new evidence, so long as such applications are received prior to June 3, 2024; and

(iv) Class Members whose applications are denied at the third stage described in subparagraph 3(7) of the OIC, after recommendation by the Multi-disciplinary Committee, shall be entitled to provide written submissions and/or an oral hearing with the Third Party Administrator and at least one representative of the Multi-disciplinary Committee. Oral hearings shall be conducted by teleconference or videoconference or, in person at the applicant's own expense, if they so request; and

(b) that the Representative Applicant or such other Class Members as may be designated, would be invited to provide input with respect to the attributes, knowledge, experience and expertise of the members of the Multi-disciplinary Committee involved in Stage 3;

(c) the review of class member applications to the CTSSP in priority to others;

(d) Class Members who are found eligible, shall receive their annual payments retroactive to June 3, 2019; regardless of when they submit their application during the application period; and

(e) payment of the lump sum payment to Class Members' estates if they pass away after being determined to be eligible to the CTSSP but before the payment issues;

(f) an honorarium payment of $10,000 to the Applicant;

(g) a discontinuance of the class proceeding; and

(h) the Settlement is without admission of liability.

[Written Representations of the Parties – underlining by Court for emphasis]

[46] Unlike many other class action settlements in this Court, the Settlement Agreement made no provision for the payment of legal fees. Canada reserved the right to seek leave to make submissions on the fees motion. The parties also agreed that nothing in the Settlement Agreement prevented the Applicant from bringing a motion for costs.

[47] In response to Canada's request to make submissions on fees, the Court granted the request subject to the clear limitation that Canada was only to address the issue of "success" (or the results of the litigation) in the analysis of a "fair and reasonable fee" test.

IV. ANALYSIS

A. *Law*

[48] As held in this Court repeatedly (see *Merlo v Canada*, 2017 FC 533 [*Merlo*]; *McLean v Canada*, 2019 FC 1075 [*McLean*]), a class action settlement must be approved by the Court (see also R 334.29). The legal test to be applied is whether the settlement is "fair, reasonable and in the best interests of the class as a whole".

[49] In considering this test, the Court takes into account a number of factors – the weighing of which and the weight assigned individually and comparatively varies depending on the circumstances.

[50] The non-exhaustive list of factors to be considered include:

- terms and conditions of the settlement;

- likelihood of success/recovery;
- amount and nature of pre-trial activities including investigation, assessment of evidence, production and discovery;
- arm's length bargaining and information regarding dynamics of negotiations;
- recommendation of Class Counsel;
- communication with Class Members;
- expression of support and objections;
- future expense and likely duration of litigation; and
- any other relevant factor or circumstance.

[51] It is now well settled that settlements must be looked at as a whole and that it is not open to the Court to rewrite the substantive terms of the settlement. Settlements involve some "give and take" – even where it is difficult for the injured parties to see why any concessions should be made. Settlements need not be perfect so long as they fall within a "zone of reasonableness" (*McLean* at para 76). In the end, the settlement is a "take it or leave it" proposition.

[52] While courts are not to rewrite or tinker with settlements, courts have an important role in ensuring that the settlement takes effect and that it operates properly. For these and other reasons, courts maintain an ongoing supervision of the settlement (*J.W. v Canada (Attorney General)*, 2019 SCC 20). This can take the form of periodic reports, ensuring prompt implementation, and providing interpretation and enforcement of the settlement and its related matters.

[53] In the current circumstances, the settlement incorporates the CTSSP and is part of the CTSSP at least with respect to Class Members. Some of the terms of the settlement are to be made available to non-Class Members of the CTSSP. As such, alterations of the CTSSP may impact the Settlement and the Approval Order. The Settlement and Approval Order give the program a stability it might not otherwise have.

B. *Terms and Conditions of Settlement*

[54] The class proceedings were a challenge to the unfair evidentiary standard and documentary requirements of the TSCP. A successful judicial review would likely have resulted in a reconsideration under the TSCP for Class Members without the burden of that standard and those requirements – as was the case in *Briand*. This settlement is more than what would have been the usual result of a judicial review.

[55] Following on the litigation and other advocacy efforts at the political and bureaucratic level, the CTSSP expanded on the TSCP. It has given Class Members (and others) another opportunity to obtain monetary support at an enhanced level. The lump sum payment has increased from $125,000 to $250,000.The annual payments of $25,000 - $100,000 remain the same.

[56] The CTSSP reflects a principal goal of the class action in reducing the evidentiary and documentary burden on an applicant. The Settlement confirmed the new evidentiary standard.

[57] Without the CTSSP or something like it to address the flaws in the TSCP, there would be no settlement.

[58] Furthermore, as discussed in paragraph 45, the Court accepts that the Settlement clarified and provided enhanced procedural safeguards and other benefits to the Class Members.

[59] The purpose of the class action to ensure procedural fairness was achieved. The fairness requirement, the safeguards and other benefits of the Settlement are available to Class Members whatever their eventual status as a claimant may be.

[60] The Settlement, considered in its overall context, provides significant advantages to Class Members which continued litigation might not have achieved.

C. *Likelihood of success/recovery*

[61] This factor, unlike in respect to legal fees/risk assessed when class action is taken on, must be assessed when the choice to proceed or settle must be made. In the present circumstances, the factor must take into consideration the CTSSP on the one hand and the Federal Court of Appeal’s certification of the class action on the other.

[62] The Class has to take into consideration the goals of the class action – a better and fairer opportunity to obtain financial benefits for Thalidomide survivors.

[63] With the creation of the CTSSP, the Class faced the choice of challenging it as part of the litigation or improving on it with such matters as retroactivity. Canada faced the prospect of the class action proceeding to an ultimate and unforeseen conclusion.

[64] Canada had available to it various defences - especially after the creation of the CTSSP - including mootness. It, however, faced the public perception challenge of furthering the suffering of Thalidomide survivors.

[65] Canada continued to resist the Class by actively pushing the principle of lack of justicability of an *ex gratia* payment program as well as moving to dismiss the class action on the grounds of mootness and the existence of an adequate alternative remedy in the CTSSP.

[66] There were conflicting authorities in this Court (see *Fontaine*; *Briand*) which put both sides at risk. In any event, a successful judicial review could only give the Class a part of what might be achieved by negotiation.

[67] Added to this uncertainty were risks of limitation periods, general litigation risk, lengthy litigation and unsettled individual assessments.

[68] Class Members, while not old, are advancing in age, some with increasing requirements due to their vulnerability and disability. Time is not their friend, if not yet their enemy.

[69] Given all these elements, a reasonable settlement is an attractive viable alternative for both sides.

D. *Amount and nature of investigation, assessment of evidence, production and discovery*

[70] By the time the Settlement Agreement was executed (the day before the scheduled hearing on the merits), all the necessary investigation, research, evidence gathering and pre-hearing work was completed. The parties were properly positioned to understand the risk of continued litigation.

[71] If the litigation had continued, there was the prospect of delay for the decision, the potential of appeal and extended time for individual assessments under the TSCP (had reconsideration been ordered).

[72] The settlement represents a practical and principled resolution which results in certainty for the parties and additional benefits for Class Members while avoiding the disruption, delay and uncertainty of litigation.

E. *Arm's length bargaining*

[73] Given the record in this case, the aggressive litigation posture of Canada and the dogged determination of the Class, the Court has no doubt that the bargaining was arm's length.

[74] The parties could not even agree on Class Counsel fees or on a contribution to those fees from Canada – as occurs often in this type of litigation. As mentioned, there is even a costs motion pending based on an exception to the no cost regime of class actions.

[75] The parties had tried negotiation before and had failed at a Dispute Resolution Conference presided over by Justice McDonald. It was only just before the common issues hearing – on the "courthouse steps" – that settlement was achieved.

F. *Class Counsel recommendation*

[76] Both counsel recommend settlement. Class Counsel, having pursued the action to the courthouse steps, had largely achieved what the action was designed to accomplish.

[77] Class Counsel and the firm are experienced, well regarded plaintiffs' class action counsel. There is a wealth of experience in a substantial number of class actions to draw upon. Their recommendation carries considerable weight.

[78] Canada has vast experience in class actions of a vast array of circumstances. Its recommendation of settlement is also of great significance.

G. *Degree and nature of communication*

[79] Class Counsel and Wenham have evidently communicated well. Communication is facilitated by the relatively small class size (see below).

[80] A website has been established and updated. Court documents and other records have been posted for Class Members' review.

[81] As was evident by the persons in attendance in the courtroom and over videoconferencing, Class Members are informed and engaged in this settlement process – both for and against the settlement.

H. *Support/Opposition*

[82] The most moving part of the settlement hearing was the representations of Thalidomide survivors, either in support or opposition. Their presence, their narrative, their passion enhanced the humanity of these proceedings. Their eloquence and courage in coming forward is highly commendable.

[83] Initially 167 Class Members were identified by Canada as of the Notice of Certification. Twelve (12) had opted out but three (3) rescinded their opt outs after the opt out deadline.

[84] An expert actuary estimated a range of 157 to 409 Thalidomide survivors to be in Canada. 135 individuals have already been recognized as Thalidomide under the 1991 EAP and TSCP. Under the TSCP, of the 168 found to be ineligible, 31 were born before the threshold date in that program and 11 after. The best estimate is that under the CTSSP, 124 will meet the threshold parameters, 42 will not.

[85] In terms of support/opposition, as indicated by forms received, 80% supported the settlement.

[86] Opposition to the settlement heard in Court or filed was based on one or more of objection to the date parameters, benefits of settlement going (at least in part) to non-class members, the existence of pressure to accept the settlement, objection to the use of an algorithm, and the restrictive nature of the CTSSP criteria. In addition, there was some objection to Class Counsel's proposed fee.

[87] The birthdate parameters were a consistent concern. Some of the individuals failed to qualify by a matter of a few weeks – their stories were tragic and compelling. Class Counsel recognized the problem but on this issue Canada was intractable.

[88] Canada's explanation for its rigid approach, while coldly scientific, lacked the compassion for the individual which the government espoused. It potentially punished the innocent who had not engaged themselves in "unauthorized use". There was less than a clear explanation why proof of ingestion of Thalidomide in Canada in the first trimester alone was not a reasonable criteria as it was for the predecessor plans – the 1991 EAP and TSCP.

[89] If it was in the power of this Court, it would have struck out these date parameters but that would have put the Settlement in jeopardy. Regrettably, the Court is powerless to do anything about this issue, other than to encourage a compassionate reconsideration. A rejection of the Settlement would be unfair to the Class and others and is not a viable alternative.

V. HONORARIUM

[90] The parties ask that the Court approve an honorarium payment to the representative plaintiff, Wenham, in the amount of $10,000. Canada had indicated that it is prepared to make that payment.

[91] A payment in this range and higher has been approved in other class actions in this Court (see *Riddle v Canada*, 2018 FC 641; *Merlo*; *McLean*) although in the context of larger class actions in terms of claimants and overall amount.

[92] In the present case, Wenham agreed to convert his personal judicial review into a class action. That, in and of itself, resulted in a delay of his own claims.

[93] Given the aggressive litigation stance in this case, Wenham played a critical role in the conduct of the various steps in the litigation. He was, in real terms, the "client" and had the carriage of all those client responsibilities on behalf of others.

[94] If Wenham had been successful in his own judicial review as *Briand* and *Rodrigue* were, and successful in the reconsideration of his TSCP claim, he would have been receiving payments in 2017/2018 instead of retroactive to June 2019. Class Counsel estimate that the foregone amount ranges from $50,000 - $200,000.

[95] Even a percentage of that foregoing amount combined with Wenham's active participation on behalf of all Class Members, more than justifies this modest honorarium.

VI. CONCLUSION

[96] For these reasons, I find that the Settlement Agreement is fair, reasonable and in the best interests of the class as a whole.

[97] An order will issue giving effect to this finding.

[98] The Court retains jurisdiction over this matter and specifically over the Approval Order and Settlement. The Approval Order will confirm the Court's continuing jurisdiction, the initial reporting requirements and may be amended as circumstances require.

"Michael L. Phelan"
Judge

Ottawa, Ontario
May 8, 2020

FEDERAL COURT

SOLICITORS OF RECORD

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