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A-212-17  
(Court File No. T-1499-16)



**FEDERAL COURT  
PROPOSED CLASS PROCEEDING**

**BRUCE WENHAM**

Applicant

and

**ATTORNEY GENERAL OF CANADA**

Respondent

**NOTICE OF APPEAL**

**TO THE RESPONDENT:**

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the appellant. The relief claimed by the appellant appears on the following page.

**THIS APPEAL** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at place where Federal Court or Appeal (or Federal Court) ordinarily sits.

**IF YOU WISH TO OPPOSE THIS APPEAL**, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

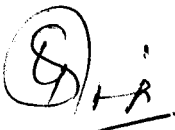
**IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION** of the order appealed from, you must serve and file a notice of cross-appeal in Form 341

prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

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

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

July 14, 2017

Issued by:  **YOGINDER GULIA**  
**REGISTRY OFFICER**  
**AGENT DU GREFFE**

Address of 180 Queen St W.  
local office: Toronto, ON M5V 1Z4

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**APPEAL**

**THE APPELLANT APPEALS** to the Federal Court of Appeal from the Order of the Honourable Madam Justice McDonald dated July 6, 2017 denying the Appellant's motion for certification of the within application as a class proceeding pursuant to the *Federal Courts Rules*, SOR/98-106.

**THE APPELLANT ASKS:**

1. That the Order of the Justice McDonald be set aside;
2. That the Federal Court of Appeal certify the within application as a class proceeding:
  - a. appointing Bruce Wenham as the representative for the class;
  - b. declaring the common issues to be certified;
  - c. providing for notice to the class as set out in the notice of motion and litigation plan; and
3. Such further and other relief as counsel may advise and this Honourable Court may permit.

**THE GROUNDS OF APPEAL** are as follows:

1. This appeal arises out of the Appellant's motion seeking certification of the underlying application as a class proceeding on behalf of all individuals who had claims for compensation denied by the TSCP for failing to provide the required proof of eligibility. The Appellant, *inter alia*, alleged that the establishment and/or application of the TSCP evidentiary criteria and/or documentary proof requirements applicable to all applicants to the TSCP are unlawful as they are effectively impossible to meet. It is alleged that those evidentiary criteria and/or documentary proof requirements applied equally to all applicants to the TSCP by denying their applications and failing to consider evidence they submitted in support of their applications.
2. Justice McDonald denied the Appellant's motion for certification of the application as a class proceeding.

3. In making the Order, the Honourable Judge erred at law in failing to apply the relevant tests pursuant to rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 in denying the Appellant's motion for certification. The Honourable Judge failed to apply, or misapprehended, the principles to be applied to class proceedings as established by the Supreme Court of Canada in *Hollick v. Toronto (City)*, 2001 SCC 68 and subsequent case law, as confirmed by the Federal Court of Appeal in *Buffalo v. Samson Cree Nation*, 2010 FCA 165;

4. With respect to the cause of action criterion (rule 334.16(1)(a)) the Honourable Judge made the following errors of principle and palpable and overriding errors:

- (a) in finding that the cause of action criterion (rule 334.16(1)(a)) was not met;
- (b) by engaging in a merits-based inquiry at the certification stage;
- (c) in holding that her finding that the first condition of rule 3316(1)(a) was not met, is not a final determination of the merits of the underlying judicial review;
- (d) in misapprehending the "reasonable cause of action" test and making a determination on the merits that the Appellant's underlying judicial review had no reasonable prospect of success;
- (e) in basing her a decision on the decision of another federal court judge in a judicial review in *Fontaine v. Canada (Attorney General)*, 2017 FC 431 ("*Fontaine*") without the benefit of the Applicant's evidence in support of his underlying application for judicial review; and
- (f) in applying the decision in *Fontaine* to the present case, without consideration of the errors in *Fontaine* and the case law that contradicts the *Fontaine* decision.

5. With respect to the class definition criterion (rule 334.16(1)(b)) the Honourable Judge made the following errors of principle and palpable and overriding errors:

- (a) in finding that the class definition criterion (rule 334.16(1)(b)) was not met;
- (b) in failing to apply or in misapprehending the "some basis in fact" evidentiary threshold as recognized in *Hollick v. Toronto (City)*, 2001 SCC 68 and subsequent case law, as confirmed by the Federal Court of Appeal in *Buffalo v. Samson Cree Nation*, 2010 FCA 165;
- (c) in misapprehending the nature of the Applicant's claim that the Appellant's underlying judicial review application was challenging the TSCP criteria and documentary proof requirements which were applicable to all class members and not solely the rejection of his own TSCP application;
- (d) in failing to consider the evidence of the common denial of applicants to the TSCP on the basis of proof of eligibility; and
- (e) in failing to consider or address the Applicant's arguments that section 18.1(2) of the *Federal Court Act* or the doctrine of *nunc pro tunc*, applied to ensure that the class definition should include those class members who had not yet commenced applications for judicial review.

6. With respect to the common issues criterion (rule 334.16(1)(c)) the Honourable Judge made the following errors of principle and palpable and overriding errors:

- (a) in finding that the common issues criterion (rule 334.16(1)(c)) was not met;
- (b) in failing to apply or in misapprehending the "some basis in fact" evidentiary threshold and principles of commonality as recognized in *Hollick v. Toronto (City)*, 2001 SCC 68 and subsequent case law, as confirmed by the Federal Court of Appeal in *Buffalo v. Samson Cree Nation*, 2010 FCA 165;

- (c) in assessing the merits of the claim in determining whether common issues existed;
- (d) in finding, on the merits of the Appellant's Application, that *Fontaine* provided a completed answer to proposed common issue (a);
- (e) in failing to find that common issue (a) was common to all the class members, despite finding that that *Fontaine* provided a completed answer to the proposed common issue; and
- (f) erred in finding that common issue (b) was seeking a remedy that is outside of the jurisdiction of the Federal Court on a judicial review application,
  - (i) without specifying the remedy that is outside of the Federal Court's jurisdiction; and
  - (ii) failing to recognize that sending the matter back for redetermination is an appropriate and available common remedy pursuant to section 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7.

7. With respect to the preferable procedure criterion (rule 334.16(1)(d)) the Honourable Judge made the following errors of principle and palpable and overriding errors:

- (a) in finding that the preferable procedure criterion (rule 334.16(1)(d)) was not met;
- (b) in basing her finding that a class proceeding is not the preferable procedure on earlier errors with respect to the identifiable class and common issues, thereby compounding the errors of principle in the Reasons;

- (c) in failing to apply or in misapprehending the "some basis in fact" evidentiary threshold and the principles of preferability, including access to justice, as established in *Hollick v. Toronto (City)*, 2001 SCC 68 and subsequent case law, as confirmed by the Federal Court of Appeal in *Buffalo v. Samson Cree Nation*, 2010 FCA 165;
- (d) in misapprehending the principle of access to justice applicable to class proceeding by determining that access to justice was achieved through the judicial review process;
- (e) in applying the wrong legal test in considering whether a class proceeding is the preferable procedure for resolving the common issues by placing excessive and erroneous weight on the alleged individual issues (including aspects of liability or limitation period issues) instead of assessing the extent to which a determination of the common issues would substantially advance the claims;
- (f) failing to consider or address the Applicant's arguments on the applicability of section 18.1(2) of the *Federal Court Act* or the doctrine of *nunc pro tunc* to ensure that the class definition should include those class members who had not yet commenced applications for judicial review, was itself a common issue that could be decided in common for the entire class;
- (g) in finding that limitation period issues negate the preferability of a class proceeding when limitation period issues are properly considered under the rule 334.16(1)(c), common issues requirement;
- (h) in finding that limitation period issues negate the preferability of a class proceeding without an assessment as to whether those issues predominate over the common issues pursuant to rule 334.16(2);
- (i) in failing to consider that a judge shall not refuse to certify a proceeding as a class proceeding on the basis that the relief claims

would require an individual assessment for damages, pursuant to rule 334.18(a);

- (j) in failing to provide reasons or principles as to why a consolidation of proceedings (rule 105) or a representative proceeding (rule 114(1)) would be preferable to a class proceeding;
- (k) in failing to identify any representative proceeding that has been commenced or has been agreed to by the Respondent which could be considered a preferable procedure;
- (l) in finding that the class proceeding would add elements of complexity and delay to the Appellant's individual application, when the common issues would not be required to be determined on an individual basis; and
- (m) in failing to find or consider whether allowing the application to proceed as a class proceeding would avoid a duplication of fact-finding and legal analysis despite her finding that a common issue was shared by the class.

8. With respect to the appropriate representative criterion (rule 334.16(1)(e)) the Honourable Judge made the following errors of principle and palpable and overriding errors:

- (a) in finding that the representative criterion (rule 334.16(1)(e)) was not met;
- (b) in considering the issue of limitation periods to negate the Appellant's litigation plan when individual issues (such as limitation period issues) are properly considered under the rule 334.16(1)(c), common issues requirement;




- (c) in failing to apprehend that the Appellant's litigation plan provides for the exchange of evidence and a process to address individual issue determinations such as limitation period issues, if necessary; and
- (d) in failing to consider that a litigation plan is a "work in progress" and can be refined as the proceeding progresses.

**The Court's Jurisdiction is:**

- 9. *Federal Courts Act*, R.S.C. 1985, c F-7, specifically sections 27 and 52;
- 10. *Federal Courts Rules*, SOR/98-106, specifically Part 5.1;
- 11. such further and other grounds as the Appellant advises and this Honourable Court may permit
- 12. THE APPELLANT REQUESTS that this appeal be heard at Toronto, Ontario.

July 14, 2017

  
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Solicitors for the Appellant

**FEDERAL COURT**

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**PROPOSED CLASS PROCEEDING**

BETWEEN:

**BRUCE WENHAM**

Applicant

and

**ATTORNEY GENERAL OF CANADA**

Respondent

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**NOTICE OF APPEAL**

(Filed this 14 day of July, 2017)

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