Federal Court of Appeal | Cour d'appel fédérale

Date: 20181101

Docket: A-212-17

Citation: 2018 FCA 199

CORAM: **STRATAS J.A.**
NEAR J.A.
WOODS J.A.

BETWEEN:

BRUCE WENHAM

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on January 9, 2018.

Judgment delivered at Ottawa, Ontario, on November 1, 2018.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NEAR J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Mr. Wenham appeals from the order of the Federal Court (per McDonald J.): 2017 FC 658. The Federal Court denied Mr. Wenham's motion to certify his application for judicial review as a class proceeding.

[2] In this Court, Mr. Wenham submits that the Federal Court's order is undermined by several legal errors. He asks this Court to make the order the Federal Court should have made: to certify his application as a class proceeding.

[3] I agree with Mr. Wenham. I would set aside the order of the Federal Court, grant Mr. Wenham's motion and make an order certifying the application as a class proceeding.

A. Background

[4] Mr. Wenham's application for judicial review seeks to quash a compensation program established by the Government of Canada for victims of the drug, Thalidomide.

[5] Mr. Wenham alleges that he is one of the victims. He says his mother took Thalidomide and this caused him to be born with severe bilateral deformities to his arms. But, thus far, he has been denied compensation.

[6] In the late 1950's and early 1960's many mothers took Thalidomide to combat nausea and morning sickness. Only later was it discovered that using Thalidomide in the first trimester of pregnancy could cause deformities in children.

[7] In 1990, by Order in Council, the Government of Canada established the Extraordinary Assistance Plan for Thalidomide Victims: *HIV-Infected Persons and Thalidomide Victims*

Assistance Order, P.C. 1990-4/872. Under this plan, qualified persons received a lump-sum payment.

[8] Many considered the compensation provided under the plan to be inadequate. In response, in 2015, the Government of Canada revised the plan. Under the revised plan, the Thalidomide Survivors Contribution Program, qualifying persons received a one-time payment of $125,000 and an annual lifetime pension of $25,000 to $100,000 depending on the level of disability.

[9] Under the revised plan, persons could qualify for benefits if they had received payments under the 1990 plan or if they applied before May 31, 2016 and qualified under the 1990 plan. Importantly, however, they had to satisfy certain documentary proof requirements.

[10] In his application, Mr. Wenham targets these requirements. To qualify, benefits-seekers had to show the following:

- verifiable information showing a settlement with the drug company;
- listing on an existing government registry of Thalidomide victims;
- documentary proof that Thalidomide was ingested during the first trimester of pregnancy; by virtue of a later direction, the Government of Canada limited the documentary proof to the following: doctor's prescriptions, hospital or medical

> records, hospital birth records, or an affidavit from persons with direct knowledge, such as the physician who prescribed the drug.

[11] Mr. Wenham applied under the revised plan. In support, he submitted several affidavits. One was from a geneticist who provided an expert opinion on the causal link between his deformities and Thalidomide exposure. The geneticist did not have direct knowledge and so his affidavit did not satisfy the documentary proof requirements. Accordingly, Mr. Wenham's application for benefits was rejected.

[12] Mr. Wenham was not alone. In all, 168 people were rejected because they failed to satisfy the documentary proof requirements.

[13] In his application for judicial review, Mr. Wenham contends that the eligibility and documentary proof requirements and the resulting rejections of applications for benefits are unreasonable in the administrative law sense.

[14] Soon after he brought his application for judicial review, Mr. Wenham brought a motion to certify it as a class proceeding on behalf of all the others whose applications were rejected for failure to satisfy the documentary proof requirements.

B. The governing provisions of the *Federal Courts Rules*

[15] The Federal Courts, unlike the courts of some other jurisdictions, allow for applications for judicial review to be prosecuted as class proceedings.

[16] Rule 334.12 of the *Federal Courts Rules*, SOR/98-106 provides for this. It expressly permits a member of a class of persons to start an action or an application on behalf of the members of the class. But the class action or application, as the case may be, can only be prosecuted as a class proceeding if it is certified as such. Certification is obtained by way of motion.

[17] For certification, five requirements must be met:

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(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;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is an adequate representative plaintiff or applicant.

(Rule 334.16(1) of the *Federal Courts Rules*.)

[18] The Federal Court found that Mr. Wenham failed to satisfy any of these requirements.

[19] In this Court, Mr. Wenham submits that the Federal Court committed errors of law and palpable and overriding errors. In his view, the Federal Court should have found that he met all five requirements and, as a result, should have certified his application as a class proceeding.

C. Analysis

[20] In my view, owing to legal errors, the order of the Federal Court cannot stand: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331.

[21] Applying proper legal principles, including clear holdings on point from the Supreme Court, and making the order the Federal Court should have made, I find that Mr. Wenham has satisfied all five certification requirements and so I would grant his motion for certification and certify his application as a class proceeding.

(1) Reasonable cause of action (Rule 334.16(1)(*a*))

[22] The reasonable cause of action requirement under Rule 334.16(1)(*a*) is identical to similar requirements found in the class proceedings legislation of other jurisdictions. Cases in those jurisdictions suggest that the reasonable cause of action requirement is best expressed in the negative: if the cause of action in the proceeding sought to be certified would not survive a motion to strike, certification must be denied. This reflects the common sense position that there is no sense certifying a proceeding that is doomed to fail.

[23] The Supreme Court has repeatedly confirmed this. In the words of the Supreme Court, "the requirement [in class proceedings] that the pleadings disclose a cause of action" is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 25; see also *Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24, [2011] 2 S.C.R. 261 at para. 20 and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 at para. 63.

[24] Therefore, to determine the requirement of a reasonable cause of action under Rule 334.16(1)(*a*), we must look to the jurisprudence on when a pleading should be struck for failure to disclose a cause of action. The leading case is *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45. There, the Supreme Court articulated the test as follows (at para. 17):

> This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[25] This Court put it this way:

> For the purposes of the first criterion - that the pleadings disclose a reasonable cause of action - the principles are the same as those applicable on a motion to strike. The facts alleged in the statement of claim are assumed to be true, and no evidence may be considered. The test is whether it is "plain and obvious" that the pleadings, assuming the facts pleaded to be true, disclose no reasonable cause of action.

(*Canada v. John Doe*, 2016 FCA 191 at para. 23.)

[26] These judicial expressions of the test and Rule 334.16(1)(*a*) refer to a "reasonable cause of action." The word "reasonable" is regrettable: it has every potential to mislead.

[27] Here, it misled the Federal Court. The Federal Court asked itself "whether a reasonable case exists" and whether the application "has a reasonable chance of success" (at paras. 18 and 45). Elsewhere, it described its task as making "a preliminary assessment of the strength of the proposed class proceeding" (at para. 25). These are not the tests.

[28] Quite aside from the above authorities, the Supreme Court has warned that on a certification motion, a court is not to resolve conflicting facts and evidence and assess the strength of the case. Rather the task is simply a threshold one: can the proceeding go forward as a class proceeding? See *Pro-Sys Consultants*, above at paras. 99 and 102.

[29] The phrase "reasonable cause of action" is not an invitation to a court to assess the odds of a cause of action ultimately succeeding, and to let it go forward if there is only, say, a 3:1 chance against evidence coming forward that will clinch the claim. Wagering on whether the cause of action will cross the finish line is no part of the court's task.

[30] In *Imperial*, above, the Supreme Court spoke against such an approach (at paras. 23 and 25):

> Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.
>
> .....
>
> Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial

> system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding. [emphasis in original]

[31] Reasonableness, as it is understood in other contexts, does not enter into it. The test is whether a cause of action has been pleaded that is not plain and obvious to fail.

[32] The foregoing authorities all concern actions, not applications. The case at bar concerns an application. Is the threshold for striking an application different than that for striking an action?

[33] No. In motions to strike applications for judicial review, this Court uses the same threshold. It uses the "plain and obvious" threshold commonly used in motions to strike actions, sometimes also called the "doomed to fail" standard. Taking the facts pleaded as true, the Court examines whether the application:

> …is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

(*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 47.)

[34] To determine whether an application for judicial review discloses a cause of action, the Court must first read the notice of application to get at its "real essence" and "essential character" by "reading it holistically and practically without fastening onto matters of form": *JP Morgan* at paras. 49-50.

[35] There are three distinct, analytical stages to an application for judicial review and it is useful to keep them front of mind: *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 474 N.R. 121 at paras. 35-37; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at paras. 26-28. Whether or not Mr. Wenham's application is certified as a class proceeding, these stages remain.

[36] An application can be doomed to fail at any of the three stages:

I. *Preliminary objections*. An application not authorized under the *Federal Courts Act*, R.S.C., 1985, c. F-7 or not aimed at public law matters may be quashed at the outset: *JP Morgan* at para. 68; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605. Applications not brought on a timely basis may be barred: section 18.1(2) of the *Federal Courts Act*. Judicial reviews that are not justiciable may also be barred: *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737. Other possible bars include res judicata, issue estoppel and abuse of process (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2

S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77), the existence of another available and adequate forum for relief (prematurity) (*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332; *JP Morgan* at paras. 81-90) and mootness (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342).

II. *The merits of the review.* Administrative decisions may suffer from substantive defects, procedural defects or both. Substantive defects are evaluated using the methodology in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; procedural defects are evaluated largely by applying the factors in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193. In certain circumstances, the application is doomed to fail at this stage right at the outset. For example, an application based on procedural defects that have been waived has no chance of success: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, [2010] 2 F.C.R. 488, 314 D.L.R. (4th) 340.

III. *Relief.* In some cases, the relief sought is not available in law (*JP Morgan* at paras. 92-94) and so the application can be quashed in whole or in part on that basis.

[37] As part of her submissions concerning Rules 334.16(1)(*b*) through (*e*), the respondent raises the objections of justiciability and the thirty-day, extendable limitation period in subsection 18.1(2) of the *Federal Courts Act*. In particular, she emphasizes the importance of the

limitation period in the Court's consideration of the "preferable procedure" requirement in Rule 334.16(1)(*d*). She does not raise these objections as part of her submissions concerning the "reasonable cause of action" requirement in Rule 334.16(1)(*a*).

[38] This misconceives their analytical role in applications for judicial review. As noted above, both of these are fatal, preliminary objections to judicial review. They belong in the first stage of analysis. If these objections are established, they extinguish any asserted cause of action—in other words, if they are established, there can be no "reasonable cause of action" within the meaning of Rule 334.16(1)(*a*).

[39] Therefore, these objections are properly considered under Rule 334.16(1)(*a*). Assuming they have some potential merit, further evidence is required, and the application is certified as a class proceeding, they may potentially qualify as common issues for the Court to determine. Further, as the respondent suggests, on a certification motion, they may also bear upon the Court's consideration of Rules 334.16(1)(*b*) through (*e*), in particular "preferable procedure" under Rule 334.16(1)(*d*).

[40] But first and foremost, these objections should be examined under Rule 334.16(1)(*a*) to see if they are fatal to the application.

(a) The thirty-day, extendable limitation period: *Federal Courts Act*, subsection 18.1(2)

[41] In many cases, an application for judicial review must be commenced within thirty days after communication of the decision to the applicant: subsection 18.1(2) of the *Federal Courts Act*. But a party can move for an extension of time.

[42] Extensions of time are granted when they are in the interests of justice. Where an application for judicial review is brought by one or more individual applicants, four questions guide this inquiry: see, *e.g.*, *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184 at para. 61 and many other cases such as *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.). They are:

(1) Did the moving party have a continuing intention to pursue the application?

(2) Is there some potential merit to the application?

(3) Has the Crown been prejudiced from the delay?

(4) Does the moving party have a reasonable explanation for the delay?

[43] While these four questions appropriately guide the analysis and implement the policies intended by Parliament under subsection 18.1(2) when an *individual* applies for an extension of

time, class proceedings are different. The nature, process and purposes of class proceedings suggest that these four questions are not suitable for class proceedings. In particular:

- A class proceeding is not a collection of individual proceedings; it is a proceeding on behalf of a class of people *instead* of individual proceedings;

- The requirement that the application have some potential merit is entirely captured by the first branch of the certification test which asks whether there is a reasonable cause of action: Rule 334.16(1)(*a*).

- Requiring that class members demonstrate a continuing intention to pursue a class action is antithetical to the very nature of a class action. Class proceedings open the doors of justice to those who, for judicially recognized reasons, have no intention—let alone a continuing intention—to venture into the world of litigation: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at para. 28; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 at para. 27.

- Out-of-time class members would likely cite access to justice considerations as a reasonable explanation for the delay, the fourth *Larkman* question. But these access to justice considerations are already integrated into the preferability inquiry: *Fischer* at paras. 27-38. If time barred applicants cannot point to a real

> access to justice concern (*i.e.* a reasonable explanation for the delay), it is hard to conceive how the class proceeding will be preferable to other alternatives.

[44] Thus, the accepted test for individuals seeking an extension of time to bring an application for judicial review under subsection 18.1(2) of the *Federal Courts Act* must be re-modeled for class proceedings. How do we go about this?

[45] First, it is important to recognize that subsection 18.1(2) of the *Federal Courts Act* is different from many other statutory limitation periods that are hard-and-fast and non-extendable. When dealing with a hard-and-fast, non-extendable statutory limitation period, the Court will have to deal with timeliness issues on an individual basis—for instance, where the limitation period depends on when class members subjectively discovered the claim: *e.g.*, *Knight v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 235, 267 D.L.R. (4th) 579 at paras. 33-36; *Smith v. Inco Ltd.*, 2011 ONCA 628, 107 O.R. (3d) 321 at paras. 164-165.

[46] Subsection 18.1(2) of the *Federal Courts Act* has no constraining language requiring that an extension of time be considered on an individual-by-individual basis. Granting an extension under subsection 18.1(2) simply depends on whether "the interests of justice [will] be served"—something quite determinable on a class-wide basis.

[47] To do so, we must get back to the overriding concept that governs the granting of extensions of time under the subsection—the purposes Parliament intended to be advanced by subsection 18.1(2). *Larkman* helpfully furthers our understanding of those purposes.

[48] This Court has repeatedly held that the "overriding consideration is that the interests of justice be served": *Larkman* at paras, 62, 90; *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263, 63 N.R. 106 at pp. 278-279 (C.A.); *Canada (Minister of Human Resources) v. Hogervorst*, 2007 FCA 41, 359 N.R. 156 at para. 33.

[49] In deciding whether to grant the extension of time, courts must weigh and balance two competing concepts: on the one hand, the advancement of access to justice, the desirability of determinations on their merits, and the fulfillment of the purposes of a class proceeding, and on the other hand, preventing potential prejudice to the Crown and the public interest represented by it.

[50] Extensions of time enhance access to justice. Many applicants will be out-of-time because of the financial, psychological and/or social barriers to justice: *Fischer* at para. 27. Allowing these time-barred applicants to join a class proceeding simply opens a door to redress that would have been available and pursued in a timely fashion but for these impediments to justice. Extensions of time also further the goal of behaviour modification. If shielded by strictly enforced limitation periods, powerful public entities can ignore their obligations to Canadians, including the lawful operation of administrative regimes, and be improperly immunized from review: *Western Canadian Shopping Centres*, above at para. 29; *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132.

[51] The greater the barriers to justice or need for behaviour modification, the more willing a court should be to grant the extension.

[52] Courts must also factor in the practical realities of advancing a class proceeding. Class proceedings are complex and cannot be commenced hastily. Classes must be defined with an eye to precision, representative applicants must be selected carefully and detailed and comprehensive litigation plans need to be carefully developed. As a result, in some circumstances, delays at the outset of class proceedings will be unavoidable.

[53] However, even if the nature and purposes of class actions heavily favour the granting of an extension of time in the particular circumstances of a case, countervailing interests still fall to be weighed and balanced.

[54] The factors to be considered come in many varieties. *Larkman* provided a non-exhaustive list (at paras. 76-79, 87-88), and others can be discerned from the purposes underlying subsection 18.1(2) of the *Federal Courts Act*:

- The danger of missing witnesses and documents and failing memories. However, if, in the circumstances, the Crown was on notice that a particular administrative scheme is under attack, it can prepare accordingly. For example, here, the Crown has already litigated a similar challenge to the program a little more than a year ago: *Fontaine v. Canada (Attorney General)*, 2017 FC 431.

- The need for government and the public to have finality and certainty concerning decisions taken under statutory mandates. As *Larkman* put it (at para. 87), Parliament has nominated thirty days as the default deadline and when the thirty

day deadline expires and no judicial review has been launched against a decision or order, parties normally ought to be able to proceed on the basis that the decision or order will stand. An out-of-time class proceeding can undercut the goals of finality and certainty.

- Whether there has been detrimental reliance on the decision under attack. After decisions are made, matters need to move forward confidently without the fear of late applications for judicial review "pop[ping] up like a jack-in-the-box, long after the parties have received the decision and have relied upon it.": *Larkman* at para. 88.

- The general effect upon the public. The broader and deeper the impact on the general public, the greater the need for finality and certainty. *Larkman* offered the example of an environmental assessment of a project of general public benefit. An all-too-permissive approach to the granting of an extension of time can interfere with the interests of the proponent of the project being assessed and the wider public who need to know whether the decision is final.

- The general effect upon the government. For example, if this class sought retroactive support payments, and this came as a surprise to the government, this may unfairly saddle it—operating a voluntary benefits scheme in good faith—with large unanticipated costs caused solely by the applicant's delay: see, in a different context, some of the parallels and discussion in *Canada (Attorney*

General) v. Hislop, 2007 SCC 10, [2007] 1 S.C.R. 429. Making retroactive payments stretching back for a year or two before commencement of the judicial review may promote access to justice and behaviour modification but the scales may tip in the other direction if certain out-of-time applicants sought retroactive yearly payments dating back to ten or twenty years ago.

- The presence of good faith and good reasons for the class proceeding. The class proceeding should not be an artifice to get around the usual test for an extension of time for individuals under subsection 18.1(2) of the *Federal Courts Act*.

- The factors used for individuals under subsection 18.1(2) of the *Federal Courts Act*, such as their intentions and the circumstances behind any delay. Some of these may advance the Court's consideration whether the proceeding is consistent with purposes served by subsection 18.1(2) of the *Federal Courts Act*.

[55] There may be other factors based on the purposes underlying the limitation period in subsection 18.1(2) of the *Federal Courts Act*.

[56] The evidentiary record before the Court on this certification motion does not preclude the granting of an extension of time. Thus, it cannot be said that it is plain and obvious that the application cannot succeed.

[57] Nevertheless, whether an extension of time should be granted under subsection 18.1(2) of the *Federal Courts Act* remains a live issue. It should be stated as a common issue and should be tried.

(b) Is the application justiciable?

[58] The Federal Court held that the application was not justiciable. I disagree. The Federal Court reached its conclusion by failing to follow the controlling authorities on this point. This was an error of law and this Court must intervene. The application raises issues that are justiciable.

[59] The current governing authority in this Court on justiciability is *Hupacasath*, above, which drew directly from the Supreme Court of Canada's decision in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481. Although *Hupacasath* was cited to the Federal Court and could not be distinguished, the Federal Court did not consider or apply it. Instead, the Federal Court relied heavily upon its own authority in *Fontaine*, above, a decision based in part upon justiciability but which did not cite this Court's decision in *Hupacasath* on that point. Thus, the validity of *Fontaine* is also suspect. It is trite that decisions of this Court that cannot be distinguished, such as *Hupacasath* in this case, bind the Federal Court. By not considering *Hupacasath*, the Federal Court committed an error of law.

[60] Justiciability is best understood by the term used for it in the United States: the political questions objection. Some questions are so bereft of legal content and are "so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-

honoured demarcation of powers between the courts and the other branches of government": *Hupacasath* at para. 62.

[61] Very few cases fall within that category. Cases that are the normal grist for administrative law review—cases that raise issues of constitutionality legality, *vires*, reasonableness and procedural fairness based on administrative law authorities and settled doctrine—are almost always justiciable. In *Hupacasath*, this Court put it this way (at paras. 66-67):

> In judicial review, courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraph 70. Usually when a judicial review of executive action is brought, the courts are institutionally capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility, and that assessment is the proper role of the courts within the constitutional separation of powers: *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers. For example, it is hard to conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way. See generally [*Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481] at pages 459-460 and 465 [S.C.R.]; *Canada (Auditor General)*, [1989] 2 S.C.R. 49 at pages 90-91; *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at page 545; [*Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.)] at paragraphs 50-51.
>
> These cases show that the category of non-justiciable cases is very small. Even in judicial reviews of subordinate legislation motivated by economic considerations and other difficult public interest concerns, courts will still assess the acceptability and defensibility of government decision-making, often granting the decision-maker a very large margin of appreciation. For that reason, it is often said that in such cases an applicant must establish an "egregious" case: see, *e.g.*, *Thorne's Hardware v. Canada*, [1983] 1 S.C.R. 106 at page 111, 143 D.L.R. (3d) 577; *Katz*

Group Canada Inc. v. Ontario (Health and Long-Term Care), 2013 SCC 64, [2013] 3 S.C.R. 810 at paragraph 28. But the matter is still justiciable.

[62] The narrowness of the objection of justiciability is shown by the facts of the leading Supreme Court case on point, *Operation Dismantle*, above. The applicant sought to strike down a decision by the Government of Canada to allow the testing of American cruise missiles over Canada's north. Without more, the objection of justiciability might have been live, as the decision drew upon quintessentially political factors, such as Canada's relations and defence arrangements with the United States. However, the applicant claimed that the decision affected security of the person rights under section 7 of the Charter. This transformed the proceeding from a challenge over purely political matters, something not adjudicated upon by the courts, to an adjudication of constitutional rights, something well within the bailiwick of the courts.

[63] In this case, the challenge is to the reasonableness of a decision to limit the availability of benefits to a particular group of claimants and to narrow the evidence that will be considered. As explained in *Hupacasath*, these are very much the sort of things that courts in their judicial review role can assess. Indeed, several other decisions of a sort similar to the case at bar involving government policies have been seen as justiciable: see, *e.g.*, *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710; *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558; *Dassonville-Trudel (Guardian ad litem of) v. Halifax Regional School Board*, 2004 NSCA 82, 50 R.F.L. (5th) 311. In saying this, it is useful to remember that justiciability is different from deference and should not be confused with it.

[64] Therefore, in this case, the objection based on justiciability does not lie.

[65] Overall, I find that a reasonable cause of action in administrative law lies. Put negatively, it cannot be said that it is plain and obvious that this application is doomed to fail. I find that the requirement for certification under Rule 334.16(1)(*a*) is met.

(2) Identifiable class (Rule 334.16(1)(*b*))

[66] Mr. Wenham must show that "there is an identifiable class of two or more persons." He proposed 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."

[67] The Federal Court held that this certification requirement was not met because there was not an identifiable class "with sufficient connection to Mr. Wenham's circumstances" in order to meet the Rule 334.16(1)(*b*) requirement. Elsewhere, the Federal Court held that this requirement was not met because the relief sought by Mr. Wenham was limited to a review of the decision to refuse his eligibility (at para. 28). In the same vein, it noted that "the basis upon which the other denials [of benefits] 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" and the "only record before this Court" is Mr. Wenham's claim and his specific circumstances (at paras. 28-29).

[68] The Federal Court's requirement of "sufficient connection to Mr. Wenham's circumstances" is unknown to class actions law. Perhaps the Federal Court was conflating the test for class definition with the test for the existence of common issues. And, fairly characterized, Mr. Wenham's notice of motion for certification alleges that the grounds set out in his notice of application apply to all class members. Finally, the record before the Federal Court was much broader than the Federal Court realized and spoke of the application of the eligibility criteria for the program applying to all class members. These were all errors of law that permit us to intervene.

[69] All that is required is "some basis in fact" supporting an objective class definition that bears a rational connection to the common issues and that is not dependent on the outcome of the litigation: *Western Canadian Shopping Centres*, above at para. 38; *Hollick* at paras. 19 and 25. Here, that requirement is satisfied.

(3) Common issues of law and fact (Rule 334.16(1)(*c*))

[70] Mr. Wenham proposed two common issues:

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 section 18.1(4) of the *Federal Courts Act*?

B. If A. is answered in the affirmative, what remedies is the Class entitled to?

[71] The Federal Court rejected issue A. because of the Federal Court's *Fontaine* decision. As mentioned above, *Fontaine* was not the controlling authority.

[72] Further, the task under this part of the certification determination is not to determine the common issues, especially not without a full record and full legal submissions on the issue, but rather to assess whether the resolution of the issue is necessary to the resolution of each class member's claim. Specifically, the test is as follows:

> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significant of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

(*Western Canadian Shopping Centres*, above at para. 39; see also *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3 at paras. 41 and 44-46.)

[73] The Federal Court did not apply this authority in its consideration of proposed common issues A. and B.

[74] On proposed issue B., the Federal Court rejected it because it sought a remedy outside the jurisdiction of the Court. Elsewhere, it added that "the ordinary remedy, if a party is successful, would be to send the matter back for redetermination" (at para. 34). But this was the very remedy claimed by Mr. Wenham in his notice of application. Common issue B. only asks what remedy is appropriate in the circumstances.

[75] Applying the law as stated by the Supreme Court to the matter before us, I conclude that common issues A. and B. are necessary, substantial components to the resolution of each class member's claim. As will been seen, in formulating the common issues, I shall tweak them to make them more closely accord with the administrative law jurisprudence relevant to the relief sought in the notice of application. But, overall, I conclude that the Rule 336.16(1)(*c*) requirement is met.

(4) Preferable procedure (Rule 334.16(1)(*d*))

[76] The Federal Court did not refer to and did not apply the test for preferable procedure outlined by the Supreme Court of Canada. In this way, it erred in law.

[77] The test, from *Hollick* at paras. 27-31, is well-summarized in Mr. Wenham's memorandum as follows:

> (a) the preferability requirement has two concepts at its core:
>
> (i) first, whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and

(ii) second, whether the class proceeding would be preferable to other reasonably available means of resolving the claims of class members;

(b) this determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole; and

(c) the preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over individual issues.

[78] The preferability of a class proceeding must be "conducted through the lens of the three principal goals of class action, namely judicial economy, behaviour modification and access to justice": *Fischer* at para. 22.

[79] Judicial economy is a key consideration in this case. Right now there are a number of similar judicial reviews either completed or pending: *Fontaine*, above; *Briand v. Canada (Attorney General)*, T-1584-16; *Rodrigue v. Canada (Attorney General)*, T-1712-16; *Declavasio v. Canada (Attorney General)*, 17-T-13; *Porto v. Canada (Attorney General)*, 17-T-14. Merging these claims into a class proceeding promotes judicial economy. Rather than have the respondent and this Court subjected to a smattering of diffuse attacks on the program all circling around the same legal and factual issues, a single proceeding can provide the applicants with one fair shot at marshaling all of the relevant jurisprudence, legal principles and documentary evidence to best advance their claim. This will avoid duplicitous proceedings, with the threat of inconsistent or conflicting judicial assessments.

[80] Mr. Wenham proposes a class proceeding as the preferred procedure. Another available procedure is a test case. At first glance, a test case presents an appealing and perhaps simpler route.

[81] However, the preferability analysis must also consider access to justice considerations. Here, those considerations outweigh any potential efficiencies associated with a test case.

[82] What are the access to justice issues here? Like most legal proceedings, the economics of litigation are often intimidating: *Fischer* at para. 27. While there is no direct evidence of Mr. Wenham or the other applicants' economic capacities, it is uncontroversial that disabled individuals face "persistent social and economic disadvantage" placing barriers to education and the labour force and, as a result, directly impacting their earning capacity: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 at para. 56. Certainly some of the proposed class face economic barriers to pursuing this litigation.

[83] And physical disability, in and of itself, has also been consistently recognized as a barrier to justice favouring the certification of a class proceeding: *Fischer* at para. 27; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 at para. 39; *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667, 73 O.R. (3d) 401 at para. 87 (C.A.); *Pearson v. Inco Ltd.* (2005), 261 D.L.R. (4th) 629, 78 O.R. (3d) 641 at para. 84 (C.A.); *Kenney v. Canada (Attorney General)*, 2016 FC 367 at para. 26.

[84] These access to justice concerns are better served by the class proceeding. I offer several observations.

– I –

[85] I will first consider the procedural benefits of a class proceeding, namely whether a class proceeding, in contrast to a test case, offers "a fair process to resolve their claims": *Fischer* at para. 24.

[86] Pooling financial resources can make litigation feasible for class members that could not otherwise pursue an individual claim: *Hollick* at para. 15. Even if some applicants could bring individual claims, a class proceeding will reduce the financial burden and allow the applicants to invest in experienced class counsel and leading medical experts who can contribute to the Court's understanding of the matter. An individual applicant, strapped by their financial circumstances, may opt for shortcuts to cut down on expenses and, as a result, fall short of meeting his or her legal or evidentiary burdens.

[87] Class proceedings also benefit from a "no costs" regime shielding all parties from a costs order absent misconduct or exceptional circumstances (Rule 334.39).

– II –

[88] Class proceedings come uniquely equipped with detailed and extensive procedural rules and case management powers that can ease the burdens of litigation for a vulnerable group of applicants. In theory, a class could pool its resources together for the advancement of a test case. But this would rob the applicants of the carefully designed statutory playbook for class proceedings.

[89] Test cases offer no procedural safeguards against the test applicant's conflicts of interest with other would-be class members, the possibility that would-be class members never learn about the existence of the test case, or class counsel exacting an exorbitant contingency fee or agreeing to a settlement that disregards a segment of the class. In a class proceeding under the *Federal Courts Rules*, SOR/98-106, these issues, among others, are diligently monitored by class counsel under judicial scrutiny, shifting the burden off of the individual applicants who—either because of their financial or physical limitations—may not have the litigation savvy or stamina to protect their interests: see Rules 334.16(1)(*e*)(iii) (requiring no conflicts of interest for representative applicant), 334.32 (requiring notice of certification to class members) 334.4 (approval of class counsel's fees), and 334.29 (settlement approval).

[90] Class members also benefit from a different test for an extension of time under section 18.1(2) of the *Federal Courts Act*: see paras. 44-55, above. A test case would leave time-barred applicants to fend with a test for an extension of time disconnected from the purposes of class actions: access to justice, behaviour modification and judicial economy.

[91] Procedural protections accrue to the respondent as well. Unlike test cases, a respondent could, with leave, examine a non-representative applicant and potentially expose a conflict, subclass or individual issue (Rule 334.22).

[92] And, in the event individual issues emerge, the *Rules* empower judges with wide discretion to craft procedures for the resolution of those issues that can reflect the nature of the individual issues and the parties' capabilities and resources further facilitating access to justice (Rule 334.26).

– III –

[93] So far I have focused on the procedural aspects of access to justice for the proposed class. But we must also consider the substantive aspects of access to justice in the class proceedings context, namely "whether the claimants will receive a just and effective remedy for their claims if established": *Fischer* at para. 24. Here, the potential for more just and effective remedial outcomes favours a class proceeding over a test case.

[94] The sought after impact of a test case could be undercut by judicial minimalism. A judge may shy away from declaring broad principles of universal application without evidence of the circumstances of other applicants to the program. In the end, that judge may rely heavily on the particular circumstances of Mr. Wenham in deciding that the program's application to Mr. Wenham is reasonable or unreasonable. This would bring us back to square-one: a stream of

contested applications for judicial review of the eligibility criteria now attempting to distinguish or analogize their facts to Mr. Wenham's circumstances.

[95] Courts have preferred test cases over class actions where, for example, a class sought declaratory relief under section 52(1) of the *Constitution Act* because, in those cases, the desired result will unquestionably accrue to all members of the class: *Roach v. Canada (Attorney General)* (2009), 185 C.R.R. (2d) 215, 74 C.P.C. (6th) 22 at paras. 39-40 (Ont. S.C.J.) aff'd (2009) 84 C.P.C. 276 (Ont. Div. Ct.). While it is possible a similar outcome could be achieved in this case if, the eligibility criteria were declared *ultra vires*, there are other outcomes which will not smoothly apply to all class members, as illustrated above.

[96] A class proceeding guarantees that a wider set of facts will be put before a judge and force that judge to issue reasons with a view to broader considerations. What kind of evidence is being rejected by the program administrator? What are the common themes among those rejected? Are there exceptional circumstances causing the lack of documentary evidence in some cases? Engaging with these types of questions can ensure that any remedy ordered responds broadly to as many class members as possible.

[97] Doing this also promotes judicial economy and finality. Consider one scenario where the eligibility criteria are declared unreasonable and must be re-drafted. Reasons enriched by a deeper factual background will assist Health Canada in re-drafting and re-administrating the program in a comprehensive manner. If the reasons are narrow and bare, an uninformed re-

drafting process may simply spawn new applications challenging the new criteria, forcing the Federal Court to play "whack-a-mole" as new proceedings pop up on its docket.

– IV –

[98] Class proceedings can also facilitate more creative and tailor-made settlement outcomes. For example, during the Indian Residential Schools settlement discussions, the government authorized an advance payment to survivors over sixty-five *prior* to a settlement agreement: Frank Iacobucci, "What Is Access to Justice in the Context of Class Actions?" (2011) 53 Sup. Ct. L.R. (2d) 17; J. Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (Toronto: Lexis Nexis Canada, 2011) at p. 22. Under the supervision and subject to the approval of a case management judge steeped in the parties' positions, class proceedings provide a fertile ground for creative yet fair outcomes.

– V –

[99] As mentioned above, the objection based on subsection 18.1(2) of the *Federal Courts Act* will have to be considered in this class proceeding. In my view, this issue does not take away from the preferability of a class proceeding in this case. The issue whether this class proceeding is barred for lateness, determined by applying the test set out earlier in these reasons, can be considered on a class basis. In these circumstances, it does not work against the preferability of a class proceeding.

[100] Overall, for the foregoing reasons, I consider the Rule 334.16(1)(*d*) preferable procedure requirement to be met in this case.

(5) Adequate representative applicant (Rule 334.16(1)(*e*))

[101] The Federal Court found that Mr. Wenham would fairly and adequately represent the interests of the proposed class. However, it held that the litigation plan requirement in Rule 334.16(1)(*e*)(ii) was not met because it failed to address how the proceeding would deal with the limitation period issue and the evidentiary record.

[102] The litigation plan need not deal with the limitation period issue. Following upon the above analysis, it will be a common issue to be decided at the trial of the common issues.

[103] Mr. Wenham submits, and I agree, that the evidentiary record already before the Court can suffice and need not have been part of the litigation plan. In any event, the Federal Court overlooked that a litigation plan proposed in a certification motion is not cast in stone. Refusing to certify a litigation plan because of one alleged weakness is an error in law. A litigation plan is "a work in progress" and, in law, "whatever its flaws, it may be amended as the litigation proceeds": *Papassay v. Ontario*, 2017 ONSC 2023 at para. 106; see also *Cloud*, above at para. 95 (C.A.).

D. The certification order

[104] Making the order the Federal Court should have made, I would certify Mr. Wenham's application as a class proceeding. The particular terms of the order I would propose are in the next section of these reasons.

E. Proposed disposition

[105] Therefore, I would allow the appeal, set aside the order of the Federal Court, grant the motion for certification and, making the order the Federal Court should have made, grant Mr. Wenham's motion. I would order that file T-1499-16 is certified as a class proceeding on the basis of the following common issues:

1. Is the proceeding barred by the limitation period in subsection 18.1(2) of the *Federal Courts Act*? To the extent that an extension of time is required, should one be granted?

2. If the proceeding is not barred by 1., is the establishment and application of the evidentiary criteria or documentary proof requirements in the Thalidomide Survivors Contribution Program incorrect or unreasonable, or otherwise unlawful?

3. If the answer to 2. is yes, what remedies is the Class entitled to?

[106] I would appoint Mr. Wenham the representative applicant for the class. I would approve the litigation plan proposed by Mr. Wenham. I would order that no other class proceedings based upon the facts giving rise to this proceeding may be commenced without leave. I would approve the form, content and method of dissemination of notice to the class. I would also order that the amended notice of application dated November 3, 2016 be amended by adding the heading "Proposed Class Proceeding" pursuant to Rule 334.12(1) of the Rules. I would also direct that any further order or direction concerning the conduct of the class proceeding shall be made by the Federal Court.

"David Stratas"

J.A.

"I agree
D.G. Near J.A."

"I agree
J.M. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-212-17
AN APPEAL FROM THE ORDER OF THE HONOURABLE MADAM JUSTICE McDONALD, DATED JULY 6, 2017, DOCKET NO. T-1499-16	
STYLE OF CAUSE:	BRUCE WENHAM v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 9, 2018
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NEAR J.A. WOODS J.A.
DATED:	NOVEMBER 1, 2018

APPEARANCES:

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