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ARTICLE

Test for Certification in the Federal Court – New Guidance on Judicial Review Class Actions

In *Wenham v. Canada (Attorney General)*, Justice Stratas of the Federal Court of Appeal helpfully reviewed the test for certification of a class proceeding pursuant to the *Federal Court Rules*, and also outlined a new test for determining whether a reasonable cause of action exists where the subject matter of the class action is an application for judicial review.

The case concerned an application to quash a compensation program the Government of Canada established for victims of the drug Thalidomide. The Government established an initial compensation program in 1990, and revised the program in 2015 after many considered the 1990 program to be inadequate. Under the 2015 program, applicants were required to satisfy various documentary proof requirements to qualify for payment. The proposed representative plaintiff was rejected from the program on the basis that he did not provide sufficient proof to meet the requirements of the program. He brought an application for judicial review, claiming the documentary proof requirements were unreasonable in the administrative law sense, and sought to certify the application as a class proceeding with the proposed class being the 168 people who were similarly rejected from the compensation program.

The Federal Court held that the plaintiff did not meet the five criteria for certification in Rule 334.16 of the *Federal Court Rules*, which are similar to those in the provincial class proceedings statutes, being (i) the pleadings must disclose a reasonable cause of action, (ii) there must be an identifiable class of two or more persons, (iii) the claims of the class members must raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members, (iv) a class proceeding must be the preferable procedure for the just and efficient resolution of the common questions of law and fact, and (v) there must be an adequate representative plaintiff or applicant.

The decision largely focuses on the first criterion – whether a reasonable cause of action exists – because the Federal Court had interpreted the standard as requiring the plaintiff to show that the claim had a reasonable chance of success. The Federal Court of Appeal clarified that the standard for the first criterion is, as in all the provincial courts, the same as the standard applicable on a motion to strike a pleading – *i.e.* whether it is plain and obvious that the claim will fail, assuming all of the factual allegations in the pleading to be true.

In the context of a judicial review class action, the Federal Court of Appeal identified three stages at which such an application could fail that were relevant to the first certification criterion: (i) preliminary questions (like an application not being authorized under the relevant statute or not aimed at public law, which could be quashed at the outset); (ii) the merits of the review (for example if the application was based on a procedural defect that had been waived); or (iii) the relief (if the relief sought is not available at law). On the second point, it should be noted that, unless a defect like waiver was pleaded, it is questionable whether the court on a "plain and obvious" standard could deny certification, because evidence of waiver would be inadmissible on a motion to strike.

In *Wenham*, the primary issue with respect to the first certification criterion was whether the thirty day extendable limitation period in the *Federal Courts Act* for bringing a judicial review had expired for the members of the proposed class, other than the plaintiff, such that no other class member would have a claim. The Court then outlined a new test that considers the nature and purposes of a class action – which favour granting the extension to all class members – and any countervailing factors that may in the circumstances weigh against granting the extension for all class members.

In respect of the other four criteria on certification, the Federal Court of Appeal reaffirmed the test that has been previously applied, and followed the Supreme Court jurisprudence that has guided the jurisprudence in the provincial courts.

This decision is an important re-statement and clarification of the test for certification in the Federal Court, particularly now that class actions under the *Competition Act* have been commenced in Federal Court. Whereas the Federal Court's class actions docket was previously reasonably quiet and focused on claims against the Federal Government, there appears to be a trend developing of plaintiff firms taking advantage of the Court's national scope to bring claims under statutory rights of action in federal statutes.

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