Federal Court of Appeal | Cour d'appel fédérale

Date: 20211027

Docket: A-155-20

Citation: 2021 FCA 208

CORAM: **STRATAS J.A.**
LASKIN J.A.
MONAGHAN J.A.

BETWEEN:

BRUCE WENHAM

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry on September 20, 2021.

Judgment delivered at Ottawa, Ontario, on October 27, 2021.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: STRATAS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] Under Rule 334.39 of the *Federal Courts Rules*, SOR/98-106, costs may not be awarded in a class proceeding unless one of the exceptions in the Rule applies. The appellant appeals the Federal Court's order (per Phelan J.) in *Wenham v. Canada (Attorney General)*, 2020 FC 591, made for reasons reported as *Wenham v. Canada (Attorney General)*, 2020 FC 592 [*Wenham*

Costs], dismissing the class' motion for costs in a class proceeding that has settled. The Federal Court concluded none of the exceptions applied.

[2] For the reasons that follow, I would dismiss the appeal.

I. Background

[3] Bruce Wenham is the representative applicant of a class comprised of individuals whose applications for support under Canada's Thalidomide Survivors Contribution Program (TSCP) were denied. The class sought judicial review of those decisions, challenging the TSCP's evidentiary criteria and documentary proof requirements. The motion for certification of the proceeding as a class proceeding was dismissed by the Federal Court in July 2017, but in November 2018, this Court allowed the appeal of that decision and certified the proceeding as a class proceeding.

[4] While certification of the class proceeding was pursued, other individuals were challenging decisions to deny them support under the TSCP in the Federal Court with mixed success: see *Fontaine v. Canada (Attorney General)* 2017 FC 431; *Briand v. Canada (Attorney General)*, 2018 FC 279, and *Rodrigue v. Canada (Attorney General)*, 2018 FC 280.

[5] Moreover, advocacy groups were seeking better support for Thalidomide survivors at the political and bureaucratic levels of government (the public policy process). In 2017, Parliament's Standing Committee on Health recommended a review of the TSCP. The February 2018 Federal

Budget acknowledged problems with the TSCP and promised changes. In January 2019, changes to the TSCP promised in that budget were announced as coming. On April 5, 2019, the Canadian Thalidomide Survivors Support Program (CTSSP) was created by Order in Council, replacing the TSCP. The CTSSP resolved many of the issues raised in the class proceeding.

[6] In May 2019, the respondent moved for dismissal of the class proceeding on the basis the CTSSP was an alternative remedy that rendered the class proceeding moot. The parties entered into negotiations and settled the class proceeding in October 2019, the day before the hearing of the motion to dismiss and on the common questions. The settlement neither required the respondent to contribute to the class' costs nor precluded the class from seeking costs.

[7] Class counsel fees and any settlement in a class proceeding must be approved by the Federal Court. The Federal Court approved the settlement agreement (*Wenham v. Canada (Attorney General)*, 2020 FC 588 [*Wenham* Settlement]) and the class counsel fees (*Wenham v. Canada (Attorney General)*, 2020 FC 590 [*Wenham* Fees]), but dismissed the class' motion for costs on the basis none of the exceptions to the no costs rule applied.

[8] This appeal concerns only the costs decision. However, because relevant factual findings also appear in *Wenham* Settlement and *Wenham* Fees, and the decisions reference each other, I refer to all of the reasons as necessary.

II. Standard of Review

[9] An award of costs is a discretionary decision. Therefore, absent the Federal Court making an error of law or a palpable and overriding error, this Court will not interfere: *Canada v. Greenwood*, 2021 FCA 186, at paras. 119-120; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, at paras. 28 and 71-72; *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 F.C.R. 246, at paras. 18-19.

III. Rule 334.39 – The No Costs Rule

[10] Rule 334.39(1) provides:

334.39. (1) Subject to subsection (2), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless	**334.39.** (1) Sous réserve du paragraphe (2), les dépens ne sont adjugés contre une partie à une requête en vue de faire autoriser l'instance comme recours collectif, à un recours collectif ou à un appel découlant d'un recours collectif, que dans les cas suivants :
(a) the conduct of the party unnecessarily lengthened the duration of the proceeding;	a) sa conduite a eu pour effet de prolonger inutilement la durée de l'instance;
(b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or	b) une mesure prise par elle au cours de l'instance était inappropriée, vexatoire ou inutile ou a été effectuée de manière négligente, par erreur ou avec trop de circonspection;
(c) exceptional circumstances make it unjust to deprive the successful party of costs.	c) des circonstances exceptionnelles font en sorte qu'il serait injuste d'en priver la partie qui a eu gain de cause.

[11] The proper interpretation of Rule 334.39, including the exceptions in 334.39(1)(*a*), (*b*) and (*c*), is at the heart of this appeal. The appellant argues the Federal Court erred in its interpretation, making both errors of law and errors of mixed fact and law.

[12] The appellant submits the Federal Court's interpretation of the exceptions does not serve the purpose of the no costs rule, which the appellant says is to incentivize class proceedings.

[13] Secondly, the appellant submits that the Federal Court's factual findings, considered objectively, support a conclusion that the exceptions apply. However, the appellant submits that the Federal Court also interpreted the exceptions as requiring the appellant to approve subjective intent on the part of the respondent to engage in the conduct described in the exceptions. This, says the appellant, set too high a bar and is an error.

[14] I disagree. Nothing in *Wenham* Costs, *Wenham* Settlement or *Wenham* Fees suggests that the Federal Court required proof of subjective intent. As I read the decisions, the Federal Court found the evidence did not establish the requisite conduct and made that finding based on its assessment of all of the evidence before it. In doing so, it recognized that its findings would have different consequences depending on the decision before it. The focus in *Wenham* Fees "differs from the Settlement Approval context" and "[m]any of the considerations which justified […] approval of Class Counsel's fees work against the Applicant's motion for costs": *Wenham* Fees, at para. 6 and *Wenham* Costs, at para. 1.

A. *Did the Federal Court interpret Rule 334.39 correctly?*

[15] Rule 334.39 is to be interpreted applying a textual, contextual and purposive analysis: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Rather than starting its analysis with the text, the Federal Court began by examining purpose and context.

(1) Purpose of Rule 334.39

[16] The Federal Court recognized that the class proceedings rules should be "construed generously" and "in a way that gives full effect to the benefits" of class proceedings as identified in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158: judicial economy, access to justice, and modification of wrongdoer behaviour. Within that context, and relying on *Campbell v. Canada (Attorney General*), 2012 FCA 45, [2013] 4 F.C.R. 234 [*Campbell*], the Federal Court concluded the no cost rule serves access to justice by removing a barrier to class proceedings. Therefore, "[t]he presumption in favour of no costs is strong and essential for the proper operation of the class proceedings regime": *Wenham* Costs, at para. 13.

[17] These conclusions about the purpose and importance of the no cost rule informed the Federal Court's interpretation of what it called "a limited exception".

[18] The appellant argues the purpose of the no costs rule is to incentivize class proceedings. In view of that purpose, says the appellant, there is no rationale for protecting non-class

defendants from costs awards. In the absence of such a rationale, the Federal Court erred by interpreting the rule in a manner that does not serve the purpose it advocates. The appellant goes so far as to suggest that the no costs rule should be interpreted so that it applies to the defendant/respondent only in the "rare circumstance" where a party has moved to certify a defendant/respondent class as permitted by Rule 334.14(2). This interpretation, says the appellant, serves the policy rationale underlying the no costs rule—to incentivize class proceedings.

[19] I disagree. The distinction between an incentive and the absence of a disincentive, although a fine one, is meaningful. The purpose of the no costs rule is to remove a barrier to class proceedings, not to incentivize them: see *Campbell*, at paras. 26-28, and *Manuge v. Canada*, 2013 FC 341, [2014] 4 F.C.R. 67, at para. 22.

[20] Moreover, in advancing this position, the appellant ignores the text of the rule: "no costs may be awarded against any party". The appellant asks us to interpret that language as meaning "no costs may be awarded against a class member or a representative of a class". I see no ambiguity in the text of Rule 334.39 permitting that interpretation. Where the Rules applicable to class proceedings intend to distinguish between parties, the language chosen reflects that intention. I agree with the Federal Court "the policy choice that the rule applies to both parties is clearly deliberate": *Wenham* Costs, at para. 13. The analysis that occurred before Rule 334.39 was added to the Rules, as described in *Campbell,* makes this clear. Notably, Rule 334.39 was not changed when class proceedings were extended to include judicial reviews in 2007: SOR/2007-301.

(2) Purpose of the Exceptions

[21] This brings me to the three exceptions to the no costs rule.

[22] The exceptions in Rules 334.39(1)*(a)* and *(b)* are concerned with a party's actions: conduct of a party that lengthens the proceeding or a step taken by a party that is improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution. The third exception in Rule 334.39(1)*(c)* concerns to exceptional circumstances that make it unjust to deny a successful party costs.

[23] The Federal Court noted the "natural tension and balance within the no costs rule"—on one side the overriding no costs principle and on the other the exceptions: *Wenham* Costs, at para. 16. While it considered the exceptions to the no costs rule to be limited, the Federal Court recognized their importance to the class proceeding regime and the need to give them "an equally fair and liberal interpretation which serves the purpose of disciplining inappropriate conduct," particularly conduct that seeks to "delay, frustrate or even prevent the plaintiff's 'day in court'": *Wenham* Costs, at paras. 14 and 15.

[24] Those statements might suggest the Federal Court considered all three exceptions to share a single purpose—controlling inappropriate behaviour—notwithstanding that nothing in the text of the third exception suggests that is its purpose. However, a careful reading of *Wenham* Costs satisfies me that the Federal Court did not interpret the third exception as narrowly as these

statements might imply. That is not to say that behaviour will never be relevant to the third exception. Rather, I do not agree that the third exception's only purpose is to control behaviour.

(3) Conduct Relevant to the Exceptions

[25] The appellant argues the Federal Court erred by concluding events in the public policy process were "not matters which fall *per se* within the exception to the Rules unless these acts were designed to frustrate the litigation": see *Wenham* Costs, at para. 28. The appellant says the question is not whether there were "unusual delays within the litigation" but rather "whether the litigation needed to go on at all, or as long as it did."

[26] The respondent contends the Federal Court made no error; it agrees that conduct outside the proceeding is irrelevant unless it is linked to, or designed to frustrate, the litigation.

[27] I see no error in the Federal Court's interpretation. The text of the first two exceptions refers to "the proceeding"—the first to conduct that unnecessarily lengthens the proceeding and the second to any improper, vexatious or unnecessary step in the proceeding taken by a party. These references to "the proceeding" can only be to a proceeding described in the opening words of Rule 334.39 (*i.e.*, a motion for certification of a proceeding as a class proceeding, a class proceeding, or an appeal arising from a class proceeding): see *Canada v. Martin*, 2015 FCA 95, [2015] D.T.C. 5048, leave to appeal to SCC refused 2015 CanLII 69426 (SCC), [*Martin*]. *Martin* considered circumstances in which proceeding was defined in the relevant rules. While the Rules do not define proceeding, that term is used in the Rules only in the context of actions (Rule 169), applications (Rule 300) and appeals (Rule 335), including class actions or applications (Rule

334.1). Although Rule 334.39 expressly applies to motions to certify an action or application as a class proceeding, motions, are not proceedings for purposes of the Rules: *Vaughan v. Canada,* (2000) 2000 CanLII 15069 (FC), 184 F.T.R. 197, at para. 23, and *Gholipour v. Canada (Attorney General)*, 2017 FCA 99, at para. 8.

[28] Moreover, this interpretation of relevant conduct is consistent with the principles relevant to fully discretionary cost awards. The language of the first two exceptions closely resembles two factors the Rules, like rules in other courts, identify as relevant to entirely discretionary costs awards. In that context, courts have looked to conduct in, or strongly linked to, the litigation. This is consistent with one of the purposes of costs awards—to "deter impetuous, frivolous and abusive behaviour": *Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202, [2003] 4 F.C. 865, at para. 46, and *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 25. In considering these factors, the Federal Court has cautioned about judging litigation choices, particularly with hindsight: *Bauer Hockey Ltd. v. Sports Maska Inc. (CCM Hockey)*, 2020 FC 862, at paras. 17-20. Circumstances in which conduct outside the litigation is relevant are extremely rare and require a direct connection to the litigation: *Martin*, at paras. 20-22; *Merchant v. The Queen*, 2001 FCA 19, 267 N.R. 186; *Canada v. Landry,* 2010 FCA 135, 404 N.R. 255.

[29] Accordingly, I agree with the Federal Court's interpretation of Rule 334.39.

B. *Did the Federal Court err in applying the law to its findings of fact?*

[30] Before addressing the appellant's arguments regarding the Federal Court's application of the law to its findings of fact, I wish to say something about anticipatory compliance, *i.e.*, delay by the defendant or respondent in agreeing to relief sought in litigation only to agree to it at the last moment. In *Wenham* Costs, the Federal Court discussed anticipatory compliance and why it did not apply in a no costs regime before stating that even if there was anticipatory compliance, the appellant could not prevail in its motion for costs unless an exception is available. This might suggest the appellant argued anticipatory compliance could result in a costs award in a class proceeding independent of the exceptions in Rule 334.39. Before this Court the appellant confirmed it was not advancing that position. Consequently, the parties, the Federal Court and I agree that costs cannot be awarded in a class proceeding unless an exception applies.

(1) Exception 334.39(1)*(a)* – Lengthened Proceedings

[31] The Federal Court found that "there were no unusual delays within the litigation," that "the litigation itself proceeded in the usual course" and that the respondent had not "unnecessarily lengthened proceedings". The Federal Court acknowledged delays occurred in the public policy process but found insufficient evidence to find those delays were intended to frustrate the litigation, so they were not relevant. The Federal Court expressly rejected the appellant's claim of anticipatory compliance in the "sense of deliberate stalling and late compliance to frustrate the litigation" or "deliberate dilatoriness": *Wenham* Costs, at paras. 9 and 22-23. I see no palpable and overriding error in these findings.

(2) Exception 334.39(1)*(b)* – Improper or Vexatious Steps

[32] As to the second exception, the Federal Court characterized the respondent's conduct as "consistent with an aggressive defence which it was entitled to mount": *Wenham* Costs, at para. 27). There was nothing improper in the respondent proceeding "through a public policy process to resolve the issue, and not to do so exclusively within the litigation context": *Wenham* Costs, at para. 27. Everyone recognized "there were a number of outside forces advancing the cause of improving the TSCP and modifying the monetary and evidentiary aspects of the program": *Wenham* Fees, at para. 44. Again, I see no palpable and overriding error.

(3) Exception 334.39(1)*(c)* – Exceptional Circumstances

[33] The third exception requires three things: a successful party, exceptional circumstances, and a finding that those circumstances render it unjust to deny the successful party its costs.

[34] The Federal Court asked whether the circumstances of this class proceeding were exceptional and decided they were not. It considered its comments about the first two exceptions equally relevant to the third. In other words, there was nothing exceptional in the litigation or about a parallel public policy process pursuing similar changes to those sought in the litigation. Similarly, the fact the class proceeding was novel and had some impact on the implementation and design of the CTSSP were not exceptional circumstances. I see no reviewable error in this.

[35] Having decided the circumstances were not exceptional, the Federal Court did not need to consider whether there was a successful party—another condition in the third exception. Nonetheless, it is worth noting that the Federal Court recognized that this was "a case of settlement where 'success' is very much a subjective evaluation" and "a reasonable settlement is an attractive viable alternative for both sides" given the risks to both parties of proceeding with the litigation: *Wenham* Costs, at para. 20 and *Wenham* Settlement, at para. 69.

IV. A Few Words about Exceptional Circumstances

[36] Because "exceptional circumstances" is not defined in the Rules, its meaning can be determined only after a textual, contextual and purposive analysis. Beyond saying what did not constitute exceptional circumstances, the Federal Court did not attempt to define it and this Court does not need to do so to decide this appeal. Indeed, it might be said to be incapable of precise definition, inviting a "You'll know it when you see it" response.

[37] "Exceptional" connotes something quite remarkable, extraordinary or, if not rare, at least very far from common. Perhaps it would be described as requiring something that would cause an objective observer, familiar with the no costs rule and its rationale, and with all the facts and circumstances of the particular case, to be astonished at the injustice of the successful party not being awarded costs. While I am not convinced it requires inappropriate behaviour, it requires something more than the circumstances in this proceeding.

V. Conclusion

[38] I have found no error in the Federal Court's interpretation of Rule 334.39 and no palpable and overriding error in its findings of fact or its application of the Rule to those findings.

[39] Accordingly, I would dismiss this appeal, without costs.

"K. A. Siobhan Monaghan"
J.A.

"I agree
David Stratas J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL1

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE PHELAN DATED MAY 8, 2020, NO. T-1499-16

DOCKET:	A-155-20
STYLE OF CAUSE:	BRUCE WENHAM v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA
DATE OF HEARING:	SEPTEMBER 20, 2021
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	STRATAS J.A. LASKIN J.A.
DATED:	OCTOBER 27, 2021

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