Court File No. A-139-20

FEDERAL COURT OF APPEAL

CLASS PROCEEDING

BETWEEN :

NOËLLA HÉBERT

Appellant/Moving Party

- and -

BRUCE WENHAM and THE ATTORNEY GENERAL OF CANADA

Respondents

MOTION FOR LEAVE TO EXERCISE RIGHT TO APPEAL
UNDER RULE 334.31(2) OF THE *FEDERAL COURT RULES*

MEMORANDUM OF FACT AND LAW OF THE MOVING PARTY NOËLLA HÉBERT

DATE: July 22, 2020

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PART I - FACTS

1. This is a motion by Noëlla Hébert under Rule 334.31(2) of the Federal Courts Rules, S.O.R./98-106. Ms. Hébert, as a class member, is seeking leave from this Honourable Court to exercise the right of appeal of the Representative Plaintiff of a Settlement Approval Order issued by the Federal Court in a class proceeding.

2. On May 8, 2020, Mr. Justice Phelan of the Federal Court approved a settlement of the class proceeding initiated by Bruce Wenham. Mr. Wenham had applied to the Thalidomide Survivor Contribution Program [**the "TSCP" or the "2015 Program"**],[1] a program created by the federal government to provide financial support to the victims of Thalidomide. When his application was refused, he commenced a judicial review application which was subsequently certified as a class proceeding.

A. Thalidomide and Canada's Response Thereto

3. Thalidomide was available in Canada under the brand names Kevadon and Talimol. It was provided to pregnant women to relieve symptoms of morning sickness.[2] Unfortunately, Thalidomide was later discovered to cause birth defects when taken during the first trimester of pregnancy.[3] Tragically, many children were born in Canada with congenital malformations caused by their mother's use of Thalidomide during the first trimester of pregnancy.[4]

4. In 1990, Canada distributed *ex gratia* payments to Thalidomide victims through the Extraordinary Assistance Plan ["**EAP**"]. To be eligible, applicants were required to provide evidence that: 1) they had received a settlement from a drug company; 2) there had been "maternal ingestion of Thalidomide in Canada during the first trimester of

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[1] *Wenham v. Canada (Attorney General)*, 2020 FC 588, Motion Record of the Moving Party ("MP MR"), Tab 2, at paras. 1-2 [Approval Decision].
[2] *Ibid* at paras 10 and 11.
[3] *Ibid* at para 11.
[4] *Ibid* at para 11.

pregnancy; or 3) they were listed on a government registry of Thalidomide victims [the **"1991 criteria**"]."[5]

5. In the spring of 2015, Canada announced further payments for Canadian Thalidomide survivors through the TSCP. The benefits included a one-time tax-free lump sum payment of $125,000; an ongoing lifetime support payment based on the level of disability; and access to the EAP medical assistance fund. These benefits were to be available for eligible recipients who either received payments pursuant to the 1991 EAP, or for those who submitted an application before May 31, 2016, and met the same criteria as the 1991 EAP.[6]

6. Pursuant to the 1991 Criteria, applicants who had not received a settlement from a drug company and were not listed on a government registry of Thalidomide victims had to establish that their mother had ingested Thalidomide in Canada during the first trimester of her pregnancy by presenting the following evidence:

i. Copies of a doctor's prescription(s);

ii. Hospital birth records, or other medical/pharmacy records; or

iii. Proof in the form of a sworn statement from a healthcare professional having direct knowledge of the event. Sworn statements from non-medical professionals such as family members) were not accepted [7] (the "**evidentiary criteria**").

7. Bruce Wenham's application to the 2015 Program was rejected, as was Noëlla Hébert's and many others', on the basis that they did not meet the evidentiary criteria.[8]

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[5] Approval Decision at paras 13-14, MP MR, Tab 2; Affidavit of Noëlla Hébert, sworn on July 22, 2020 at para 28, MP MR, Tab 6 [Hébert Affidavit].
[6] *Ibid* at paras 16-17; Hébert Affidavit at paras 31-32, MP MR, Tab 6.
[7] Approval Decision at paras 18-21, MP MR, Tab 2; Hébert Affidavit at para 34, MP MR, Tab 6.
[8] Approval Decision at para 28, MP MR, Tab 2; Hebert Affidavit at paras 36-37, MP MR, Tab 6.

B. The Class Proceeding

8. Mr. Wenham sought judicial review of the refusal of his application to the 2015 Program on the grounds that the evidentiary criteria were *ultra vires* and procedurally unfair.[9] His was one of many applications for judicial review filed in respect of decisions to deny benefits.[10]

9. Mr. Wenham subsequently converted his application for judicial review into a class proceeding. Although certification was initially denied by the Federal Court,[11] that decision was overturned by this Honourable Court on November 1, 2018,[12] and the Federal Court subsequently ordered the dissemination of the notice of certification on March 29, 2019.[13] The class was certified as including "all individuals whose applications to the Thalidomide Survivors Contribution Program were rejected on the basis of failing to provide the required proof of eligibility."[14]

10. The class proceeding was described as follows:

> *The class proceeding alleges that the eligibility criteria and evidentiary restrictions imposed by the Thalidomide Survivors Contribution Program were incorrect, unreasonable or unlawful and all rejections on those bases ought to be set aside. The class proceeding is asking that all applications rejected on those bases be reconsidered by the Federal Government using more reasonable criteria.*[15]

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[9] *Ibid* at para 29; see also Amended Application for Judicial review of Bruce Wenham, MP MR, Tab 4.
[10] See *Fontaine v Canada (Attorney General)*, 2017 FC 431, *Briand v Canada (Attorney General)*, 2018 FC 279 [*Briand*] and *Rodrigue v Canada (Attorney General)*, 2018 FC 280 [*Rodrigue*], Book of Authorities of the Appellant/Moving Party ("MP BOA"), Tabs 1, 4 and 5.
[11] *Wenham v Canada (Attorney General)*, 2017 FC 658, MP BOA, Tab 2,
[12] *Wenham v Canada (Attorney General)*, 2018 FCA 199, MP BOA, Tab 3.
[13] *Wenham v Canada (Attorney General)*, 2019 FC 383, MP BOA, Tab 6,
[14] Notice of Certification dated March 28, 2019, Exhibit "K", Hébert Affidavit, MP MR, Tab 6-K.
[15] *Ibid.*

11. The Appellant/Moving Party, Ms. Hébert, is a member of the class, as her application to the TSCP was rejected because she failed to submit evidence that met the evidentiary criteria set out above.[16]

12. In total, the class is comprised of 167 individuals whose applications to the 2015 Program were rejected (158 after opt-outs).[17]

C. <u>The 2019 Program</u>

13. On January 9, 2019, Canada announced the creation of a new program for Canadian Thalidomide survivors: the Canadian Thalidomide Survivors Support Program ["**CTSSP**" or the "**2019 Program**"].[18]

14. The program was created by Order in Council on April 5, 2019. Persons found eligible under the 1991 or 2015 Programs and those listed on a Canadian government registry were automatically eligible for the 2019 Program. Anyone else believing themselves to be a victim of Thalidomide had to pass a three-step application process.[19]

15. As part of the first step in the application process, the Order in Council introduced birthdate parameters. As a result of these parameters, applicants born before December 3, 1957, or after December 21, 1967, may not be eligible for the new program [the **"Birthdate Parameters"**].[20]

16. Mr. Wenham's birthdate falls within the Birthdate Parameters. Ms. Hébert was born on January 31, 1968, and therefore her date of birth falls outside of the Birthdate

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[16] Hébert Affidavit at para 48, MP MR, Tab 6.
[17] Approval Decision at para 83, MP MR, Tab 2.
[18] New Program announcement, Exhibit "L", Hébert Affidavit, MP MR, Tab 6-L, Approval Decision at para 39, MP MR, Tab 2.
[19] Order in Council, Exhibit "M", Hébert Affidavit, MP MR, Tab 6-M.
[20] *Ibid*.

Parameters.[21] She is not alone: 41 other individuals in the class were born outside of the Birthdate Parameters.[22]

17. The Notice of Certification stated that class members who wished to opt out from the class proceeding had until May 27, 2019 to do so.[23] By that time, the 2019 Program had been created. The difficulty, however, is that it was unclear what impact, if any, the 2019 Program would have on the class proceeding.

18. Class counsel did not provide any insight into the possible impact of the 2019 Program before the opt-out deadline of May 27, 2019, despite being requested to do so by Ms. Hébert and other class members who also fell outside of the Birthdate Parameters.[24]

19. More specifically, class counsel had informed class members that they would provide them with details of the impact of this new program on the class proceeding. On May 24, 2019, a few days before the expiration of the opt-out period, Ms. Hébert wrote to class counsel to request these details. No answer was received. Another appellant, Ms. Singmaster, also communicated with class counsel to obtain this information, also in vain.[25]

20. Concerned that she would be excluded from the 2019 Program because she was born outside of the Birthdate Parameters, Ms. Hébert did not opt out of the class proceeding. Recall that the class proceeding arose from the 2015 Program, which did not include any Birthdate Parameters. Given her date of birth, she reasoned that she was more likely to be found eligible under the terms of that program.[26]

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[21] Hébert Affidavit at para 2, MP MR, Tab 6.
[22] Approval Decision at para 84, MP MR, Tab 2; joint written representations for settlement approval, Exhibit "T", Hébert Affidavit, MP MR, Tab 6-T.
[23] Notice of Certification, Hébert Affidavit, MP MR, Tab 6-K.
[24] Hébert Affidavit at paras 68-69; Order in Council, Exhibit "M", Hebert Affidavit, MP MR, Tab 6-M.
[25] Hébert Affidavit at paras 68-69, MP MR, Tab 6.
[26] *Ibid* at paras 71-73.

D. The Settlement Agreement and Approval Order

21. On October 22, 2019, Mr. Wenham and Canada signed a Settlement Agreement in order to end the class proceeding.[27]

22. On December 5, 2019, a Notice of Settlement hearing was issued.[28]

23. The Settlement Agreement incorporated by reference the 2019 Program to settle the class proceeding.[29]

24. The Settlement Approval hearing was held on February 26 and 27, 2020. During the hearing, several class members expressed their opposition to the settlement. Their main concern was the inclusion of the Birthdate Parameters.[30]

25. Ms. Hébert and others provided extensive submissions in opposition of the settlement and further asked the Federal Court to allow them to exclude themselves from the class at that point.[31]

26. On May 8, 2020, Justice Phelan approved the settlement of the class proceeding.

27. Regarding the objections on the basis of the Birthdate Parameters, Justice Phelan stated that:

> *[89] If it was in the power of this Court, it would have struck out these date parameters but that would have put the Settlement in jeopardy. Regrettably, the Court is powerless to do anything about this issue, other than to encourage a compassionate reconsideration. A rejection*

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[27] Approval decision at para 43, MP MR, Tab 2; Settlement Agreement, Exhibit “R”, Hébert Affidavit, MP MR, Tab 6-R.
[28] Notice of Settlement hearing, Exhibit “S”, Hébert Affidavit, MP MR, Tab 6-S.
[29] Approval Decision at para 45, MP MR, Tab 2.
[30] *Ibid* at para 87.
[31] Hébert Affidavit at paras 83 and 89-90 and at Exhibits “U” and “W”, MP MR, Tabs 6-U, 6-W

> *of the Settlement would be unfair to the Class and others and is not a viable alternative.*[32]

28. Although Mr. Wenham is appealing the Settlement Approval decision on the issue of costs, he is not appealing the Settlement Approval Order.[33]

E. <u>The Moving Party, Noëlla Hébert</u>

29. As set out above, Ms. Hébert is a class member. She was born into a poor family in rural New Brunswick in January 1968, with malformations consistent with maternal ingestion of thalidomide during the first trimester of pregnancy.[34] Her mother has sworn an affidavit indicating that a physician in Rexton, New Brunswick, provided her with thalidomide in March, April, May and June of 1967.[35] This same physician was present at Ms. Hébert's birth and told her parents that the thalidomide had caused her significant malformations.[36]

30. Ms. Hébert was born with only one arm and hand, although she is severely limited in the use she can make of them. She cannot raise her arm, lift more than one pound, or turn a doorknob in order to open the door. As a result of the overuse of her arm, she has developed arthritis in all the joints in her right arm and hand. On days when the pain is particularly severe, she has no useful function of her right arm at all.[37]

31. Ms. Hébert's lower limbs are also malformed. She was born with no right hip; instead, the lower portion of her leg grew directly form her trunk, ending in a small foot. She was also born without a functional left hip and with her left knee turned outwards.[38] At the age of two, she underwent a complex surgery to try and fix her left hip, resulting in a two-month course in hospital.[39] After developing severe scoliosis in

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[32] Approval Decision at para 89, MP MR, Tab 2.
[33] Hébert affidavit at para 109, MP MR, Tab 6.
[34] *Ibid* at paras 2 and 6-7.
[35] *Ibid* at para 10.
[36] *Ibid* at para 11.
[37] *Ibid* at paras 12-16.
[38] *Ibid* at paras 17-18.
[39] *Ibid* at para 2.

her teens, she underwent surgery at the age of 13 to insert a rod in her back.[40] She went on to suffer a severe hernia and the rod was removed during the course of two separate surgeries. Her spine has been surgically fused.[41]

32. At the age of 16, she underwent yet another procedure to rotate her right foot 90 degrees so that it could be used as a knee on which a prosthesis could be placed.[42] More recently, she has had two surgeries to reconstruct her left hip and knee. She will require more surgeries to address her ongoing severe pain.[43]

33. Notwithstanding the above and the evidence supplied by her parents, a geneticist and her treating physicians, Ms. Hébert's application to the 2015 Program was rejected because she did not meet the evidentiary criteria.[44] She anticipates being excluded from the 2019 Program because she was born outside the Birthdate Parameters.

34. Ms. Hébert's story illustrates the extent to which, in the words of the Federal Court, "Canada's explanation for its rigid approach, while coldly scientific, lacked the compassion for the individual which the government espoused. It potentially punished the innocent who had not engaged themselves in "unauthorized use" [of thalidomide]."[45]

PART II - ISSUES

35. Rule 334.31(2) provides as follows:

> *If a representative plaintiff or applicant does not appeal an order, or does appeal and later files a notice of discontinuance of the appeal, any member of the class for which the representative plaintiff or applicant had been appointed may apply for leave to exercise the right of appeal of that representative within 30 days after*

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[40] Hébert affidavit at para 21, MP MR, Tab 6.
[41] *Ibid* at paras 23 and 26.
[42] *Ibid* at para 22.
[43] *Ibid* at paras 24-25.
[44] *Ibid* at para 37.
[45] Approval Decision at para 88, MP MR, Tab 2.

> *(a) the expiry of the appeal period available to the representative, if the representative does not appeal; or*
>
> *(b) the day on which the notice of discontinuance is filed, if the representative appeals and later files a notice of discontinuance of the appeal.*[46] [Emphasis added.]

36. The decision at issue in this case, the approval of a settlement agreement, is an "order" and therefore falls within the scope of Rule 334.31(2). As explained by this Honourable Court in *McLean*, "[a]n approval order made in a class action is the equivalent of a final judgment as described in paragraph 27(1)(*a*) of the *Federal Courts Act*."[47]

37. As a result, the issues before this Court are as follows:

i. Will the Applicant Noëlla Hébert fairly and adequately represent the class on appeal?

ii. Is the appeal itself in the best interests of the class?

PART III - LAW AND ARGUMENT

38. Noëlla Hébert seeks leave to exercise the right to appeal a settlement approval order that is unfair, unreasonable and not in the best interests of the class as a whole. The settlement not only provided no benefits at all to the approximately 25% of class members who fall outside of the Birthdate Parameters, but effectively extinguishes their rights to proceed individually, leaving them worse off than if the class proceeding had not occurred.

39. Although he did not use the word "conflict," the Federal Court judge expressed

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[46] Rule 334.31(2), Federal Courts Rules, S.O.R./98-106 (our emphasis), MP BOA, Tab 24.

[47] See *Ottawa v McLean*, 2019 FCA 309 at para. 11[*McLean*], MP BOA, Tab 7: "This application under rule 334.31(2) must be brought before this Court because, if it is allowed, it is the Federal Court of Appeal that will hear the arguments on the merits. An approval order made in a class action is the equivalent of a final judgment as described in paragraph 27(1)(a) of the Federal Courts Act."

significant concerns at paragraphs 88 and 89 of his reasons about the impact of the settlement on 25% of the class. Nevertheless, the Federal Court stated it was not within the power of the court to do anything about it.

40. This is an error of law and showcases a misunderstanding regarding the role of a judge being asked to approve a settlement in a class proceeding. Not only are they not powerless, the judge is obligated to refuse a settlement that severely prejudices a portion of the absent class members.

41. Moreover, the Federal Court failed to recognize that the settlement agreement gave rise to a conflict within the class which the Court was required to address. The conflict could and should have been addressed in the Settlement Agreement through either the decertification of the subclass members prejudiced by the settlement or by providing these members with a second opportunity to opt out.

42. Having failed to address the conflict, it was simply not open to the Federal Court to approve the proposed settlement agreement.

43. This Honourable Court has issued only two reported decisions in relation to requests to exercise the right of appeal under Rule 334.31(2): *Frame v. Riddle*[48] and *Ottawa v. McLean*.[49] These cases establish that "to obtain leave to exercise the appeal right of a representative plaintiff, a class member must show that he or she will fairly and adequately represent the class on appeal, and that the appeal is itself in the best interests of the class."[50] In both *Frame* and *McLean*, evidentiary issues relating to the suitability of the proposed representative plaintiff were fatal. These issues are not present in this case. Moreover, the cases can also be distinguished by the absence of a conflict within the class and an option to opt out for absent class members prejudiced by the settlement.

44. In this case, the proposed appeal seeks to raise critical deficiencies in the

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[48] 2018 FCA 204 [*Frame*], MP BOA, Tab 8.
[49] 2019 FCA 309 [*McLean*], MP BOA, Tab 7.
[50] *Frame* at para. 24, MP BOA, Tab 8; *McLean* at para. 13 MP BOA, Tab 7.

settlement and is in the best interests of the class as a whole. The proposed appellant Ms. Hébert will fairly and adequately represent all class members, including those excluded from the Settlement Agreement because of the Birthdate Parameters.

A. Ms. Hébert Will Fairly and Adequately Represent the Class on an Appeal Which Seeks to Set Aside the Settlement Approval Order

i. Ms. Hébert will adequately represent the interests of the class

45. Ms. Hébert can step into the shoes of the Representative Applicant and exercise his right to appeal the Settlement Approval Order. Rule 334.31(2) provides for a motion for leave to *exercise a right to appeal* rather than a motion for *leave to appeal*. In other words, under this Rule, a proposed appellant must take the place of the Representative Applicant and exercise their right of appeal.[51]

46. Ms. Hébert must show that she will adequately represent the interests of the class by bringing an appeal seeking to set aside the Settlement Agreement. To establish this, the test to be applied is similar to that on a certification motion: the record must provide evidence of the applicant's interests, the understanding of the position it seeks to advance, her role in the proceeding and her competence to instruct counsel.[52]

47. It goes without saying that the applicant must be a member of the class she seeks to represent on appeal.[53] Ms. Hébert is clearly a member of the class, as her application to the 2015 Program was rejected because of it lacked the required evidence.[54] In addition, she is a member of the sub-class representing the 42 class members who are born outside of the Birthdate Parameters.

48. Ms. Hébert has an interest in setting aside the Settlement Approval Order, as it not only put an end to the class judicial review of her 2015 Program application, but, more importantly, because it will most likely prevent her from arguing that the

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[51] *Frame* at para 24, MP BOA, Tab 8.
[52] *Ibid* at para 31.
[53] *Ibid* at para 32.
[54] Hébert Affidavit at paras 37-38, MP MR, Tab 6.

Birthdate Parameters are unreasonable.[55]

49. The decision-maker has now confirmed that it considers the Birthdate Parameters to be mandatory and that it will apply them strictly.[56] As a result, Ms. Hébert's application to the 2019 Program will be rejected on the basis of her birth date. Her only option, and that of the other 41 members, will be to apply for a judicial review of that decision. However, as the Settlement Agreement incorporates by reference the 2019 Program and its Birthdate Parameters, we anticipate that the Attorney General will rely on the Settlement Agreement as a bar to any challenge to the Birthdate Parameters.[57] An appeal must be sought to set aside the Settlement Agreement and, at the very least, preserve the right to challenge the Birthdate Parameters.[58]

50. Ms. Hébert understands that she must act as a Representative Applicant on the appeal and that she has to represent the interests of all those individuals whose application to the 2015 Program were rejected because they failed to meet the evidentiary criteria.[59]

51. Ms. Hébert communicates frequently with other members of the class, whether via email or via a Facebook page. The fact that she is bilingual is especially helpful, as many class members speak either only English or only French.[60] She has also been seen by many class members on the news media and many have gotten in contact with her after noticing her appearance in the media.[61]

52. Finally, Ms. Hébert, as a lawyer herself, is fully capable and available to instruct counsel on this appeal and make decisions for the benefit of the class.[62]

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[55] Hébert Affidavit at paras 107-108, MP MR, Tab 6.
[56] Rejection letters received by Ms. Singmaster and Mr. Richard, two other appellants at Exhibit "P", Hébert Affidavit, MP MR, Tab 6-P.
[57] Hébert Affidavit at paras107-108, MP MR, Tab 6.
[58] *Ibid*.
[59] *Ibid* at para 114.
[60] *Ibid* at paras 115 and 118.
[61] *Ibid* at paras 116-117.
[62] *Ibid* at paras 121-22.

ii. The current representative applicant, Mr. Wenham, no longer qualifies to act as the representative applicant

53. While courts have on occasion expressed concerns about motions of this nature undermining the authority of the Representative Plaintiff or Applicant,[63] such concerns do not arise in this case. The reason for this is that the current Representative Applicant, Mr. Wenham, no longer qualifies as a representative applicant for the entire class.

54. A plaintiff (or applicant, in this case) with an interest that conflicts with the interests of other class members does not qualify as a representative plaintiff.[64] Indeed, Rule 334.16(1)(*e*)(iii) of the *Federal Courts Rules* requires that a representative plaintiff "not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members."[65]

55. The introduction of the Birthdate Parameters resulted in a disqualifying conflict between Mr. Wenham and those class members whose birthdate fell either before or after the range set out in the 2019 Program and incorporated by reference into the Settlement Agreement ["**Non-Birthdate Parameters class members**"]. Whereas the class members like Mr. Wenham whose birthdates fell within the Birthdate Parameters ["**Within Birthdate Parameters class members**"] gained a small benefit from the settlement in terms of how their application to the 2019 Program would be treated, the opposite is the case for the Non-Birthdate Parameters class members. As anticipated, the administrator of the 2019 Program is requiring that applicants be born within the range set out in the program.[66] Applicants born outside of the range have thus far been refused admission into the program. Moreover, the Non-Birthdate Parameters class members will almost certainly be unable to contest the reasonableness of the Birthdate Parameters through judicial review as a result of them having been enshrined in the

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[63] See e.g., *Bancroft-Snell v. Visa Canada Corporation*, 2019 ONCA 822 at para. 22, MP BOA, Tab 9.
[64] *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271 at para. 47 [*Sondhi*], MP BOA, Tab 10.
[65] *Federal Courts Rules*, SOR/98-106, R. 334.16(1)(e)(iii).
[66] Rejection letters received by Ms. Singmaster and Mr. Richard, two other appellants at Exhibit "P", Hébert Affidavit, MP MR, Tab 6-P.

Settlement Approval Order.

56. Whether a conflict is apparent at certification or thereafter, the court is not only competent but required to intervene. Much like the gatekeeping function that the Supreme Court of Canada has recognized in relation to expert evidence, the court retains its oversight function to ensure that the class proceeding is being prosecuted by a representative plaintiff who is truly representative and who is able to instruct counsel in the best interests of the class, and by class counsel who are able to zealously advance the interests of the class as a whole. In discharging this function, the court must be live to the interests of the absent class members.

57. As set out in the case law, there are several ways in which the conflict within the class that arose in this case could have been remedied.

58. First, it may be possible to address the possibility of a conflict developing between a representative plaintiff and the members of a class by creating a subclass.[67] Indeed, Rule 334.16(3) of the *Federal Courts Rules* deals with subclasses and provides that, where class members have claims that are not shared by all members, the judge cannot certify the class proceeding unless there is a representative plaintiff who would fairly and adequately represent the subclass.[68]

59. Another way to address the conflict would have been by allowing class members to opt out of the class.[69] In this case, the opt-out deadline set by the Federal Court in the certification order preceded the settlement. Moreover, despite repeated requests, class members were not provided with information on how the 2019 Program would impact the class action before the opt-out deadline passed.[70] While Non-Birthdate Parameters class members made written and oral submissions requesting a

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[67] *Sondhi* at para. 48, MP BOA, Tab 10.
[68] *Federal Courts Rules*, SOR/98-106, R. 334.16(3).
[69] *1176560 Ontario Ltd v. Great Atlantic & Pacific Co. of Canada Ltd*, 2004 CanLII 16620 (Ont. Div. Ct.), MP BOA, Tab 11.
[70] Hébert affidavit at paras 68-70, MP MR, Tab 6.

second opt-out or *nunc pro tunc*[71] extension, the Federal Court failed to address these requests in its reasons[72] and the settlement was approved without providing Non-Birthdate Parameters class members with a further right to opt out. In effect, the sole purpose of their continuing inclusion in the class is to extinguish their rights.[73] Such a result is wholly inconsistent with the access to justice objective of class actions.

60. When neither a subclass nor an opt-out are possible, as a last resort, it may be necessary to decertify the class action.[74] That is precisely what occurred in *Bouchanskaia v Bayer Inc*.[75]

61. In *Bouchanskaia*, as in this case, the settlement agreement only benefitted some members of the class. *Bouchanskaia* was a class proceeding relating to complications arising from the ingestion of Baycol, a cholesterol-lowering drug distributed by the pharmaceutical company Bayer. The proposed settlement only compensated class members who had developed a condition known as Rhabdomyolysis.

62. In order to address the conflict, class counsel brought a motion to decertify the class action in relation to the so-called Non-Rhabdomyolysis Group, being those class members who had not developed that specific condition. In granting the motion, the B.C. Supreme Court made the following comments in relation to the disqualifying conflict that had arisen between the representative plaintiff and other class members:

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[71] Hébert Affidavit at paras 83 and 88-89 and at Exhibits "T" and "V", MP MR, Tabs 6-T, 6-V; in *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, 2009 CanLII 44271 at para. 57 (Ont. Sup. Ct.) [*Farkas*], MP BOA, Tab 12, Perrell J. at suggested that this option would be open to class members under the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6.
[72] The failure to rule on the request is the subject of an appeal on individualized grounds under R. 334.31(1). That case is currently being case managed by de Montigny J.A.
[73] See *McCarthy v Canadian Red Cross Society*, 2001 CarswellOnt 509 at para 24 [*McCarthy*], MP BOA, Tab 13, where the Ontario Superior Court refused to approve a settlement agreement that provided no benefits whatsoever to a subclass of members and simply extinguished their rights of action.
[61] See *Sondhi* at para. 48, MP BOA, Tab 10.
[75] *Bouchanskaia v. Bayer Inc.*, 2004 BCSC 1276 [*Bouchanskaia*], MP BOA, Tab 14.

> *[32] In light of the settlement agreement, I am not satisfied that the two representative plaintiffs retain a common interest with other class members. The interest of those class members who are Rhabdomyolysis Group members now differ from the interest of the Non-Rhabdomyolysis Group who are members of the class.*
>
> *[33] In addition, now that their counsel have executed the settlement agreement, I am no longer satisfied that the plaintiffs would "vigorously prosecute" the claim. As a result, the conditions in s. 4(1)(e)(1) are not satisfied.*[76]

63. Ms. Hébert submits that these statements apply equally in this case. Mr. Wenham no longer retains a common interest with the over 40 class members, including Ms. Hébert, whose birthdates fall outside the Birthdate Parameters.[77] For that reason, there is no concern about the present application for leave undermining the representative applicant, when that representative applicant has a conflict with other class members that has not been addressed.

64. Indeed, despite class members in this proceeding including Ms. Hébert raising concerns about the impact of the proposed settlement on the Non-Birthdate Parameters class members, no steps were taken to remedy the situation.

B. <u>The Appeal is Itself in the Best Interests of the Class</u>

i. Nature of proposed appeal

65. Ms. Hébert, along with three other class members, filed a Notice of Appeal on June 8, 2020. The proposed appeal seeks first and foremost to set aside the Settlement Approval Order. There are two reasons for which it should be set aside.

66. First, the Settlement provides no benefits whatsoever to the 42 class members born outside the Birthdate Parameters and serves only to extinguish their rights. In *McCarthy v. Canadian Red Cross Society*, the Ontario Superior Court refused to approve a settlement agreement that provided no benefits whatsoever to a subclass of

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[76] *Bouchanskaia* at paras. 32-33, MP BOA, Tab 14.
[77] Hébert Affidavit at para 80, MP MR, Tab 6.

members and simply extinguished their rights of action.[78]

67. Second, the incorporation of the Birthdate Parameters into the Settlement Agreement gave rise to a conflict within the class, which necessitated the creation of a subclass and the appointment of a representative plaintiff for that subclass. The conflict could easily have been addressed by providing for a second opt-out as part of the Settlement Agreement. Failing this, the Federal Court had no choice but to refuse to approve the settlement.

68. In addition, four appellants have sought a second opt-out or extension of the opt-out deadline through requests made either in writing or in oral submission to this effect.[79] This is an individual issue that is not before the Court on this motion.

69. Pursuant to communications from the Respondent Attorney General of Canada, Ms. Hébert acknowledged that the portion of the appeal seeking to set aside the Settlement Order was a common issue and required leave to exercise the right of appeal pursuant to Rule 334.31(2).[80] This is what gave rise to the present motion.

70. The proposed appeal seeking to set aside the Settlement Approval Order will allege that the Federal Court erred in law and in exercising its discretion to approve a settlement given its extremely deleterious impact on the approximately 25% of class members like Ms. Hébert who the 2019 Program will exclude. More details on the benefits of the proposed appeal to the class are set out in subsection (iii), below.

ii. There are special and/or extraordinary circumstances surrounding the approval order that constitute a denial of justice

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[78] *McCarthy* at para 24, MP BOA, Tab 13.
[79] Hébert Affidavit at paras 83, 88-89, MP MR, Tab 6
[80] Hébert Affidavit at para 105, MP MR, Tab 6. With respect to the portion of the appeal that seeks an extension of the opt-out deadline, Ms. Hébert takes the position that this question is individual in nature and therefore properly before the Court pursuant to Rule 334.31(1). The Attorney General of Canada disagrees, and a case conference will be held on August 5, 2020 with De Montigny J.A. to discuss the next steps in this regard.

71. Ms. Hébert acknowledges that the limited case law to date on Rule 334.31(2) from this Honourable Court has established a high bar to obtaining leave to exercise a right of appeal. Ms. Hébert submits, however, that the bar is met in this case. The present case can be distinguished from those cases where leave was denied because there are special or extraordinary circumstances surrounding the Approval Order made by the Federal Court that constitute a denial of justice,[81] namely:

i. A conflict has arisen in the class; and

ii. The matter proceeded to a contested certification motion, meaning that the opt-out window expired long before a settlement was negotiated and submitted for approval.

72. The proposed settlement – in particular, the incorporation of the Birthdate Parameters – has created a conflict in the class. It is unrealistic to expect class counsel to zealously advocate against a settlement that they recommended and would benefit the Representative Applicant and a portion of the class. As a result, the existence of this fact alone distinguishes the present case from the previous case law under Rule 334.31(2) and constitutes a special and extraordinary circumstance. Put simply, none of the previous cases decided under Rule 334.31(2) dealt with a conflict that had arisen within the class

73. Even in the absence of a conflict, a judge who is asked to approve a settlement in a class actions must zealously protect the interests of the absent class members.[82] The U.S. Supreme Court stated definitively in the infamous *Amchem* case that the rights of absent class members must be "the dominant concern" of the court.[83] Similarly, Winkler J., as he then was, stated in *McCarthy v. Canadian Red Cross Society*[84] stated that "a class proceeding by its very nature involves the issuance of orders or judgments

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[81] *McLean* at para. 18, MP BOA, Tab 7.
[82] *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. dismissed, [1998] S.C.C.A. No. 372 [Dabbs], MP BOA, Tab 15.
[83] *Amchem Products,Inc. v. Windsor*, 521 U.S. 591 at 621 (1997), MP BOA, Tab16.
[84] MP BOA, Tab 13.

that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests."

74. The presence of a conflict within the class further complicates the ability of judges to protect absent class members. Unlike judges who approve settlements on behalf of infants or a party under disability, class action judges do not have the assistance of counsel charged only with protecting the interests of absent class members. Courts and commentators alike have already recognized that class counsel's neutrality in this regard is compromised by an inherent conflict of interest.[85]

75. The second distinct and extraordinary circumstance in this case is the absence of an opt-out right. As noted above, because the case had proceeded to a contested certification motion, the opt-out period expired some time ago – before the Non-Birthdate Parameter class members were aware of a settlement that would exclude them from all benefit and extinguish their right to challenge the reasonableness of the Birthdate Parameters.

76. The presence of an option to opt out has been essential in many past rulings against objecting class members. The Ontario Superior Court recently held that the option to opt out of a class action provides a "complete remedy for those class members who might dissent from the proceeding being certified as a class action."[86] Objectors in class actions are frequently met with a common response that such persons may opt out and pursue their claims individually.[87] The ability of class members to otherwise continue proceedings has been similarly of paramount important to courts considering

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[85] J. Kalajdzic, *Access to a Just Result: Revisiting Settlement Standards and Cy Près Distributions*, Canadian Class Action Review, Vol 6, No. 1, April 2010, p. 228 [Kalajdzic], MP BOA, Tab 26; *Dabbs* at para. 32, MP BOA, Tab 15 ("The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved.").
[86] *Romeo v. Ford Motor Co.*, 2017 ONSC 6674 at para 18, MP BOA, Tab 17.
Kalajdzic, p. 235, MP BOA, Tab 26; similar wording was used in *Stewart v. General Motors of Canada Ltd.*, [2008] O.J. No. 4426 at para. 30 (Ont. Sup. Ct.) [Stewart], MP BOA, Tab 18.

requests to discontinue a class action.[88]

77. However, the option to opt out and continue the claim elsewhere is not available to objecting class members where the settlement and certification are not obtained concurrently. As stated by Professor Jasminka Kalajdzic, "[a]ccess to justice in such a scenario is turned on its head; the binding nature of the representative proceeding denies dissatisfied class members formal access to the courts."[89]

78. Class action procedure and commentary in the United States is also instructive in demonstrating the extraordinary nature of the present situation.[90] Of note, Rule 23(e)(4) of the U.S. *Federal Rules of Procedure* states that "the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."[91] These rules are considered to have codified best practices for settling class actions and are frequently referred to by Canadian courts. Similarly, the American Law Institute ["ALI"] published the Principles of the Law of Aggregate Litigation in 2010. This publication was co-authored by the leading class action/civil procedure experts in the United States. The ALI recommended a second opportunity to opt out when settlement and certification do not occur simultaneously.[92]

79. The absence of an opt-out also distinguishes the present case from previous case law of this Court. This Honourable Court's decision in *Frame* included an opt-out as part of the settlement approval order. Similarly, in the *McLean* action, Chief Ottawa

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[88] See e.g., *Winter v. C.R. Bard*, 2020 ONSC 3532, MP BOA, Tab 19.
[89] Kalajdzic, p. 228, MP BOA, Tab 26.
[90] See e.g., Tremblay-Lamer J. in *Châteauneuf v. Canada*, 2006 FC 286, MP BOA, Tab 20, which established the test for settlement approval in this Court, relying on an Ontario decision which was itself based on an American text and the criteria therein.
[91] U.S. Federal Rules of Procedure, available online at https://www.law.cornell.edu/rules/frcp/rule_23; evidently, the Canadian *Federal Courts Rules* do not expressly include the same requirement, but the principle is instructive and should guide courts in terms of assessing the fairness of settlements.
[92] Principles of the Law of Aggregate Litigation (Am. L. Inst. 2010), MP BOA, Tab 27.

had the option to opt out of the action and not be bound by the terms of the order.[93] There was no such option in the present case, with the result that Ms. Hébert and the 41 other Non-Birthdate Parameters class members are being held hostage by a Settlement Agreement – the intended effect of which is to extinguish their rights.

iii. The proposed appeal is in the best interests of the class

80. The proposed appeal would allow for a settlement that provides little benefit to the majority of the class and significantly harms approximately 25% of the class (the Non-Birthdate Parameter class members) to be set aside. For the reasons set out above, the Settlement Approval Order raises significant concerns about fairness and reasonableness.

81. Moreover, it is not the best interests of the class.

82. As was explained by the court in *Bouchanskaia*, a settlement can only be in the interests of the class as a whole if the non-settling class members are in no worse position than they would have been in if this litigation had not proceeded:

> *[26] I am satisfied that the settlement proposed for the British Columbia group that is before me is in the interests of the Rhabdomyolysis Group. <u>However, I must consider the impact of the proposed settlement on all members of the class as presently certified.</u>*
>
> *[27] I am satisfied that class counsel sought to achieve a settlement which would have resulted in payment to the members of the Non-Rhabdomyolysis Group but was not able to achieve such a settlement.*
>
> *[28] Since it does not provide for any payment to them, the proposed settlement can be in the interests of the Non-Rhabdomyolysis Group only if it puts them in no worse position than they would have been in if this litigation had not proceeded.*[94]

83. In *Bouchanskaia*, the class action was decertified in relation to the subclass that would not benefit from the settlement. Accordingly, that group would not be bound by

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[93] *McLean* at para 21, MP BOA, Tab 7.
[94] *Bouchanskaia*, MP BOA, Tab 14.

the settlement and could be said to be in no worse position.[95]

84. In this case, there was no decertification of the subclass, meaning that the Non-Birthdate Parameter class members are indeed in a worse position than if the litigation had not proceeded.

85. There is a difference between having one's application for benefits denied and having an existing right (to challenge the reasonableness of the Birthdate Parameters) taken away. The law has recognized that taking away an existing right is a far more serious matter. Thus, the Federal Court has recognized that a decision which takes away an existing right triggers a higher degree of procedural fairness than the mere denial of an application.[96]

86. Non-Birthdate Parameter class members have now begun receiving rejections from their applications to the 2019 Program. The program administrator is treating the Birthdate Parameters as mandatory, with the result that the applications of Non-Birthdate Parameter class members are being automatically rejected. Had the settlement agreement not been approved, or had they been excluded from the class, Non-Birthdate Parameter class members would be free to judicially review the reasonableness of the Birthdate Parameters.

87. The ability to judicially review the Birthdate Parameters is not merely hypothetical, but real and grounded in the case law of this Honourable Court and of the Federal Court in relation to the 2015 Program.

88. Pursuant to paragraph 5(a) of the OIC creating the 2019 Program, the administrator must assess whether a person is eligible under the Program by using a

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[95] *Ibid* at para 29; see also the Ontario settlement approval case for the same settlement in *Coleman v Bayer Inc*., [2004] O.J. No. 1974 at para 81 (Ont. Sup. Ct.); MP BOA, Tab 22, where the Court dealt with the certification and settlement approval at the same time; a narrower class was certified to ensure that the rights of the "sub-class" who did not get benefits from the settlement would not be extinguished.

[96] *Peter G. White Management Ltd. v. Canada*, 1997 CanLII 22722 (F.C. Trial Div.), MP BOA, Tab 23.

three-step process. First, it must conduct a preliminary assessment of the person's eligibility based on the following criteria:

i. the date of birth of the person in Canada falls within the period beginning on December 3, 1957 and ending on December 21, 1967;

ii. the person's date of birth or any other information available is consistent with maternal ingestion of thalidomide in the first trimester of pregnancy; and

iii. the nature of the person's congenital malformations is consistent with known characteristics of congenital malformations linked to thalidomide.[97]

89. In the rejection letters received by Non-Birthdate Parameters class members, the administrator confirms that "[a]ll applicants to the CTSSP must meet all three criteria at Step 1 of the Order in Council to advance to Step 2 of the CTSSP application process."[98] To meet the first criteria at Step 1 "your date of birth must fall between the period beginning on December 3, 1957 and ending on December 21, 1967."[99]

90. Assuming for the moment that the administrator's interpretation of the above criteria is upheld by the Federal Court on judicial review, the Non-Birthdate Parameter class members have the right but for the Settlement Agreement – to judicially review the Birthdate Parameters themselves. This is so even though they constitute the exercise of a federal Crown prerogative power.

91. Indeed, this very issue arose before this Court in *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*.[100] The Court in that case confirmed that it has the jurisdiction to review exercises of federal Crown prerogative

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[97] Order in Council, Exhibit "M", Hébert Affidavit, MP MR, Tab 6-M.
[98] Hébert Affidavit at para 99, MP MR, Tab 6.
[99] Rejections letters of Raye Singmaster and Paul Richard at Ex at Exhibit "P", Hébert Affidavit, MP MR, Tab 6-P.
[100] 2015 FCA 4 [*Hupacasath*], MP BOA, Tab 21.

power and held that Canada's decision to enter into an international agreement that allegedly affected the rights and interests of the Appellant First Nation was justiciable.

92. The Court explained that justiciability concerns the appropriateness and ability of a court to deal with an issue before it. Some questions are so political that courts are incapable or unsuited to deal with them, or should defer to other branches of government.[101] The Court clarified, however, that whether the question before the Court is justiciable bears no relation to the source of the government power.[102] This led the Court to conclude that:

> *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" [citations omitted]. 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…*[103]

93. The Court emphasized that it will only be in a "very small" number of "rare" cases that exercises of executive power will not be suitable for judicial analysis. It provided, by way of examples, a military General's strategic decision to deploy military forces in a particular way during wartime or the decision to sign a treaty (without more).[104] This case does not fall into that category.

94. In 2018, Claudie Briand challenged the evidentiary criteria in the 2015 Program. As set out above, these required her to submit the original prescription provided to her mother, contemporaneous medical or pharmacy records documenting that her mother had taken thalidomide, or a sworn statement from the prescribing physician. Unfortunately, the physician who had provided her mother with thalidomide had passed away in the 1970s, the archives regarding her birth were destroyed in a fire

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[101] *Hupacasath* at para 62, MP BOA, Tab 21.
[102] *Ibid* at para 63.
[103] *Hupacasath* at para 66., MP BOA, Tab 21.
[104] *Ibid.*

at the Baie-Comeau hospital, and the physician's file had been similarly destroyed.[105] When she attempted to provide other evidence establishing that she was a victim of thalidomide, that evidence was not accepted.[106]

95. Relying on *Hupacasath*, the Federal Court held that these evidentiary policies were reviewable and concluded that were egregiously unreasonable, unless interpreted to allow the admission of circumstantial evidence likely to prove the probability that Mme Briand's malformations were the result of her mother's use of thalidomide during the first trimester of her pregnancy.[107]

96. The purpose of the eligibility criteria contained in the 2019 Program is the same as those contained in the 2015 Program: to preserve financial assistance for thalidomide survivors by avoiding providing financial assistance to people who submit spontaneous or otherwise unexplainable malformations similar to those caused by thalidomide.[108] The Birthdate Parameters would appear arbitrary in light of this goal, if not entirely inconsistent with it.

97. The Frequently Asked Questions section of the CTSSP's website explains that "[e]ligibility will be based on the earliest global market availability in West Germany (October 1, 1957) and up to five years after its withdrawal from the Canadian Market (March 2, 1962)."[109] There is no explanation as to why the date of earliest market availability in West Germany is being used, and no explanation for a five-year cut-off following withdrawal from the Canadian market. Ms. Hébert was born just over a month after the cut-off date.[110] No one has explained how her birthdate makes it less likely that her mother ingested thalidomide during the first trimester of her pregnancy, in light of the other information provided.

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[105] *Briand* at para 18 MP BOA, Tab 4.
[106] *Briand* at paras 26-27, MP BOA, Tab 4.
[107] *Ibid* at para 2 of the Judgment.
[108] *Ibid* at para 44.
[109] See Screen Shot of the CTSSP's website at Exhibit "N", Hébert Affidavit, MP MR, Tab 6-N.
[110] Hébert affidavit at para 2, MP MR, Tab 6.

98. Indeed, this led the Federal Court in this case to comment that "[t]here was less than a clear explanation why proof of ingestion of Thalidomide in Canada in the first trimester alone was not a reasonable criteria as it was for the predecessor plans – the 1991 EAP and [the 2015 Program]."[111]

99. Moreover, the wording of the OIC confirms that information other than the applicant's date of birth may be consistent with maternal ingestion of thalidomide in the first trimester of pregnancy, including the nature of the person's congenital malformations.[112] The mandatory application of Birthdate Parameters to determine eligibility thus excludes people who, on a balance of probabilities, are more likely than not to be victims of thalidomide and in desperate help of medical and financial assistance. As in *Briand*, "the policies do not meet the objectives of the order because some thalidomide victims are excluded from the Program due to the excessive restrictions imposed in terms of what constitutes acceptable proof of malformations."[113] Like Claudie Briand, the Appellants seek here only to demonstrate that they are victims of thalidomide by applying the ordinary principles of evidence and the burden applicable to civil matters, without facing arbitrary obstacles based on their date of birth.

100. The impetus for this class proceeding was the government's insistence that victims of thalidomide – the very people the 2015 Program was intended to help – produce evidence that no longer existed in order to demonstrate their eligibility. That was determined to be egregiously unreasonable. The 2019 Program attempts to preclude the Non-Birthdate Parameters class members from even attempting to demonstrate that they are what they have always known themselves to be – victims of thalidomide – based on Birthdate Parameters whose logic has yet to be explained let alone justified. In this Court, the Appellants seek to maintain the right to challenge these Parameters as being similarly unreasonable to the evidentiary criteria

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[111] Approval Decision at para 88, MP MR, Tab 2.
[112] Order in Council, Exhibit "M", Hébert Affidavit, MP MR, Tab 6-M.
[113] *Briand* at para 45 MP BOA, Tab 4.

successfully challenged in *Briand*.

101. In light of Justice Phelan's decision, however, all class members are bound by the settlement in the class proceeding and cannot make these arguments. This leaves them without another option to advance their claims. Such a result turns the notion of access of justice on its head: the defendant gets more rights because of the class proceeding than it would have otherwise. Canada took the position in *Briand* that the evidentiary criteria were not reviewable and they lost. Now, as a result of the settlement approval order, Canada is in a position to claim that the Birthdate Parameters are not reviewable because they were enshrined in a settlement order.

102. A settlement whose purpose and effect is to extinguish the rights of 42 class members is therefore neither fair nor in the best interests of the class. In the absence of a second opt-out right or a decertified subclass of Non-Birthdate Parameter class members, it was an error for the Federal Court to approve a settlement that provided no benefits whatsoever to a subclass of members and simply extinguished their rights of action.

103. Faced with this injustice, the Federal Court was not "powerless".[114] To the contrary, the only fair and reasonable outcome, having regard to the best interests of the class as a whole, was to refuse to approve the proposed settlement.

PART IV - ORDER SOUGHT

104. The Moving Party Noëlla Hébert requests that this Honourable Court grant her leave to exercise the right of appeal under Rule 334.31(2) of the Federal Court Rules.

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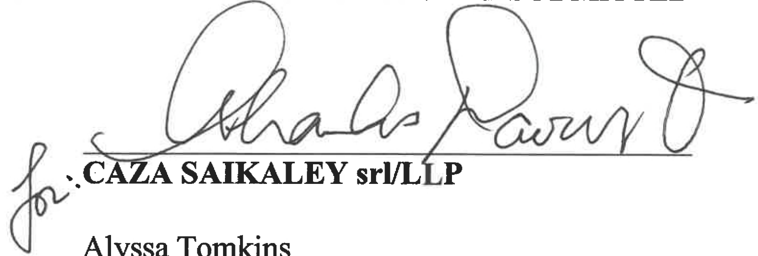
[114] Approval Decision at para 89, MP MR, Tab 2.

July 22, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED



CAZA SAIKALEY srl/LLP

Alyssa Tomkins
Marie-Pier Dupont

PART V - LIST OF AUTHORITIES

TAB	CASELAW	PARA
1.	*Fontaine v. Canada (Attorney General)*, 2017 FC 431	
2.	*Wenham v. Canada (Attorney General)*, 2017 FC 658	
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16.	*Amchem Products,Inc. v. Windsor*, 521 U.S. 591 at 621 (1997)	
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18.	*Stewart v. General Motors of Canada Ltd.*, [2008] O.J. No. 4426 (Ont. Sup. Ct.)	30
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20.	*Châteauneuf v. Canada*, 2006 FC 286	
21.	*Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4	62, 63, 66, 67
22.	*Coleman v. Bayer Inc*., [2004] O.J. No. 1974, 2004 (Ont. Sup. Ct.)	
	DOCTRINE	
23.	J.Kalajdzic, Access to a Just Result: Revisiting Settlement Standards and Cy Près Distributions, Canadian Class Action Review, Vol 6, No. 1, April 2010, 215-251	
24.	Principles of the Law of Aggregate Litigation (Am. L. Inst. 2010	

APPENDIX A – STATUTES AND REGULATIONS

1.	Rules 334.31(2), 334.16(1)(*e*)(iii), 334.16(3), *Federal Courts Rules*, S.O.R./98-106
2.	Rule 23(e)(4) of the *U.S. Federal Rules*