Court File No. A-139-20

FEDERAL COURT OF APPEAL

CLASS PROCEEDING

B E T W E E N:

NOELLA HÉBERT, RAYE SINGMASTER, JANET KIM CARTWRIGHT, PAUL RICHARD and YVON ROBICHAUD

Appellants/Moving Party

-and-

BRUCE WENHAM and ATTORNEY GENERAL OF CANADA

Respondents

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

REPLY MEMORANDUM OF FACT AND LAW OF THE MOVING PARTY NOËLLA HÉBERT

Date: September 4, 2020

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B. SUBMISSIONS

a. The Test

2. Contrary to Canada's submission at paragraphs 46 and 50 of its factum, the test on a motion for leave to exercise the representative applicant's right of appeal does not require the Applicant to show that there is an arguable ground on which the appeal might succeed. Canada cites *Frame v. Riddle*[1] in support of its submission, but the case does not stand for that proposition.

3. The Applicant agrees with Mr. Wenham[2] that in deciding whether to grant leave, this Court must consider whether (i) the Applicant will fairly and adequately represent the class on appeal, and (ii) the appeal is itself in the best interests of the class.[3]

4. Relying on *Bancroft-Snell v. Visa Canada Corporation*,[4] Canada emphasizes that a class member does not, under Ontario's statutory scheme, have the right to seek leave to exercise the right of appeal of the representative plaintiff with respect to a settlement approval order. In that case, however, the Court of Appeal explained that:

> *Class actions permit the efficient resolution of disputes in a manner that is **fair** to all parties and **promote access to justice**, judicial economy and behaviour modification. In part, efficiency is achieved through the appointment of one or more class members as representative plaintiffs,*

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[1] *Frame v. Riddle*, 2018 FCA 204 (CanLII) [*Frame*], Book of Authorities of the Appellant/Moving Party ("MP BOA"), Tab 8.
[2] Memorandum of Fact and Law of the Respondent Bruce Wenham at para 18, Motion Record of the Respondent Bruce Wenham, Tab 2.
[3] *Frame* at para 24, MP BOA, Tab 8.
[4] *Bancroft-Snell v. Visa Canada Corporation*, 2019 ONCA 822 CanLII [*Bancroft-Snell*], MP BOA, Tab 9.

> *to conduct the litigation* ***in the best interests of all class members****.*[5] *[emphasis added]*

5. In order for class proceedings to be fair and promote access to justice – a fundamental objective -, the representative plaintiff must conduct the litigation in the best interests of all class members. Where he fails to do so, because of a conflict, the class proceeding becomes unfair and is used to deny certain class members access to justice. This is precisely what we say occurred in this case. Class proceedings legislation takes away a class member's "*litigation autonomy*" in order to "*achieve its ends of access to justice, behaviour management and judicial economy."*[6]

6. In *Ottawa v. McLean,*[7] Justice Rivoalen on behalf of this Court recognized that "*the* Ontario Class Proceedings Act*, 1992, S.O. 1992, c. 6, ... provide[s] for appeal rights that are more limited than those under rule 334.31*". Unlike in Ontario, rule 334.31 permits leave to appeal a settlement approval order. Indeed, Canada concedes as much at paragraph 54.

7. Justice Rivoalen nonetheless agreed with the Ontario Court of Appeal that there are sound policy reasons why class members should not be entitled to appeal a settlement order where the representative plaintiff declines to do so. However – and critically – in dismissing the motion for leave in that case, she 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" (Romeo v. Ford Motor Co., 2017 ONSC 6674 (CanLII) at paragraph 18). In the McLean Action, Chief Ottawa had the option to opt out of the action and not be bound by the terms of the order.*[8]

8. This is precisely the remedy sought by the appellants in this case.

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[5] *Bancroft-Snell* at para 2, MP BOA, Tab 9.
[6] *Coburn and Watson's Metropolitan Home*, 2019 BCCA 308 at para 15 (CanLII) [*Coburn*], Book of Authorities of the Respondent Attorney General of Canada, Tab 2 [Canada BOA].
[7] *Ottawa v. McLean*, 2019 FCA 309 at para 19 (CanLII) [*McLean*], MP BOA, Tab 7.
[8] *Ibid* at para 20.

9. Finally, Canada suggests, at the end of paragraph 55 of its factum, that the courts of appeal in Ontario and B.C. have confirmed that their legislation does not permit applications for leave to appeal a settlement approval order. The decision of the B.C. Court of Appeal on which Canada relies, however, confirms that breaches of procedural fairness or a demonstrable injustice in the settlement approval order may justify an order granting leave.

10. The appellants in *Coburn and Watson's Metropolitan Home*, a 2019 decision of the B.C. Court of Appeal, claimed that, as class members, they had a right to appeal the settlement approval order. The Court of Appeal framed the issue as follows: "***whether a class member who is not a representative plaintiff has a right to appeal an order approving a settlement.***"[9] Contrary to our case, the appellants had <u>not</u> applied to act as representative plaintiffs and to exercise the representative's right of appeal.[10]

11. The Court of Appeal held that a class member does not have a right to appeal an order approving a settlement. At paragraph 26, however, the Court of Appeal took emphasized that its reasoning was limited to the specific issue before it.

12. The Court went on to refer to s. 9(3) of the B.C. *Court of Appeal Act*,[11] which provides that "*[t]he court may exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal*." This section has been interpreted to permit an appeal by a person who is not a party to the order.[12]

13. The Court of Appeal concluded that the appellants had not demonstrated, on the facts before it, that they would have been proper, if not necessary, parties to the settlement approval procedure. One of the reasons for this was that the Act protected class members' interests by requiring court approval for any settlement. The Court described the test for approval of a settlement as "*stringent*" and "*explicitly focuse[d]*" on the protection of the interests of class members who have not participated in the

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[9] *Coburn* at para 3, Canada BOA, Tab 2.
[10] *Ibid* at para 23.
[11] RSBC 1996, c 77, s. 9(3), MP RBOA, Tab 1.
[12] *Coburn* at para 41, Canada BOA, Tab 2.

negotiation of a settlement that nonetheless will bind them.[13]

14. Importantly for our purposes, the Court cautioned that:

> ***None of this is meant to cast doubt on the possibility that an order approving settlement may have been granted in circumstances that would justify this Court exercising its discretion to grant leave to an objecting class member to appeal the order****. Without attempting to be exhaustive,* ***those circumstances might relate to breaches of procedural fairness or possibly demonstrable injustice in the settlement approval order.*** *What is required are special or extraordinary circumstances going beyond the inherent procedures of the CPA or orders made within the class proceeding that arguably amount to a miscarriage of justice...*[14] [emphasis added]

15. Unlike in *Coburn*, the Applicant in this case has sought leave to exercise the right of appeal of the representative. It is therefore unnecessary to invoke the original jurisdiction of the Federal Court of Appeal. Relying on *Coburn* and the other authorities set out in its initial factum, the Applicant submits that the procedural fairness breaches in relation to the request for an extension of the opt-out period and the demonstrable injustice caused by the settlement agreement justify granting leave.

b. <u>The Appellants' Ability to Challenge the Birthdate Parameters</u>

16. When they brought this motion, the appellants were concerned that the settlement agreement would be interpreted to bar a challenge to the 2019 Program criteria, including the birthdate parameters.

17. At subsection 4.02(a), the settlement agreement provides that "*the Third-Party Administrator will determine whether a person is eligible under the Program by using the three-step process set out in subparagraph 3(5) of the OIC.*"[15] Subparagraph 3(5) of the Order in Council requires the Third-Party Administrator to apply the birthdate

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[13] *Coburn* at para 45; see also para 47, Canada BOA, Tab 2.
[14] *Ibid* at para 48.
[15] Settlement Agreement, Exhibit "R", Affidavit of N. Hébert, sworn on July 22, 2020, Amended Motion Record of the Moving Party, Tab 6-R.

parameters.

18. The settlement agreement also includes a separate release provision, which is expressed differently in English and in French. Having regard to the principles of contractual interpretation, the appellants interpreted the release as allowing an application for judicial review of individual decisions received under the 2019 program, but not a challenge to the three-step process or the criteria themselves, which are incorporated by reference into the agreement as a result of subsection 4.02(a).

19. The appellants appreciate both Canada[16] and Mr. Wenham[17] advising that the intent of the settlement agreement was <u>not</u> to preclude a challenge to the three-step process or the criteria, including the birthdate parameters. The appellants submit that this interpretation should be formalized by court order; otherwise, the appellants may have to invoke the discretionary doctrines of issue of estoppel and abuse of process in order to rely on Canada's admission herein in the context of an eventual judicial review of the criteria for the 2019 Program.

20. Notwithstanding this concession, the fact remains that the settlement agreement provides no benefit to the Applicant or any of the appellants, and that it extinguishes their right to seek judicial review of their exclusion from the 2015 Program.

c. <u>The Settlement Agreement Provides no Benefit to the Applicant</u>

21. Canada does not dispute that the Applicant, and all class members born outside the birthdate parameters, are excluded from the 2019 program. At paragraph 64 of its factum, Canada relies on the fact that the settlement agreement does not preclude a judicial review of the birthdate parameters themselves. At paragraph 69, however, Canada takes the position that these parameters are not justiciable. Finally, at paragraph 80, Canada submits that the Applicant and other class members benefit from the

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[16] Memorandum of Fact and Law of the Respondent Attorney General of Canada at para 69, Motion Record of the Respondent Attorney General of Canada, Tab 7 [Canada's motion Factum].
[17] Responding Memorandum of Fact and Law of the Respondent Bruce Wenham at para 23, Motion Record of the Respondent, Bruce Wenham, Tab 2.

settlement insofar as it provides for their applications to be processed in priority.

22. Canada's position can be summed up as follows: (i) the Applicant has the right to a speedy rejection of her application to the 2019 program; (ii) the Applicant is not precluded from bringing an application for judicial review of the birthdate parameters on which the rejection is based; (iii) but that application is not justiciable. This is the alleged benefit conferred by the settlement agreement, and it is no benefit at all.

d. The Settlement Extinguishes the Appellants' Rights to Seek Judicial Review of their Exclusion from the 2015 Program

23. Beyond simply providing them with no benefit, the settlement agreement denies the Applicant and other class members a further right to opt out. In so doing, the settlement agreement extinguishes the right of the Applicant, and of all class members, to seek judicial review of their exclusion from the 2015 Program. At paragraph 72 of its factum, Canada argues that the 42 members born outside the birthdate parameters were out of time to do so in any event, and that the settlement agreement is therefore of no consequence.

24. The Applicant submits that this is precisely the sort of case in which the Federal Court and Federal Court of Appeal have seen fit to extend the time period to apply for judicial review.

25. In *Huard v. Canada*,[18] the applicant brought an application for an extension of time to file an application for judicial review in 2006, over 12 years after the decision it sought to challenge had been rendered. The case concerned an Order in Council that authorized the Minister to make an *ex gratia* payment of $100,000 to a depatterned person who met the criteria set out in the Order.[19] Briefly, and horrifically, a depatterned person was someone who had undergone treatment consisting of sedation followed by massive electroshocks that reduced the patient's mental state to more or

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[18] *Huard v. Canada (Attorney General)*, 2007 FC 195 (CanLII), MP RBOA, Tab 2; cited with approval in *Canada (Attorney General) v. Larkman*, 2012 FCA 204 at para 62 (CanLII) [*Larkman*], MP RBOA, Tab 3.
[19] *Huard* at paras 66-67, MP RBOA, Tab 2.

less that of a child.[20]

26. In considering whether to extend the time period to apply for judicial review, the Court listed the factors that are generally considered on such an application. The Court emphasized, however, that "*an extension of time may be granted by the judge even if one of the aforementioned criteria is not met, when the ends of justice require it*", and concluded that "*[t]hat is the case here*."[21] The Court considered that "*if the motion at bar for an extension is not granted, a great injustice would be caused to the applicant who, despite the length of the delay in question, is entitled to have the impugned decisions reviewed on their merits*."[22]

27. A similar injustice risks occurring in this case if the Applicant is not granted leave to exercise the right of appeal with a view to, if necessary, applying for an extension of the time period to seek judicial of her exclusion from the 2015 Program, four years ago.[23]

28. The similarities between *Huard* and this case are striking. First, the Court in *Huard* began its analysis by emphasizing that:

> *The fact that victims of medical acts or medical errors no longer have any civil remedy against the perpetrators of unjustified acts against their person and their dignity does not remove the indelible marks left on the minds of those individuals. Certain public acts of recognition by society, symbolic though they may be, are sometimes necessary to heal the still painful wounds caused to victims of such medical acts.*[24]

The Court went on to note that "*for humanitarian reasons, the Government of Canada has already paid ex gratia compensation in the past, without the admission of any liability, to victims of medical, institutional or other errors in the health field*." The

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[20] *Huard* at para 22, MP RBOA, Tab 2.
[21] *Ibid* at para 94.
[22] *Ibid* at para 96.
[23] The Applicant's application to the 2015 Program was rejected on July 9, 2015. Affidavit of N. Hébert, Exhibit "I", sworn July 22, 2020, Amended Motion Record of the Moving Party, Tab 6-I.
[24] *Huard* at para 78, MP RBOA, Tab 2.

Court expressly referred to the 1991 Program for victims of thalidomide as one such example.[25] The Court in *Huard* thus recognized the inherent similarity between the Order at issue in that case, and the government program providing compensation to victims of thalidomide.

29. Second, Ms. Huard brought her application after having learned of the successful application brought by Ms. Kastner several years prior and retained the same lawyer who had represented Ms. Kastner.[26] In this case, Ms. Hébert intends to rely on the decision in *Briand v. Canada*[27] and has also retained as one of her counsel the lawyer who represented Ms. Briand.

30. Third, the Court in *Huard* noted that the Attorney General had not argued that *Kastner* was wrongly decided. The Court explained that "*[u]nless significant facts exist as a result of which the case at bar may be distinguished, therefore, these are precedents which by judicial comity may eventually be applied by other judges of the same Court*."[28]

31. The same is true in the present case: although Canada did argue that *Briand* was wrongly decided in its factum for the Wenham application,[29] it has not made those arguments on this motion for leave. Nor has it sought to distinguish *Briand* and its companion decision factually. Canada says only that while the Applicant may have hoped for a similar outcome in the class proceeding, such an outcome was never "*guaranteed*".[30]

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[25] *Huard* at para 79, MP RBOA, Tab 2.
[26] *Ibid* at paras 84 and 107.
[27] *Briand v. Canada (Attorney General)*, 2018 FC 279 (CanLII) [*Briand*], MP BOA, Tab 4.
[28] *Huard* at para 87, MP RBOA, Tab 2.
[29] Memorandum of Fact and Law of the Attorney General of Canada at para 57-58 on the Wenham Application, Exhibit "A", Affidavit of Negar Hashemi, Sworn August 27, 2020, Motion Record of the Respondent Attorney General of Canada, Tab 1 [Canada Wenham Application Factum].
[30] Canada's motion Factum at para 72, Motion Record of the Respondent Attorney General of Canada, Tab 7.

32. Given the potential for injustice were the application for judicial review not heard on its merits, this is precisely the type of case in which the courts have extended the time period to apply for judicial review. Perhaps in recognition of this fact, we note that in its factum on the Wenham application, Canada took no position with respect to whether an extension of time was warranted.[31] In *Huard*, the Federal Court interpreted the absence of any opposition to a motion for an extension as an implicit admission that the delay in question caused the Attorney General no hardship.[32] The same inference should be drawn in this case.

e. The Justiciability and Reasonableness of the 2015 Program Criteria have been Finally Determined

33. Canada's position in this litigation is, amongst other things, that the 2015 Program criteria are not justiciable and, in the alternative, that they are reasonable. The Federal Court concluded precisely the opposite in *Briand* and *Rodrigue*; Canada did not appeal either decision. In its factum on the Wenham application, Canada argued that the Court in *Briand* had erred in concluding that the 2015 Program criteria were justiciable. Although it also argued that the 2015 Program criteria were reasonable, it failed to address the holding in *Briand* on this point.

34. In its factum on this motion, Canada submits that it was not "*guaranteed*" that the outcome of the class proceeding would be the same as in *Briand*. It relies partly on this proposition to argue that the settlement agreement was fair and reasonable and in the best interests of the members of the class, and that an appeal of the settlement approval order is therefore not in the best interests of the class. Canada's submissions in this respect fundamentally mischaracterize the strength of its defence in the litigation and the state of the law respecting the issues in dispute.

35. In support of its submissions that the outcome in this proceeding was not

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[31] Canada Wenham Application Factum at para 63, Exhibit "A", Affidavit of Negar Hashemi, Sworn August 27, 2020, Motion Record of the Respondent Attorney General of Canada, Tab 1.
[32] *Huard* at para 14, MP RBOA, Tab 2.

"*guaranteed*", Canada relies on the decision in *Fontaine v. Canada*.[33] *Fontaine* was the fourth application for judicial review of the 2015 Program, the others being *Briand*, *Rodrigue* and this proceeding. At paragraph 10 of its factum on this motion, Canada explains that in *Fontaine*, Justice Strickland held that the criteria for the *ex gratia* payments were exercises of the prerogative power and not justiciable.

36. Citing *Canada v. Khadr*[34] and *Operation Dismantle Inc. v. Canada*,[35] the Court in *Fontaine* concluded that judicial review of prerogative power was limited to *Charter* breaches and breaches of other constitutional norms.[36] The difficulty is that this is precisely the argument that was made by Canada and rejected by the Federal Court of Appeal more than two years earlier in *Hupacasath First Nation v. Canada*[37]:

> *[60] … Canada submits that exercises of pure federal Crown prerogative are reviewable only where Charter rights are in issue. They cite Canada (Prime Minister) v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44 at paragraphs 36-37 and Operation Dismantle Inc. v. Canada, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.*
>
> *[61] It is true that these cases do stand for the narrow proposition that Charter cases are justiciable regardless of the nature of the government action, be it an exercise of the Crown prerogative or otherwise. But* ***these cases do not stand for the broad proposition that all other exercises of the Crown prerogative are not justiciable****. In fact, as I shall demonstrate, some are.* [emphasis added][38]

37. This Court in *Hupacasath* went on to conclude that exercises of the prerogative power are reviewable, provided they are justiciable, and that "the category of non-justiciable cases is very small,"[39] describing such cases as "rare."[40] The Court held that

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[33] *Fontaine v. Canada (Attorney General)*, 2017 FC 431 (CanLII) [*Fontaine*], MP BOA, Tab 1; Canada's motion factum at para 30, Motion Record of the Respondent Attorney General of Canada, Tab 7.
[34] 2010 SCC 3 cited in *Fontaine* at para 33, MP BOA, Tab 1.
[35] [1985] 1 SCR 441 (SCC) cited in *Fontaine* at para 33, MP BOA, Tab 1.
[36] *Fontaine* at para 33, MP BOA, Tab 1.
[37] 2015 FCA 4, MP BOA, Tab 21 [*Hupacasath*].
[38] *Ibid* at para 60.
[39] *Ibid* at para 67.
[40] *Ibid* at para 66.

even subordinate legislation – or in this case, *ex gratia* payments - motivated by economic considerations and other difficult public interest concerns, are reviewable, although the margin of appreciation may be very large.[41]

38. No explanation has ever been provided for why *Hupacasath* was not brought to the Federal Court's attention in *Fontaine*. In referring to *Fontaine* in its factum before this Court, Canada failed to acknowledge that its validity is suspect, in light of the Court's failure to cite controlling authority.

39. Moreover, the Federal Court of Appeal expressed the opinion that this very application was justiciable almost two years ago. In an appeal of the certification decision, Justice Stratas wrote:

> *[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.*
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> *[59] The current governing authority in this Court on justiciability is Hupacasath ... 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.*[42]

40. While there is no "*guarantee*" that the outcome of the Wenham application would be the same as in *Briand*, it is surely stating the obvious to say that nothing in life is guaranteed, least of all litigation. That said, it is far from clear that Canada would be entitled to challenge the conclusions in *Briand* and *Rodrigue* in light of the doctrine of abuse of process, which precludes the relitigation of issues if it would be manifestly unfair to a party or would in some other way bring the administration of justice into

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[41] *Hupacasath* at para 67, MP BOA, Tab 21.
[42] *Wenham v. Canada (Attorney General)*, 2018 FCA 199 (CanLII), MP BOA, Tab 3.

disrepute. This Court has previously suggested that the doctrine might apply to prohibit the Attorney General from relitigating issues that had been decided in a judicial review proceeding brought in the Ontario Superior Court, and then overturned by the Ontario Court of Appeal on jurisdictional grounds. This was so even though the Attorney General for Canada was not a party to the Ontario proceedings.[43]

41. At a minimum, *Briand* and *Rodrigue* would constitute persuasive – albeit non-binding – authority. In any event, it can no longer be reasonably disputed that the criteria for the 2015 Program are justiciable. Canada lost that argument in both *Briand* and *Rodrigue*, and then declined to appeal those decisions. Although it was successful in *Fontaine*, it appears that it failed to bring controlling authority to the attention of the Federal Court. Indeed, the Federal Court of Appeal, in an earlier decision in this very proceeding, has confirmed that *Hupacasath* is indeed controlling, that the validity of *Fontaine* is suspect, and that the criteria are justiciable. While that decision was rendered on the appeal of the certification motion, there is no reason to believe the outcome would be any different when the application is heard on its merits. Justiciability is a question of law; a more detailed factual record is unlikely to alter the Court's view of the matter.

f. Justice Phelan erred in Findings that the Settlement was Fair, Reasonable and in the Best Interests of the Class

42. Although the Applicant need not show an arguable ground on which the appeal could succeed, we consider it necessary to address some of the arguments made by Canada under this heading.

43. It bears emphasizing that the test to be applied on a motion for settlement approval is "stringent" and "exclusively focuse[d]" on the interests of the absent class members. Several courts have recognized that "[c]lass action settlements should be viewed with suspicion and seriously scrutinized by judges because they are entered

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[43] *Larkman* at para 74 (CanLII), MP RBOA 3; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at paras 39-41 (CanLII), MP RBOA, Tab 4.

into by defendants and class counsel who have interests and incentives that may not align with the best interests of the class."[44]

44. Canada appears to take the position, in paragraph 77 of its factum, that even if a conflict arose, the Court was powerless to do anything about it. With respect, that cannot be. The whole purpose of a settlement approval motion is to protect the interests of the absent class members. As soon as a conflict arose, the representative applicant and class counsel were incapable of acting in the best interests of the class as a whole, and the process became fundamentally tainted. These are precisely the circumstances contemplated in *Coburn* as justifying leave.

45. At paragraph 60, Canada suggests that the Applicant cannot fairly represent the interests of all class members. Canada submits that Ms. Hébert's primary interest lies in challenging the birthdate parameters, a matter that is of no benefit to the majority of class members. If the birthdate parameters render the Applicant incapable of fairly representing the interests of the 126 class members born within that time period, then surely the converse is also true: they render Mr. Wenham incapable of fairly representing the 42 class members born outside that time period. These propositions are two sides of the same coin.

46. Canada further submits, at paragraph 77, that a Court hearing a settlement approval motion cannot alter the terms of the agreement. While this may be the case, if the Court has concerns that the agreement may fall outside the zone of reasonableness, it must refuse to approve it. In most cases, one can only presume that where the Court, exercising its supervisory jurisdiction to protect the interests of absent class members, expresses a concern, the parties will take meaningful steps to address it. By way of example, in *Coburn*, the motions judge expressed concern at the hearing that if the releases barred unknown future conduct they might render the settlement

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[44] *Coburn* at para 67, Canada BOA, Tab 2, referring to *AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC 532 at paras. 3, 5 and 17.

unreasonable. The parties revised the releases to address the Court's concern.[45]

47. By contrast, Canada has adopted the opposite approach in this case. At paragraph 66, it describes Mr. Wenham's choice in accepting the agreement or continuing the litigation as "binary," suggesting that it was not open to further negotiation. At paragraph 67, Canada advises that if the settlement is set aside, it is unlikely that the parties would resume negotiations, and advises that it would pursue its motion to have the application declared moot on the basis that the 2019 Program provides an adequate alternative remedy. Finally, at paragraph 82, Canada warns that it may not provide the same benefits to the class (excluding the 42 members born outside the birthdate parameters, who receive no benefit) if the 2015 Program is not brought to an end.

48. The Court below described Canada's "*litigation posture*"[46] in this case as "*aggressive*"[47], and its position on the birthdate parameters as "*intractable*."[48] Canada's submission, at paragraph 78 its factum, invoking deference for a negotiated agreement that is the result of "give and take" by all parties on a broad range of issues fundamentally mischaracterizes its own approach in this case, as found by the Federal Court. The notion of a negotiated give and take is also at odds with Canada's position on the costs motion, that it was always going to enact the 2019 Program – which is the crux of the settlement agreement - within the time period that it did so, regardless of this litigation.[49]

49. With respect, in alleging that "*[t]he applicants have not pointed to any authority that supports the proposition that a settlement approval order may be overturned on the basis that it does not provide comparable benefits to every member*

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[45] *Coburn* at para 71, Canada BOA, Tab 2.
[46] *Wenham v Canada (Attorney General)*, 2020 FC 588 (CanLII) at para 73, Book of Authorities of the Respondent Bruce Wenham, Tab 1.
[47] *Ibid*.
[48] *Ibid* at para 87.
[49] *Wenham v Canada (Attorney General)*, 2020 FC 590 (CanLII) at para 8, Book of Authorities of the Respondent Bruce Wenham, Tab 5.

of the class,"[50] Canada raises a straw man argument. The settlement provides no benefit to the 42 class members born outside the birthdate parameters and extinguishes their right to apply for an extension of time to seek judicial review of their exclusion from the 2015 Program.

50. At paragraph 72, Canada alleges these class members "will still face the same legal hurdles in relation to a CTSSP denial decision that they faced with a TCSP denial decision." In challenging their exclusion from the 2015 program, however, the class members would rely on *Briand* and *Rodrigue v. Canada*,[51] which already found the criterion on the basis of which they were excluded to be justiciable and egregiously unreasonable. As set out above, it may not be open to Canada to challenge these conclusions, nor is there any basis in law upon which to challenge the conclusion that the 2015 Program criteria are justiciable. At a minimum, *Briand* and *Rodrigue* constitute persuasive – if not binding – authority.

51. Albeit in a far different context, the Supreme Court of Canada has recognized that "[I]*ncreasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system*."[52] In the context of civil litigation, the Supreme Court has recognized that undue process and protracted proceedings, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. Moreover, when court costs and delays become too great, people may simply give up on justice.[53]

52. Canada suggests that there is no harm in forcing the 42 class members born outside the birthdate parameters to start the process afresh and relitigate the justiciability and reasonableness of the 2019 Program criteria. In doing so, the Applicant and the other class members would be faced with new records of decision, and Canada could attempt to distinguish *Briand*, *Rodrigue* and this Court's earlier

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[50] Canada's motion factum at para 78, Motion Record of the Respondent Attorney General, Tab 7.
[51] 2018 FC 280, MP BOA, Tab 5.
[52] *Hryniak v. Mauldin*, 2014 SCC 7 at para 2 (CanLII) [*Hryniak*], MP RBOA, Tab 6.
[53] *Ibid* at paras 24-25.

decision in the certification motion appeal. Canada's submission in this respect ignores the fact that the Applicant (not to mention the other class members) has spent decades living in pain waiting for recognition and financial relief. It is often said that justice delayed is justice denied; the old adage rings particularly true in these circumstances.

53. If necessary, the Applicant expects to respond to Canada's motion seeking to have this application declared moot on the basis that the 2019 Program provides an adequate alternative remedy on the same basis.

54. Finally, we note that Canada has chosen not to address the Court's comment that it was "*powerless*" to address the issue of the birthdate parameters, other than to encourage a compassionate reconsideration. The Federal Court's conclusion that it was "*powerless*" is precisely the problem. Indeed, the Court found 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 TSCP."[54] The Applicant submits that it is difficult, if not impossible, to reconcile this finding with the Court's conclusion that the settlement agreement was fair and reasonable and in the best interests of the class.

55. If, in the words of the Court, the stories of these excluded class members were tragic and compelling, if Class Counsel recognized the problem, if Canada's approach lacked compassion, if the birthdate parameters potentially punished the innocent fetuses who had not themselves engaged in "unauthorized use" of thalidomide, and if there lacked a clear explanation for why the birthdate parameters were necessary in the first place, how could the settlement be reasonable?[55]

56. In this respect, the appellants object to the statement, at paragraph 19 of Canada's factum, that "*the OIC limits eligibility based on one's date of birth because reliance on medical screening alone is not sufficient to determine if injuries are due to*

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[54] *Wenham v Canada (Attorney General)*, 2020 FC 588 (CanLII) at para 89, Book of Authorities of the Respondent Bruce Wenham, Tab 1.
[55] *Ibid* at paras 42, 87-89.

thalidomide." There was no finding to this effect in the Court below. Canada cites paragraph 14 of Ms. Hashemi's affidavit as authority for this proposition. Ms. Hashemi is a lawyer with the Department of Justice. At paragraph 14 of her affidavit, she deposes that she was advised of this fact by Ms. Cindy Moriarty, the Director General of Health Canada's Health Programs and Strategic Initiatives Directorate. This evidence constitutes both hearsay evidence and opinion evidence and is not properly before this Court. Moreover, it is unsupported by the factual findings of Justice Phelan, which form the basis for this motion.

C. ORDER SOUGHT

57. 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.

58. The appellants also request that this Honourable Court confirm that the individual appeals alleging a breach of natural justice are properly before the Court.

59. The appellants submit that this motion raises novel issues of law that engage fundamental access to justice and fairness considerations. We would be pleased to address any issue, or to respond to any question this Court may have, in oral submissions if it would assist the Court in deciding this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4TH DAY OF SEPTEMBER, 2020

CAZA SAIKALEY srl/LLP
Alyssa Tomkins
Marie-Pier Dupont

for **GOWLING WLG**
Anne M. Tardif

D. LIST OF AUTHORITIES

NO.	DOCUMENT	PARA
	LEGISLATION	
1.	B.C. *Court of Appeal Act*, RSBC 1996, c 77	s. 9(3)
	CASELAW	
2.	*Huard v. Canada (Attorney General)*, 2007 FC 195 (CanLII)	66-67, 78, 79, 84, 87, 94, 96, 107
3.	*Canada (Attorney General) v. Larkman*, 2012 FCA 204	62, 74
4.	*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26	39-41
5.	*Hryniak v. Mauldin*, 2014 SCC 7	2, 24-45

APPENDIX A – STATUTES AND REGULATIONS

B.C. COURT OF APPEAL ACT [RSBC 1996] CHAPTER 77

Powers of Court of Appeal

9 (1)On an appeal, the court may

(a)make or give any order that could have been made or given by the court or tribunal appealed from,

(b)impose reasonable terms and conditions in an order, and

(c)make or give any additional order that it considers just.

(2)The court or a justice may draw inferences of fact.

(3)The court may exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal.

(4)The court may exercise its powers
(a)even though only part of an order has been appealed from, and
(b)in favour of any person whether or not the person is a party to the appeal.

(5)If a power is given to a justice by this Act or the rules, the court may exercise the power.

(6)The court may discharge or vary any order made by a justice other than an order granting leave to appeal under section 7.

(7)The court and a justice have the same powers as the Supreme Court in relation to matters of contempt of court.

(8)For all purposes of and incidental to the hearing and determination of any matter and the amendment, execution and enforcement of any order and for the purpose of every other authority expressly or impliedly given to the Court of Appeal,

(a)the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court, and

(b)if the appeal is not from the Supreme Court, the Court of Appeal has the power, authority and jurisdiction vested in the court or tribunal from which the appeal was brought.