Court File No: A-139-20

FEDERAL COURT OF APPEAL

CLASS PROCEEDING

B E T W E E N :

NOËLLA HÉBERT, RAYE SINGMASTER, JANICE KIM CARTWRIGHT AND PAUL RICHARD

Appellants

- and -

BRUCE WENHAM AND ATTORNEY GENERAL OF CANADA

Respondents

MEMORANDUM OF FACT AND LAW

(Response to motion for leave in writing pursuant to rules 334.31(2) and 352)

August 28, 2020

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. Class proceeding settlements are to be encouraged. Permitting class member appeals from a settlement approval order introduces uncertainty into the negotiation and approval of settlements, undermines the authority of the appointed class representative, and impedes settlement. Accordingly, the threshold to obtain leave to exercise a representative applicant's right of appeal of a settlement approval order is high. Appellate courts should intervene in only the most exceptional circumstances. No exceptional circumstances exist here.

2. It has not been established that the applicants can fairly represent the interests of the class as a whole, nor that pursuit of the proposed appeal is in the best interests of the class. The applicants' argument that the settlement of the application challenging the 2015 thalidomide survivors *ex gratia* payment program provides marginal benefits to a majority of the class while precluding others from challenging the new program is based on a fundamental misunderstanding of the terms of the release and the order approving the settlement. The terms of the release expressly provide that it *"shall not impact a Class Member's right or entitlement to bring any court proceedings with respect to the CTSSP or decisions thereunder*". Moreover, allowing the proposed appeal to proceed will have the effect of delaying the implementation of the settlement, including the processing of retroactive payments and payments to estates, and may eliminate the value of other terms, such as priority in processing.

3. No arguable grounds on which the appeal may succeed have been established. Phelan J. has not made any palpable and overriding error in approving the settlement nor did he err in refusing to grant the requests to opt out. A class proceeding settlement need not be perfect. Nor must it provide benefits to all class members. The Court below weighed the proper considerations, turned its mind to the objections raised by the applicants, and determined that the settlement was fair and reasonable and should be approved. Finally, the alternative relief which seeks permission to opt out is not available given the terms of the settlement, nor are there grounds upon which such relief could be granted. The opt-out process was valid and binding. Once an individual has made an election to remain a class member that election is binding. This serves to preserve the finality and predictability of the opt-out process in the federal class regime.

4. The claim that there is a direct right of appeal is also without merit. There were no individual questions before the Court from which an appeal could be brought either under section 27 of the *Federal Courts Act*, or rule 334.31(1). In any event, in the specific circumstances of this case, it was not open to the Court to entertain a motion allowing for a late opt-out even had one been brought. The request to be permitted to opt out was tantamount to a request to amend the agreement, which the Court below had no power to do in the context of an approval motion. A term of the parties' settlement agreement expressly required that anyone who had not opted out prior to the opt-out deadline would be bound by the agreement and terms of release if approved. To grant the applicants' requests would compel a rejection of the settlement. Phelan J. understood this. He gave due consideration to the applicants' concerns, but ultimately determined that it was in the best interests of the class to approve the settlement.

5. In all of the circumstances, the Attorney General of Canada (Canada) asks that the applicants' motion for leave to exercise the representative applicant's right of appeal be dismissed.

B. STATEMENT OF FACTS

1) Background

6. This class application arose from one of four judicial review applications (*Fontaine, Briand, Rodrigue and Wenham*) that were commenced in 2016 relating to the eligibility criteria of the Thalidomide Survivors' Contribution Program (TSCP), a non-statutory program launched in 2015 to provide *ex gratia* payments to aging thalidomide survivors.

7. The four judicial review applications were promptly initiated in September and October 2016 following decisions made by the Administrator of the TSCP, which denied eligibility under the program in August 2016.[1]

8. All four applications presented similar grounds of challenge to the TSCP's evidentiary requirements for establishing maternal ingestion of thalidomide during the first trimester of pregnancy. TSCP applicants were required to provide medical, pharmacy or hospital records, or

[1] Affidavit of Negar Hashemi, affirmed August 27, 2020 [Hashemi Affidavit], para 3, **AGC Motion Record [AGC MR], tab 1, p 2**

affidavit evidence from a medical professional with first-hand knowledge of the ingestion of thalidomide by an applicant's mother, during the first trimester of her pregnancy.[2]

9. Mr. Wenham decided to seek to certify his individual judicial review application as a class proceeding in November 2016 and delivered his motion to certify the following month. Mr. Fontaine, Mr. Rodrigue, and Mrs. Briand each declined to stay their matters in favour of the proposed class proceeding, and instead chose to proceed individually.[3]

10. On May 2, 2017, the Federal Court dismissed the *Fontaine* application. Justice Strickland declined to assess the Minister's choice of criteria or the reasonableness of the Crown's decision to make *ex gratia* payments as an exercise of the prerogative power, which she held to be non-justiciable and beyond the Court's jurisdiction.[4]

11. On July 6, 2017, Justice McDonald denied certification of Mr. Wenham's application, finding that none of the five requirements for certification were met. Mr. Wenham appealed.[5]

12. The decisions in *Briand* and *Rodrigue* were not released until March 9, 2018. In both cases, the Court set aside the decisions of the TSCP Administrator denying eligibility. Contrary to Justice Strickland's conclusions in the *Fontaine* decision, Justice Annis found that the Court could review the reasonableness of the Minister's policy choice establishing the TSCP's eligibility criteria, and that the policies were unreasonable.[6]

13. On November 1, 2018, the Federal Court of Appeal (FCA) reversed the decision in *Wenham* denying certification, appointed Mr. Wenham as the representative applicant and certified three common issues:

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[2] Hashemi Affidavit, para 4, **AGC MR, tab 1, p 2**
[3] *Ibid*, para 5, **AGC MR, tab 1, p 3**
[4] *Fontaine v Canada (Attorney General)*, 2017 FC 431, **Applicants' Book of Authorities [Applicants' Authorities], tab 1**
[5] Hashemi Affidavit, para 7, **AGC MR, tab 1, p 3**
[6] *Briand v Attorney General of Canada*, 2018 FC 279; *Rodrigue v Canada*, 2018 FC 280, **Applicants' Book of Authorities [Applicants' Authorities], tabs 4, 5**

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

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

(3) If the answer to 2 is yes, what remedies is the class entitled to?[7]

14. In appointing Mr. Wenham as the representative applicant, the FCA upheld the Federal Court's finding that he would fairly and adequately represent the interests of the proposed class.[8]

15. Beginning in May 2016, several individuals, stakeholders and Parliamentarians raised issues relating to the evidentiary requirements of the TSCP. By the spring of 2017, the Standing Committee on Health (HESA) had reviewed concerns raised by Members of Parliament and recommendations were made to the Minister of Health in June 2017.[9]

16. In February 2018, the government committed to expand eligibility and funding to support thalidomide survivors in the 2018 Budget process. The work required to put the Budget decision into effect through an Order in Council (OIC) began immediately. On January 9, 2019, further announcement that there would be expanded eligibility and funding was made.[10]

17. The OIC creating the Canadian Thalidomide Survivors Support Program (CTSSP) was promulgated on April 5, 2019. It gives class members and others another opportunity to obtain monetary support at an enhanced level. The lump sum payment has increased from $125,000 to $250,000. The annual payments of $25,000 - $100,000 were confirmed.[11]

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[7] Reasons for Judgment of the Federal Court of Appeal, per Stratas, Near and Woods, JJ.A., November 1, 2018, 2018 FCA 199, [FCA Reasons], para 105, **Applicants' Authorities, tab 3**

[8] *Ibid*, paras 101-103, **Applicants' Authorities, tab 3;** Order and Reasons of the Federal Court, per McDonald J., July 6, 2017, 2017 FC 658, para 43, **AGC MR, tab 2, p 60**

[9] Hashemi Affidavit, para 10, **AGC MR, tab 1, p 4**

[10] *Ibid*, para 11, **AGC MR, tab 1, p 4**

[11] Order Establishing the Canadian Thalidomide Survivors Support Program in order to set out the parameters for a federal financial support program for victims of thalidomide, called the CTTSP, which would replace the current Thalidomide Survivors Contribution Program [OIC], PC 2019-0271, **Amended Motion Record of the Moving Party [Applicants' MR], tab 6M**

18. The OIC provides that persons who were eligible for the 1991 Extraordinary Assistance Plan (EAP) or the 2015 TSCP and those who were listed on a Canadian government registry would be automatically eligible for the CTSSP.[12] Others could apply to receive support upon meeting specific eligibility criteria under the new probability-based model.[13]

19. In addition to expanding the types of evidence that would be accepted to prove maternal ingestion of thalidomide, 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 thalidomide. Under the OIC, those born over the ten-year period between December 3, 1957 and December 21, 1967 may qualify.[14]

20. To err on the side of inclusion, the dates provided allow a grace period before and after the drug's authorised availability in Canada, and allows for the drug to have been consumed at any point during the first trimester. For thalidomide injuries to have occurred, thalidomide had to have existed and had to have been available. Globally, thalidomide's earliest market availability was October 1, 1957, in West Germany. In Canada, thalidomide was only authorised for use between June 23, 1959 to March 2, 1962.[15]

21. The CTSSP's date of birth parameters exclude 42 class members. Of this group, the respondent confirmed at the settlement approval motion that 31 were born before December 3, 1957, which is the earliest possible viable birth date if one's mother consumed thalidomide immediately upon the drug becoming available in Europe.[16]

22. In addition, the new program employs a diagnostic algorithm to assist in assessing the probability of Thalidomide caused congenital malformations,[17] and a multi-disciplinary

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[12] OIC, **Applicants' MR, tab 6M**, section 3(1)(a), (b) and (2)
[13] *Ibid*, section 3(1)(c), (4), (5)
[14] *Ibid*, section 5(a)(i); Hashemi Affidavit, para 14, **AGC MR, tab 1, p 5**
[15] Hashemi Affidavit, para 14, **AGC MR, tab 1, p 5**
[16] Affidavit of Michel Doucet, sworn Aug 21, 2020 [Doucet Affidavit], Exhibit "A", **Applicants' MR, tab 7, p. 626**
[17] OIC, section 5(b), **Applicants' MR, tab 6M**

committee reviews applications and provides recommendations on eligibility. The CTSSP began receiving applications as of June 3, 2019.[18]

2) Notice of certification and the opt-out process

23. In late 2018 and early 2019, following the certification of the application by this Court, the parties turned their minds to the issuance of notice of certification. Class counsel brought a motion on January 15, 2019, for approval of the notice plan, and the terms of the notice, including the opt-out process.[19] Given the imminent launch of the CTSSP and the parties' agreement to participate in dispute resolution, Canada opposed the issuance of notice at that time.[20]

24. The parties ultimately appeared at a case management conference (CMC) on February 6, 2019, to deal with Mr. Wenham's motion referenced above. Following the conference, Justice McDonald, who was then the Case Management Judge, issued a Direction fixing the dates for a dispute resolution conference (DRC) (February 28, 2019), and the motion relating to approval of the Notice (March 12, 2019).[21]

25. At the February 28, 2019 CMC, the Court adjourned Mr. Wenham's motion to March 26, 2019. The Court also re-scheduled the DRC to a date to be set in April 2019 as the details of the new program were expected to be announced by that time.[22]

26. The motion for approval of the notice plan proceeded on March 26, 2019. Canada asked that notice be issued only after the CTSSP details were announced and the DRC was held and proposed a 90 day opt-out period.[23]

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[18] OIC, section 5(c), **Applicants' MR, tab 6M**
[19] Hashemi Affidavit, para 17, **AGC MR, tab 1, pp 5-6**
[20] *Ibid*, para 17, **AGC MR, tab 1, pp 5-6**
[21] *Ibid*, para 18, **AGC MR, tab 1, p 6**
[22] *Ibid*, para 19, **AGC MR, tab 1, p 6**
[23] *Ibid*, para 20, **AGC MR, tab 1, p 6**

27. On March 28, 2019, Justice McDonald ordered that notice of certification should proceed, and fixed an opt-out period of 60 days. The Court agreed to reschedule the DRC to a date following release of details of the new program.[24]

28. Class counsel distributed notice to the class beginning on March 28, 2019, in accordance with the order. The notice provided that any individual wishing to opt out of the proceeding was required to do so by delivering an opt-out form to class counsel no later than May 27, 2019.[25] Of the 167 class members identified, twelve chose to opt out.[26]

29. At the same time, the parties continued to finalize their materials for the hearing of the application. Canada delivered its record and memorandum of fact and law on May 22, 2019, together with a motion to dismiss the application for judicial review on the basis that the CTSSP provides an adequate alternative remedy to the class members in this proceeding, which renders the judicial review application moot.[27]

30. In addition to the mootness threshold issue, Canada submitted that the choice of eligibility criteria to be met for an *ex gratia* payment is non-justiciable, as found in *Fontaine*. Canada alternatively submitted that the criteria were reasonable and consistently applied, that there was no breach of procedural fairness, and that the application should be dismissed.[28]

3) The dispute resolution conference and the negotiated settlement

31. On June 17, 2019, Mr. Wenham, two representatives from Health Canada responsible for the implementation of the TSCP and CTSSP, and counsel for the parties attended a day long DRC at the Federal Court before Justice McDonald. The DRC was productive and demonstrated both sides' genuine interest in resolving the litigation issues to benefit the class members. The

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[24] Order and Reasons of the Federal Court, per McDonald J., dated March 28, 2019 (Certification Notice Order), **Applicants' MR, tab 3**
[25] Hashemi Affidavit, para 22, **AGC MR, tab 1, pp 6-7**
[26] *Ibid*, para 23, **AGC MR, tab 1, p 7**. Also, three individuals were allowed to opt back in as part of the approval of the settlement.
[27] *Ibid*, para 24, **AGC MR, tab 1, p 7**
[28] *Ibid*, para 25, **AGC MR, tab 1, p 7**

parties agreed on a number of terms and discussions continued through the summer months leading to a final settlement agreement that was executed on October 22, 2019.[29]

32. Canada did not concede liability in the judicial review application, nor that the TSCP's evidentiary program requirements were unreasonable or unlawful. In exchange for a release of all matters relating to the old program (the TSCP) that expressly binds all class members who had not opted out of the settlement prior to May 27, 2019, the settlement includes a number of benefits requested by the representative applicant regarding the application process and administration of the new program (the CTSSP). Monetary benefits include retroactive payments which ensure class members found eligible will receive the annual payment for 2019, and payments to estates in certain circumstances. All class members benefit from the term that provides that their applications are to be determined in priority to others, and from the enhanced procedural fairness provisions.[30]

33. As the negotiations began only after the opt-out period had ended, the parties negotiated an agreement that did not allow for any late opt-outs. The settlement agreement and approval order expressly provides that all those who had not opted out prior to May 27, 2019 would be bound by the agreement including the terms of the release.[31]

34. No motions to extend the opt-out period, to seek leave to opt-out of the proceeding, or to otherwise participate were made between May 27, 2019 and October 22, 2019, when the settlement was executed.[32]

35. Upon notice that the parties had reached an agreement, the Court adjourned the hearing of the application[33] and fixed dates for the exchange of materials for the motion for approval of the notice of settlement hearing, the settlement and fee approval motions and the costs motion.

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[29] Hashemi Affidavit, para 26, **AGC MR, tab 1, p 8**

[30] *Ibid*, para 27, **AGC MR, tab 1, p 8;** Settlement Agreement between Bruce Wenham and the Attorney General of Canada, dated October 22, 2019, Hébert Affidavit, Exhibit "R", **Applicants' MR, tab 6R, pp 241-253**

[31] Settlement Agreement, 1.01 definition "class members"; 5.01, Schedule "A" – Draft Approval Order, paras 9, 17, Hébert Affidavit, Exhibit "R", **Applicants' MR, tab 6R, pp 257-259**

[32] Hashemi Affidavit, para 28, **AGC MR, tab 1, pp 8-9**

[33] *Ibid*, para 29, **AGC MR, tab 1, p 9**; Order, per Phelan J., dated October 23, 2019, **AGC MR, tab 3, p 64**

4) The settlement approval hearing

36. The motions for approval of the settlement, legal fees and costs proceeded on February 26 and 27, 2020.[34]

37. Out of a class of 167 members, 55 class members submitted participation forms to either support, or object to, the settlement and/or legal fees. Of these, only 11 opposed the settlement agreement. Six class members attended the hearing and made oral submissions. Three of the applicants were among the class members who objected to the approval of the settlement by providing written submissions with a participation form and who also made oral submissions at the hearing. None of the applicants sought leave to bring a motion to opt out prior to or during the settlement approval hearing or for the determination of an individual question.[35]

38. In her written submissions, Ms. Hébert indicated that she would seek standing before the Court, would bring an application for leave and judicial review regarding the TSCP, and would seek *certiorari* and *mandamus*. Ms. Hébert raised four objections to the settlement: 1) the date of birth parameters are arbitrary and unreasonable; 2) the algorithm is discriminatory; 3) the multi-disciplinary committee has nothing to do with the old program; and 4) the lack of retroactive annuities releases the government from accountability and responsibility. She also objected to the deduction of legal fees sought by class counsel from annuities paid to class members.[36]

39. Although Ms. Hébert's correspondence and other materials indicated an intention to file an application for leave to submit and file a judicial review application concerning the terms of the TSCP, no application or motion was served on the parties or filed with the Court. During the hearing of the motion to approve the settlement, Phelan J. heard the applicant's objections to the Settlement Agreement and acknowledged that she wished to opt out.[37] Counsel confirmed that

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[34] Hashemi Affidavit, para 30, **AGC MR, tab 1, p 9**

[35] Ms. Hébert, Ms. Cartwright and Mr. Richard made oral submissions: Doucet Affidavit, Exhibits "A" and "C"- "F", **Applicants' MR, tab 7, pp 562-583, 870, 879, 883**; Hashemi Affidavit, para 31, **AGC MR, tab 1, p 9**

[36] Doucet Affidavit, Exhibit "C", **Applicants' MR, tab 7, pp 842-869**

[37] Doucet Affidavit, Exhibit "A", **Applicants' MR, tab 7, pp 579-580**

the agreement allows individuals to opt back in, but does not permit further opt outs,[38] and that class members were free to challenge denials under the CTSSP.[39]

5) Approval of the settlement

40. On May 8, 2020, the Court approved the settlement, and the legal fees and disbursements proposed by class counsel, and dismissed Mr. Wenham's requests for costs.[40]

41. The Court found that the Settlement Agreement is fair, reasonable and in the best interests of the class as a whole. Before reaching this conclusion, the Court considered the non-exhaustive list of factors to be considered including the terms and conditions of the settlement; the likelihood of success/recovery; the amount and nature of activities including investigation, assessment of evidence, production and discovery; the arm's length bargaining and information regarding dynamics of negotiations; the recommendation of class counsel; the communication with class members; and the expression of support and objections.[41]

42. The Court noted in its reasons that 80% of class members who participated in the approval hearing (in writing or in person) supported the settlement. Phelan J. expressly addressed the objections in his Reasons for Order.[42] He specifically considered the objections of class members, including those made orally by Ms. Hébert, Ms. Cartwright and Mr. Richard. While expressing a desire to strike the date of birth parameters from the new program, Phelan J. recognized that this was beyond the powers of the Court, and instead could only "encourage a compassionate reconsideration" by the government. Despite the objections, he concluded that "[a] rejection of the Settlement would be unfair to the class and others and is not a viable alternative".[43]

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[38] Doucet Affidavit, Exhibit "A", **Applicants' MR, tab 7, pp 557, 602**
[39] *Ibid*, pp 598, 633
[40] Reasons for Order (Settlement Approval) of the Federal Court, per Phelan J., dated May 8, 2020 (Settlement Approval Reasons), **Applicants' MR, tab 2, pp 53-75**; Reasons for Order (Applicants' Motion for Costs) of the Federal Court, per Phelan J., dated May 8, 2020, **AGC MR, tab 4, p 65;** Reasons for Order (Fee Approval) of the Federal Court, per Phelan J., dated May 8, 2020, **AGC MR, tab 5, p 77**
[41] Reasons (Settlement Approval), paras 50-95, **Applicants' MR, tab 2**, **pp 65-75**
[42] *Ibid*, para 85
[43] *Ibid*, paras 86-89

43. Paragraphs 4 and 9 of the Order expressly address the finality of the opt-out process:

> **4.** Any Class Member who wished to opt out of this class proceeding was required to do so by May 27, 2019, pursuant to the Order of this Court dated March 28, 2019.
>
> **9.** The Settlement and this Order, including the release referred to in paragraph 17 below, are binding on the Parties and on the Representative Applicant and every Class Member, including persons under a disability, unless they opted out on or before the expiry of the Opt Out Period and have not revoked their opt out, and is binding whether or not such Class Member claims or receives an ex gratia payment under the CTSSP upon application to that program.[44]

6) Proposed appeal

44. On June 8, 2020, Canada was served with a notice of appeal brought by five individuals,[45] which seeks to appeal the Order of Phelan J. dated May 8, 2020, approving the settlement.[46] The notice of appeal seeks an order to set aside the approval, or in the alternative, an order permitting the applicants and others who are similarly situated to opt-out of the proceeding.

45. Upon being advised by Canada of the leave requirement in rule 334.31(2), the applicants brought this motion. However, the applicants also assert in their additional submissions that the portion of the appeal pertaining to requests made during the objections at the approval hearing are validly before the Court as they relate to "individual questions".[47]

PART II - POINTS IN ISSUE

46. To determine whether the applicants ought to be granted leave to exercise the right of appeal in place of the representative applicant, the points in issue are:

(a) whether the applicant, Ms. Hébert can fairly and adequately represent the interests of the class on the proposed appeal;

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[44] Order of the Federal Court (Settlement Approval), per Phelan J., May 8, 2020, paras 4, 9, **AGC MR, tab 6, pp 103, 104**

[45] Mr. Yvon Robichaud is not a class member and has been removed from the style of cause.

[46] Hébert Affidavit, Exhibit "Y", **Applicants' MR, tab 6Y, p 475**

[47] Hashemi Affidavit, para 37, **AGC MR, tab 1, p 11**

(b) whether the proposed appeal is in the interests of the class as a whole; and

(c) whether there is an arguable ground on which the appeal might succeed.

47. Canada also takes the position that no individual questions were determined by the Court, and that the Court did not fail to rule on any issue it ought to have ruled on.

PART III – SUBMISSIONS

A. The test for leave to exercise the representative applicant's right of appeal

48. Rule 334.31(2) of the *Federal Courts Rules* provides that a class member may seek leave to exercise the right of appeal where a representative plaintiff or applicant does not appeal, or later discontinues an appeal from an order.[48]

49. For a class member to be granted leave to exercise the right to appeal an order approving a settlement agreement, this Court has endorsed a three-part test.[49] The person must show that (1) they can fairly and adequately represent the class on appeal; (2) the appeal is itself in the best interests of the class, and (3) the class member must establish some arguable ground upon which the proposed appeal might succeed.[50]

50. At the heart of this analysis is the best interests of the class. As Laskin J.A. held in *Frame*, this "…focus on the best interests of the class is entirely consistent with the nature of the courts' supervisory role in class proceedings, particularly in relation to settlements…".[51]

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[48] Federal Courts Rules, SOR/98-106, s 334.31(2) [*Federal Courts Rules*]
[49] *Frame v Riddle*, 2018 FCA 204, at para 24, **Applicants' Authorities, tab 8**
[50] *Ibid*, at para 17
[51] *Frame*, *supra* note 49, at para 24, **Applicants' Authorities, tab 8,** citing to *Bancroft-Snell v Visa Canada Corp*, 2016 ONCA 896, at para 40, **Book of Authorities of the Attorney General of Canada, [AGC Authorities], tab 1**

51. To date, there have been two such motions brought to this Court, in the cases of *Frame v. Riddle*[52] (Sixties Scoop), and *Ottawa v. McLean* (Federal Indian Day Schools).[53] Leave to exercise the right of an appeal was denied in both cases.

52. In *McLean*, Justice Rivoalen adopted the reasoning of the Ontario Court of Appeal in *Bancroft-Snell v Visa Canada Corp*,[54] where the demerits of allowing a class member to appeal a settlement approval order were discussed. The Court noted that allowing this form of appeal is "problematic in several ways", including the uncertainty it would introduce into the negotiation and approval of class settlements and the undermining of authority of the representative plaintiff.[55]

53. The purpose of rule 334.31(2) and its analogs in provincial legislation is to protect the class from the abdication or inaction of a representative plaintiff or applicant, and not to offer a means to question the successful outcome of a deliberate legal strategy on the part of the representative. Rule 334.31(2) protects class members when a representative fails to exercise their right of appeal where prudence and sound legal strategy warrant an appeal. This rationale is far less compelling in the context of a motion for settlement approval brought on consent of the representative litigant and the respondent.

54. That leave may be granted in the Federal Court class regime established under the *Federal Courts Rules* is exceptional when compared to other Canadian jurisdictions. Nearly all provincial class proceedings legislation specifically provide the parties with express rights of appeal, or a right to seek leave to appeal certification and decertification orders, common issues judgments, and/or orders granting aggregate damages. However, a class member's right to seek leave to appeal an order approving a settlement is not provided in most provincial class regimes, including: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Newfoundland.[56]

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[52] *Frame*, *supra* note 49, **Applicants' Authorities, tab 8**
[53] *Ottawa v McLean*, 2019 FCA 309, **Applicants' Authorities, tab 7**
[54] *Ibid*, at paras 19-20; *Bancroft-Snell v Visa Canada Corp*, 2019 ONCA 822 [*Bancroft-Snell 2019*] at para 22, **AGC's Authorities tab 1**
[55] *Bancroft-Snell 2019*, *supra* note 51, at para 22, **AGC's Authorities tab 1**
[56] *Class Proceedings Act*, RSBC 1996, c 50 ; *Class Proceedings Act*, SA 2003, c C-16.5 ; *The Class Actions Act*, SS 2001, c C-12.01 ; *Class Proceedings Act*, CCSM c C130 ; *Class Proceedings*

55. Both the Ontario Court of Appeal and the British Columbia Court of Appeal recently confirmed that the provisions of their class proceedings legislation which allow class members to seek leave to exercise a representative's appeal rights in limited circumstances, does not permit applications for leave to appeal a settlement approval order, for sound policy reasons. A settlement involves no adjudication of the contested issues.[57]

B. The test for leave has not been met

1) <u>The applicants have not established that they can fairly represent the interests of all class members</u>

56. To exercise the representative applicant's right of appeal, the applicant/proposed appellant must meet the same test for a representative at certification: she must show that she will "fairly and adequately represent the interests of all Class members".[58] As no evidence has been presented which would permit the Court to consider the suitability of the applicants other than Ms. Hébert, Canada's submissions address her evidence.

57. The Federal Court of Appeal in *Frame* held that where a class member seeks to exercise the right of the representative to appeal, the court should expect evidence to demonstrate the class member's interest, their understanding of the position they seek to advance, their role in the proceeding, and their competence to instruct counsel, among other factors.[59] This evidence is in addition to the requirement that the class member demonstrates that they can fairly and adequately represent the best interests of the class.

58. Although Ms. Hébert has skills and attributes that are important for class representatives, her evidence does not demonstrate that she could fairly represent this class. There is no dispute that she is a member of the class as defined in the certification order and that she is familiar with the issues. She exercised her rights as a class member to remain in the class rather

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Act, 1992, SO 1992, c 6 ; *Class Proceedings Act*, RSNB 2011, c 125 ; *Class Proceedings Act*, SNS 2007, c 28 ; *Class Actions Act*, SNL 2001, c C-18.1

[57] *Bancroft-Snell 2019*, *supra* note 51 at paras 16, 19-22, **AGC's Authorities, tab 1**; *Coburn and Watson's Metropolitan Home v Home Depot of Canada*, 2019 BCCA 308, at paras 14-16, **AGC's Authorities, tab 2**

[58] *McLean*, *supra* note 53, at para 13, **Applicants' Authorities, tab 7**

[59] *Frame*, *supra* note 49 at para 31, **Applicants' Authorities, tab 8**; see also *McLean*, *supra* note 53, at para 31, **Applicants' Authorities, tab 7**

than opting out, and was given leave to participate in the settlement approval hearing to express her views on whether the settlement should be approved.

59. However, when a class member is seeking to exercise the appeal right of the representative, she must take the class as she finds it. It is not open to a class member to come forward for the first time at the settlement approval hearing to seek to create a new sub-class at the end of the process, and after: the definition of the class has been certified; the notice of certification has been distributed; the opt out period has run and the opt out deadline has passed; and a settlement agreement has been negotiated by the court appointed representative applicant; and the settlement agreement has been put before the court for approval.

60. Despite stating that she understands she must represent the interests of all class members, Ms. Hébert's evidence is that her interest and intent is to challenge the date of birth parameters in the new program – a matter that is of no benefit to the majority of class members. She states that "an appeal must be sought to set aside the Settlement Agreement and, at the very least, preserve the right to challenge the Birthdate Parameters".[60] Otherwise put, her objective is not to represent the interests of all or a majority of the class members in the class judicial review application concerning the former TSCP program, but rather, to advance the interests of those who fall outside date of birth parameters of the new CTSSP.[61]

61. As part of her submissions, she also argues that Mr. Wenham's interests conflict with those who fall outside of the date of birth parameters of the CTSSP. There is no conflict between Mr. Wenham and Ms. Hébert or others. In negotiating the settlement on behalf of the class, Mr. Wenham was faced with a binary choice: to accept an agreement that could potentially provide benefits to a majority of the class or to pursue a hearing on the merits of the application that could have resulted in the application being wholly dismissed by the court. In the end, he and class

[60] Applicants' Amended Memorandum of Fact and Law, para 48, **Applicants' MR, tab 8, p 899**; Affidavit of Noëlla Hébert, sworn July 22, 2020, paras 108, 112, 123, **Applicants' MR, tab 6, pp 126-128**

[61] Although she states she understands that she will have to represent the interests of all class members, she expressly states that she only has a conflict with those outside the CTSSP's date of birth parameters: Hébert Affidavit, paras 114, 119, 120, **Applicants' MR, tab 6, p 127**

counsel negotiated an agreement that obtained benefits for the class, while ensuring that the release clause did not operate to preclude a future challenge to the terms of the new program.

2) <u>The Applicants have not established that an appeal is in the best interests of the class</u>

62. Allowing the proposed appeal to proceed is not in the best interests of the class. If the appeal proceeds, at best, the implementation of the settlement will be delayed, to the detriment of class members and the value of the priority in processing benefit may be entirely lost.

63. The applicants assert that setting aside the Approval Order is in the best interests of the class, but do not explain how or why this is so. The applicants contend that the settlement approval should be overturned as it "provides no benefits whatsoever to the 42 class members who were born outside the Birthdate Parameters [in the CTSSP] and serves only to extinguish their rights".[62] Ms. Hébert's statement that « Bien que le règlement permette les révisions judiciaires des décisions en vertu du programme de 2019, le règlement accepte les paramètres de dates, excluant potentiellement les 42 membres identifiés qui sont nés avant ou après les dates prévues au décret »[63] misconstrues the terms of the settlement and how it is intended to operate.

64. As set out below, nothing in the Settlement Agreement or the Approval Order precludes the filing of judicial review applications relating to the CTSSP, or a challenge to the CTSSP's date of birth parameters. In these circumstances, the applicants have not demonstrated that setting aside the Approval Order is in the best interests of any class members.

(a) Pursuit of an appeal will not benefit the class

65. The proposed appeal will prevent the parties from fully implementing the settlement agreement. The third party administrator will be required to delay or at a minimum, hold back the retroactive payments and potential payments to estates of those class members found eligible under the CTSSP, until the appeal is resolved. The benefit of being given priority in the processing of claims may be lost entirely depending on how long it takes for the appeal to be heard and determined.

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[62] Applicants' Amended Memorandum of Fact and Law, para 66, **Applicants' MR, tab 8, p 916**
[63] Hébert Affidavit, para 124, **Applicants' MR, tab 6, p 128**

66. If the proposed appeal proceeds, and is ultimately successful, the result would be to deprive a majority of the class of the benefits of the settlement, without conferring any material advantage to the applicants or those who are similarly situated to them.

67. If the settlement is set aside, there is no guarantee, nor is it likely that the parties would resume negotiations. Rather, the application would proceed to the hearing of common issues. The respondent's motion to dismiss the application on the basis that it is moot, and that the new program provides for an adequate alternative remedy, will be heard first. If granted, it will entirely dispose of the matter. If the respondent's motion is dismissed, the Federal Court will hear the merits of the application, which could similarly result in the application being dismissed in whole.

(b) Neither the Settlement Agreement nor the Approval Order put the applicants and other similarly situated class members in a worse position than had the litigation not proceeded

68. Neither the Approval Order nor the Settlement Agreement prevent the applicants or others from seeking to challenge the CTSSP's date of birth parameters. The applicants' argument in support of pursuing the appeal is based on a fundamental misunderstanding of the effect of the Settlement Agreement and Approval Order on class members.

69. Although Canada's position is, and continues to be that the terms and conditions of government *ex gratia* programs including the TSCP and the CTSSP are not justiciable, the Settlement Agreement contains no specific bar to any individual seeking to bring an application for judicial review of a decision by the third party administrator with respect to eligibility for the CTSSP. The deemed release clause contained in section 5.01 of the Settlement Agreement is expressly limited to the TSCP. It provides:

> **5.01 Deemed release of Canada by all Class members**
>
> Upon approval by the Court of this Settlement Agreement, the Applicant agrees that all current and future legal proceedings, actions and claims, based on the matters pleaded or which could have been pleaded in the Application or asserted through other proceedings, with respect to known or unknown acts or omissions related to determinations of eligibility pursuant to the TSCP, are barred, and that all Class members, Estate Executors, and immediate family members of all deceased Class members who have not opted out by the Opt Out Deadline, will

> be bound by the deemed release in the form set out in Schedule "A: – Approval Order.[64]

70. The terms of release set out in Schedule "A", which the Court incorporated into paragraph 17 of the Approval Order specifically provided that the release "shall not impact a Class Member's right or entitlement to bring any court proceedings with respect to the CTSSP or decisions thereunder":

> 17. The discontinuance of this application shall be with prejudice to the Class, and such discontinuance shall be a defence and absolute bar to any subsequent application, action or claim against the Respondent in respect of any of the claims or any aspect of the claims made in this Application and relating to the subject matter hereof, and are hereby released against Canada. In particular, …
>
> …
>
> This release includes any such claim made or that could have been made in any proceeding including this Application whether asserted directly by the Class Member, their estate executors and their respective legal representatives, successors, heirs and assigns or by any other person, group or legal entity on behalf of such person. **For greater clarity this release shall not impact a Class Member's right or entitlement to bring any court proceedings with respect to the CTSSP or decisions thereunder.** [emphasis added][65]

71. The release must be read in relation to the Notice of Application and the issues that were certified as common issues by this Court, both of which were focused exclusively on the TSCP and its eligibility requirements.

72. Ms. Hébert's evidence is that she decided to remain in the class as she was encouraged by the decision in *Briand* and hoped for a similar result in the *Wenham* class judicial review proceeding.[66] That outcome was never guaranteed. In any event, the applicants are free to seek to challenge the evidentiary requirements of the new CTSSP. They will still face the same legal hurdles in relation to a CTSSP denial decision that they faced with a TSCP denial decision, with at least one exception. None of the applicants, nor other members of the group who fall outside of

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[64] Settlement Agreement, Hébert Affidavit, Exhibit "R", **Applicants' MR, tab 6R, pp 250-251**
[65] Order of the Federal Court (Settlement Approval), per Phelan J., dated May 8, 2020, **AGC's MR, tab 6, pp 106-107**
[66] Hébert Affidavit, paras 44, 73, **Applicants' MR, tab 6, pp 115, 120**

the date of birth parameters, sought judicial review of their individual TSCP decisions within 30 days of receiving those decisions as required under s.18.1(2) of the *Federal Courts Act.* All of the 42 class members were out of time to file a judicial review application in relation to the TSCP when Mr. Wenham brought his motion to certify the application.[67]

3) <u>There is not an arguable ground on which the proposed appeal might succeed</u>

73. The third requirement for the granting of leave is to show an arguable ground of appeal. In *Frame*, the FCA adopted the test in *Kurniewicz v Canada*, which applies to motions for leave to appeal under the *Federal Courts Rules*, and requires an applicant to establish "some arguable ground upon which the proposed appeal might succeed".[68]

74. An arguable ground of appeal is one that is capable of meeting the standard of review on appeal, which in this case, requires the applicants to demonstrate a palpable and overriding error. This Court has repeatedly confirmed that this standard is difficult to meet. In *South Yukon Forest Corp.*, Stratas J.A. explained that "[w]hen arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree [must] fall".[69]

(a) Phelan J. committed no error in approving the settlement

75. The applicants have not advanced an arguable ground of appeal that can meet the standard of palpable and overriding error.

76. When considering whether to approve a settlement pursuant to rule 334.29, it is not open to the Court to rewrite the substantive terms of the agreement nor is it permissible to place the interests of a handful of class members over the interests of the class as a whole.[70] In view of this principle, Phelan J. committed no errors in approving the settlement. He correctly addressed

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[67] Hashemi Affidavit, paras 2 & 3, **AGC MR, tab 1, p 2**

[68] *Frame*, *supra* note 49, at para 17, **Applicants' Authorities, tab 8**.

[69] *South Yukon Forest Corp. v. Canada*, 2012 FCA 165, at para 46, **AGC's Authorities, tab 3;** approved in *Benheim v. St. Germain*, 2016 SCC 48, at para 38, **AGC's Authorities, tab 4;** *Millennium Pharmaceuticals Inc. v. Teva Canada Limited*, 2019 FCA 273, at para 6, **AGC's Authorities, tab 5**

[70] *Manuge v Canada, 2013 FC 341 [Manuge]* at para 5, **AGC's Authorities, tab 6**; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] OJ No 1598 [Dabbs] (SC), at paras 10-11, **Applicants' Authorities, tab 15**

the factors that previous courts have identified and his reasons demonstrate that he gave due consideration to the concerns expressed by the applicants and other objectors. Having considered those concerns, and the powers of the court on an approval motion, he came to the conclusion that the settlement was fair, reasonable and in the best interests of the class as a whole.

77. The applicants argue that a conflict arose once the terms of the CTSSP were announced, which required Phelan J. to either decertify a sub-class of those who fall outside the date of birth parameters, or to reject the settlement. The case law is clear that it is not the role of the Court on a settlement approval motion to change the terms of the agreement or to impose its own terms.[71] The Court must also refrain from considering the interests of certain class members over the comprehensive interests of the whole class.[72]

78. The 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 of the class. In any complex negotiated agreement, there has inevitably been "give and take" by all parties on a broad range of issues. For this very reason, settlement approval courts have determined that "it is inappropriate to apply a standard of perfection to the end product. Considerable deference must be shown to the process underlying the negotiated settlement."[73]

79. The applicants' reliance on *McCarthy v Canadian Red Cross Society*[74] is of little assistance. In that case, the court refused to approve a settlement in large part because there was an absence of evidence filed in support of the motion, which prevented the court from properly assessing whether the settlement amount was fair and reasonable, in view of the release that was to be granted to the Plan Participants.[75] The reference to the treatment of derivative claims in that proposed settlement was not the primary reason for refusal, and in any case, is distinguishable from the present situation.

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[71] *Manuge* at paras 5, 19 **AGC's Authorities, tab 6**; *Dabbs* at paras 10-11, **Applicants' Authorities, tab 15**
[72] *Ibid*
[73] *Fontaine v. Canada (Attorney General)*, 2006 NUCJ 24, at para 38, **AGC's Authorities tab 7**
[74] *McCarthy v Canadian Red Cross Society*, [2001] OJ No 567**, Applicants' Authorities, tab 13**
[75] *Ibid*, at paras 19-22, **Applicants' Authorities, tab 13**

80. The court's concern in that case was that the rights of class members with derivative claims would be extinguished unless they opted out, and yet they received no benefit from remaining in the class. Winkler J. found it would be unfair and would put these individuals to the needless expense of having to formally opt out when a more appropriate route would be to amend the class definition to exclude the derivative claims. By contrast, there is at least one aspect of the agreement in this case that benefits all class members (priority in processing) and, although the release brings an end to proceedings relating to the TSCP, the Approval Order expressly protects the rights of the applicants and others to challenge the CTSSP.

81. The decision of the British Columbia Supreme Court in *Bouchanskaia* similarly does not support the argument that Phelan J. committed a palpable and overriding error in approving the settlement or failing to decertify a sub-class. While that case stands for the proposition that a court can amend the terms of a certification order in the context of an approval motion, it did so in circumstances where all parties consented to the amendment to the class definition in order to facilitate the agreement reached by the parties. While the parties could have agreed to narrow the certified class definition in this case, that was not the bargain reached.

82. The Settlement Agreement in the present case was negotiated after the opt-out deadline, and a key feature of the agreement is that it brings all litigation relating to the TSCP to an end. It cannot be assumed that Canada would agree to provide the same benefits to the class if the agreement no longer brought an end to litigation concerning the TSCP.

(b) The alternative relief seeking permission to opt-out now is not available

83. The applicants' proposed appeal seeks the alternative relief of being permitted to opt out of the proceeding at this stage. Such an order is unavailable in the particular circumstances, nor are there grounds upon which such relief could be granted.

84. An order allowing the applicants to opt out now is incompatible with the approval of the Settlement Agreement. In view of the Court order to issue notice and providing a 60 day opt-out period, Canada negotiated an agreement that required that all persons who did not opt out prior to May 27, 2019 to be bound by the settlement and release. In other words, the parties agreed there would be no late opt outs permitted. If leave is granted, the Court can only uphold or set aside the

decision to approve the settlement; it cannot simultaneously uphold the decision and grant the alternative relief.

85. Even if the Court were to entertain this request for relief, the applicants have not provided any evidence to establish the grounds upon which the opt-out deadline may be varied. A fundamental principle in class proceedings is that once class members make their election they must be bound to it.[76] The presumption is that class members understand the options available to them and the consequences of their failure to opt out.[77] The general rule of class proceedings in Canada is that class members must make a formal decision to opt-in or opt-out of the proceeding *before* the outcome of the litigation is known. A class member is not permitted to wait to make their decision on whether to participate only after learning about the results of the litigation.[78] If the member does not opt out, then the judgment or settlement of the common issues in the class action is binding upon them, whether favourable or not.[79]

86. If class members are dissatisfied with a proposed settlement, class proceedings procedure offers other mechanisms to ensure those concerns are brought to the court's attention. The participation/objection process exists and is designed to provide class members an opportunity to be heard. The court charged with deciding whether to approve a settlement must consider the views of class members when assessing if approval is in the best interests of class members.

87. The jurisprudence has consistently emphasized the integrity of the out-opt process and the important values of predictability and finality that it strives to achieve.[80] Critical to the predictability and finality principles is the importance of exercising the right to opt-out during a

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[76] *Cannon v Funds for Canada Foundation*, 2014 ONSC 2259, [*Canon*] at paras 11, 18, **AGC's Authorities, tab 8**

[77] *Silver v. IMAX Corp*, 2013 ONSC 1667, leave to appeal refused 2013 ONSC 6751, at para 112, **AGC's Authorities tab 9**

[78] *Jones v Zimmer GMBH*, 2016 BCSC 1847 at para 58, **AGC's Authorities tab 10**

[79] *Federal Court Rules*, SOR/98-106, s 334.25(1) [*Federal Courts Rules*].

[80] *1250264 Ontario Inc. v Pet Value Canada Inc.*, [*Pet Value*] 2013 ONCA 279, **AGC's Authorities tab 11***;* *Cannon*, *supra* note 76, at paras 11, 18, **AGC's Authorities tab 8;** *Silver v. IMAX*, 2013 ONSC 1667, at para 73, **AGC's Authorities tab 9**

finite period, which is set out in the certification order and spelled out in the court-approved notice to class members of the certification of the action.[81]

88. In *Bancroft-Snell*, Chief Justice Strathy described the respective rights and status of representative plaintiffs and class members in these terms:

> Class members have a right to notice of a certified class proceeding, the right to opt out of the class, and the right to object to settlement agreements. However, class members who do not choose to opt out of the class proceeding, are bound by the outcome. A settlement of a class proceeding that is approved by the court binds all class members.[82]

89. Courts have only allowed class members to opt out after the opt-out deadline where there is evidence that class members could not make a fully informed and voluntary decision about whether to remain as a member of the class or to exercise the right to opt out.[83] In *Quenneville v Volkswagen Group Canada Inc.*, Perell J. denied a motion brought by 66 class members to opt out of a class settlement, approved as fair and reasonable and in the best interests of the class, on the basis that their failure to properly opt out before the opt-out deadline was not justified.[84]

90. The applicants have not provided evidence that their decision was not voluntary or informed. Ms. Hébert confirms that, she followed the litigation and the OIC announcement closely.[85] In particular, Ms. Hébert advised the court that she stayed in because she felt she had no recourse regarding the 2015 program.[86]

91. Although there may be advantages in certain cases to postponing the opt-out process until after the terms of a settlement are known, the federal class regime established by the *Rules* does not require that the process unfold in this manner.

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[81] *Pet Value* *supra* note 80, at para 2; **AGC's Authorities tab 11**. See also paras 16, 45.
[82] *Bancroft-Snell* 2019, *supra* note 51, paras 3-4, **AGC's Authorities, tab 1**
[83] *Pet Value*, *supra* note 80, paras 2, 16, 45, **AGC's Authorities tab 11**
[84] *Quenneville v Volkswagen Group Canada Inc.*, 2018 ONSC 1020, **AGC's Authorities tab 12** See also: *Crider v Nguyen*, 2016 ONSC 4400, leave to appeal refused [2016] OJ No 7301 (Ont Sup Ct J, Div Ct)(QL), **AGC's Authorities tab 13**
[85] Hébert Affidavit, paras 64-73, **Applicants' MR, tab 6, pp 118-120**
[86] Doucet affidavit, Exhibit "A", **Applicants' MR, tab 7, p 575**

92. In any event, the 60 day opt-out period did permit class members to review the pertinent details of the CTSSP (i.e. date of birth) prior to the opt-out deadline. Class members had sufficient time to make an informed and voluntary decision whether to maintain autonomy and control over or to pursue any individual claims relating to the TSCP, or to remain a member of the Class. Those who did not opt out elected to be bound by the outcome of the litigation, for better or worse.

93. Although the settlement does not provide what the applicants and others in their situation had hoped for, it will not preclude them from seeking to challenge the terms of the new program. As the release and Approval Order expressly preserve the applicants' ability to pursue relief in relation to the CTSSP, there are no arguable grounds on which an appeal might succeed, and leave should be denied.

C. There is no appeal as of right

94. The claim that there is a direct right of appeal under s. 27(1) of the *Federal Courts Act* or under rule 334.31(1) arising as a result of the alleged failure of the Court to expressly rule on the applicants' requests to opt out during the hearing of the motion to approve the Settlement Agreement is without merit. The requests to opt out were inextricably linked to the determination of the approval motion. The concerns were properly raised through the participation process provided by rule 334.23 and were appropriately considered by the Court. In view of the particular facts of this case, there was no obligation on the Court to render separate rulings regarding the applicants' requests to opt out made during the approval motion.

95. Rule 334.31(1) permits a class member to appeal an order determining the member's claim in respect of one or more *individual questions*.[87] Canada's position is that no individual questions were determined on the approval motion. Under the rules, the term "individual questions" has a specific meaning. Rule 334.26(1) provides that where "a judge determines that there are questions of law or fact that apply only to certain individual class or subclass members, the judge shall set a time within which those members may make claims in respect of those questions" and may direct the manner in which, and by whom, such determinations are made.[88]

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[87] Federal Court Rules, SOR/98-106, s 334.31(1)(2) [*Federal Courts Rules*]
[88] Federal Court Rules, SOR/98-106, s 334.26(1) [*Federal Courts Rules*]

96. Participation under rule 334.23 is distinct from the determination of an individual question. At no time did Phelan J. identify any individual questions or direct how they should be determined in relation to the applicants. It may well be that if the Court had directed that a class member's motion for leave to opt out after the deadline should be heard as an individual question under rule 334.26(1), rule 334.31(1) would permit an appeal of any order made on that motion.

97. In the absence of such a direction however, a class member does not have standing to bring motions in the class proceeding or to move to amend a certification order, without leave of the court. Rule 334.21(1), which provides for the opt out process generally, does not recognize the opt out deadline as an individual question. Here, the opt out deadline was fixed by McDonald J. in her March 28, 2019 Order. Her Order provided that no one could opt out after the deadline without leave of the Court. This meant that only the representative applicant was entitled to appeal the March 28, 2019 Order of McDonald J. pursuant to section 27(1) of the *Federal Courts Act* as of right, or to seek to amend its terms.

98. Whether or not a class member's motion for leave to be permitted to opt out of a proceeding after the deadline may properly be considered an individual question is not in issue here given that no motion was brought and the Court did not direct the determination of any questions. In any event, once the parties had entered into the agreement on October 22, 2019, it would not have been open to the Court to grant such a motion independent of the decision to approve or reject the settlement.

99. Had a motion to extend the opt out period been made before the settlement was signed, class members would have had to meet the criteria identified above in *Bancroft-Snell 2019*. However, once the settlement was signed, the window to bring such a motion had effectively closed. In view of this, the applicants took the only steps that they could have taken at that point – they sought leave to participate in the hearing pursuant to rule 334.23 to make their objections to the settlement known.

100. Precluding motions for late opt outs after the outcome (settlement) is known does not amount to procedural unfairness. The opt out process is designed to affect procedural rights only. Once a person chooses the procedure they wish (individual vs. class action), courts will hold them

to that election even though it may impact individual rights. Class members who do not opt out cannot await the outcome and then make a different choice. Instead, they can raise their objections at the approval stage, and urge the Court to reject the settlement, which is what occurred here.

101. The only issue that the Court had to determine on the approval motion was whether the settlement was fair and reasonable and in the best interests of the class. Phelan J. was well aware of the applicants' requests to be permitted to opt out. Phelan J. correctly recognized that the requests were tantamount to a request to amend the agreement, which the court has no power to do in the context of an approval motion. Phelan J. fully appreciated the applicants' wish to be free to pursue challenges to the TSCP. He also heard from both parties' counsel in oral argument, that the agreement did not preclude challenges to the CTSSP.[89]

PART IV - ORDER SOUGHT

102. As there is no direct right of appeal, and the test for leave has not been met, the motion should be dismissed without costs. Should leave be granted, only Ms. Hébert should be granted leave as no evidence has been presented which would permit the Court to consider the suitability of the applicants other than Ms. Hébert.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 28th day of August, 2020

Christine Mohr

Melanie Toolsie

Counsel for the Respondent, Attorney General of Canada

[89] Doucet Affidavit, Exhibit "A", **Applicants' MR, tab 7, pp 598, 633**

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TABLE OF AUTHORITIES

APPENDIX A - STATUTES AND REGULATIONS

***Federal Court Rules,* SOR/98-106, s 334.21, 334.23, 334.25(1), 334.26, 334.29, 334.31**

Opting Out and Exclusion

Voluntary

334.21 (1) A class member involved in a class proceeding may opt out of the proceeding within the time and in the manner specified in the order certifying the proceeding as a class proceeding.

Automatic

(2) A class member shall be excluded from the class proceeding if the member does not, before the expiry of the time for opting out specified in the certifying order, discontinue a proceeding brought by the member that raises the common questions of law or fact set out in that order.

SOR/2007-301, s. 7.

Participation

By class members

334.23 (1) To ensure the fair and adequate representation of the interests of a class or any subclass, the Court may, at any time, permit one or more class members to participate in the class proceeding.

Directions

(2) When permitting a class member to participate in the proceeding, the Court shall give directions regarding the role of the participant, including matters relating to costs and to the procedures to be followed.

SOR/2007-301, s. 7.

Exclusion

Volontaire

334.21 (1) Le membre peut s'exclure du recours collectif de la façon et dans le délai prévus dans l'ordonnance d'autorisation.

Automatique

(2) Le membre est exclu du recours collectif s'il ne se désiste pas, avant l'expiration du délai prévu à cette fin dans l'ordonnance d'autorisation, d'une instance qu'il a introduite et qui soulève les points de droit ou de fait communs énoncés dans cette ordonnance.

DORS/2007-301, art. 7.

Participation

Participation de membres du groupe à l'instance

334.23 (1) Afin que les intérêts du groupe ou d'un sous-groupe soient représentés de façon équitable et adéquate, la Cour peut, en tout temps, autoriser un ou plusieurs membres du groupe à participer au recours collectif.

Directives

(2) La Cour assortit l'autorisation de directives concernant le rôle du participant, notamment en ce qui concerne les dépens et la procédure à suivre.

DORS/2007-301, art. 7

Common questions

334.25(1) A judgment on questions of law or fact that are common to a class or subclass binds every class or subclass member who has not opted out of or been ex- cluded from the class proceeding, but only to the extent that the judgment determines common questions of law or fact that

(a) are set out in the certifying order;

(b) relate to claims described in that order; and

(c) relate to relief sought by the class or subclass as stated in that order.

Points de droit ou de fait communs

334.25(1) Le jugement rendu sur les points de droit ou de fait communs à un groupe ou à un sous-groupe lie chacun de ses membres non exclu du recours collectif, mais seulement dans la mesure où ces points:

a) figurent dans l'ordonnance d'autorisation de l'ins- tance comme recours collectif;

b) se rapportent aux réclamations exposées dans cette ordonnance;

c) se rapportent aux réparations demandées par le groupe ou le sous-groupe et figurant dans la même or-donnance.

Individual questions

334.26 (1) If a judge determines that there are questions of law or fact that apply only to certain individual class or subclass members, the judge shall set a time within which those members may make claims in respect of those questions and may

(a) order that the individual questions be determined in further hearings;

(b) appoint one or more persons to evaluate the individual questions and report back to the judge; or

(c) direct the manner in which the individual questions will be determined.

Points individuels

334.26 (1) Si le juge estime que certains points ne sont applicables qu'à certains membres du groupe ou du sous-groupe, il fixe le délai de présentation des réclamations à l'égard des points individuels et peut :

a) ordonner qu'il soit statué sur les points individuels au cours d'autres audiences;

b) charger une ou plusieurs personnes d'évaluer les points individuels et de lui faire rapport;

c) prévoir la manière de statuer sur les points individuels.

Judge may give directions

(2) In those circumstances, the judge may give directions relating to the procedures to be followed.

Directives

2) Il peut assortir sa décision de directives concernant la procédure à suivre.

Who may preside

(3) For the purposes of paragraph (1)(a), the judge who determined the common questions of law or fact, another judge or, in the case of a claim referred to in subsection 50(3), a prothonotary may preside over the hearings of the individual questions.

SOR/2007-301, s. 7.

Qui peut statuer

(3) Pour l'application de l'alinéa (1)a), peuvent présider les auditions relatives aux points individuels le juge qui a statué sur les points de droit ou de fait communs, un autre juge ou, dans le cas visé au paragraphe 50(3), un protonotaire.

DORS/2007-301, art. 7.

Settlements

Approval

334.29 (1) A class proceeding may be settled only with the approval of a judge.

Binding effect

(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.

SOR/2007-301, s. 7.

Règlement

Approbation

334.29 (1) Le règlement d'un recours collectif ne prend effet que s'il est approuvé par un juge.

Effet du règlement

(2) Il lie alors tous les membres du groupe ou du sous-groupe, selon le cas, à l'exception de ceux exclus du recours collectif.

DORS/2007-301, art. 7.

Appeals

Individual questions

334.31(1) A class member may appeal any order determining or dismissing the member's claim in respect of one or more individual questions.

Appels

Points individuels

334.31(1) Un membre peut interjeter appel d'une ordonnance portant sur un ou plusieurs points individuels.

Representative plaintiff or applicant failing to appeal

334.31(2) 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

Représentant omet de faire appel

334.31(2) Si le représentant demandeur n'a pas interjeté appel ou s'en est désisté, un membre du groupe peut demander l'autorisation d'exercer le droit d'appel du représentant demandeur dans les trente jours suivant :

may apply for leave to exercise the right of appeal of that representative within 30 days after

(a) the expiry of the appeal period available to the representative, if the representative does not appeal;

(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.

SOR/2007-301, art. 7

a) l'expiration du délai d'appel ouvert au représentant demandeur, si celui-ci n'a pas interjeté appel;

b) le dépôt de l'avis de désistement, si le représentant demandeur s'est désisté de l'appel.

DORS/2007-301, art. 7