Court File No. A-139-20

FEDERAL COURT OF APPEAL

B E T W E E N :

NOELLA HÉBERT , RAYE SINGMASTER, JANICE KIM CARTWIGHT and PAUL RICHARD

Appellants

- and -

BRUCE WENHAM and ATTORNEY GENERAL OF CANADA

Respondents

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT

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TABLE OF CONTENTS

Caselaw:

17. *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1

18. *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879

Legislation:

19. *Federal Courts Rules*, SOR 98-106, rr. 50(3) and 334

20. *Federal Courts Act*, RSC 1985, c F-7, s. 18.1

Secondary Sources:

21. Endorsement of Belobaba J. in *Panacci v. Volkswagen Aktiengesellschaft et al*, dated Feb 10 and March 23, 2020 (Court File No. CV-16-559393-CP)

PART I - OVERVIEW

1. While empathizing with the moving parties, their motion for leave to appeal the Settlement reached and approved in this class proceeding is fundamentally flawed and is not in the best interests of the class. The appropriate avenue to seek redress for their concerns is a judicial review of any negative decisions of their individual applications under the Canadian Thalidomide Survivors Support Program ("CTSSP") following the implementation of the Settlement, which right has not be taken away from them despite their submissions to the contrary.

2. In May 2020, the Federal Court approved the proposed Settlement of the class proceeding underlying the matter now before this Court. That approval brought to an end several years of hard-fought and precedent-setting litigation by Bruce Wenham on behalf of a class of Thalidomide survivors. Bruce and the class members were all denied support and recognition as Thalidomide survivors under the Thalidomide Survivors Contribution Program ("TSCP"). The TSCP's requirements for proving one's exposure to Thalidomide were practically impossible for Bruce and others to meet, creating a fundamentally unfair and unlawful process.

3. The Settlement added benefits and protections for class members who made applications under a new support program, the CTSSP. The CTSSP had been introduced by the Government of Canada shortly after the class proceeding was certified and it did away with the impossible proof requirements of the TSCP. This dramatically changed the landscape for the class proceeding and threatened to render it moot.[1] At the same time, the introduction of the CTSSP provided a second chance for class members to have their applications for support and recognition determined. With the enhancements and protections of the Settlement it provided a fairer process for class members' applications. However, the CTSSP also included birthdate parameters ensuring that some class members would fall outside its scope.

4. The Honourable Mr. Justice Phelan heard the positions of the parties as well as class members who participated in the settlement approval motion. He considered all submissions,

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[1] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at para. 64, Wenham Book of Authorities ("WBOA"), Tab 1.

including poignant concerns regarding birthdate parameters from the class members bringing this motion. He criticized Canada's rationale for the birthdate parameters and commented that "[i]f it was in the power of this Court, it would have struck out these date parameters" but that "[r]egrettably, the Court is powerless to do anything about this issue, other than to encourage a compassionate reconsideration."[2] He determined that the benefits and protections of the Settlement were real and that it met the test of being "fair, reasonable and in the best interests of the class as a whole."[3]

5. Settlement approval decisions in class proceedings are discretionary decisions within a large zone of reasonableness. Leave to exercise the representative's right of appeal in respect of settlement approval is and must be granted sparingly.

6. There is no basis for leave to be granted here. Ms. Hébert and the other Proposed Appellants are not being denied any right to challenge the structure of the CTSSP. They are free to apply for acceptance under the CTSSP. If their applications are denied they can seek judicial review of those rejections in Federal Court. The approved Settlement does not preclude such a challenge. Rather, the claims release in the Settlement was carefully negotiated to ensure that such challenges would ***not*** be barred. Neither the Attorney General of Canada ("AGC"), Mr. Wenham and Class Counsel, nor Justice Phelan in his reasons suggested that approval of the agreement would bar the Proposed Appellants from making such a challenge. The allegation that the moving parties are now precluded, as a matter of law, from challenging any denials of their applications under the CTSSP is simply wrong. The motion for leave rests almost entirely on this faulty premise and therefore cannot be granted.

7. The moving parties were also not denied procedural fairness in the settlement approval motion. The Court did not fail to decide the moving parties' motions to opt-out – no motions to opt-out were brought. Moreover, the breaches of procedural fairness that they allege are not "individual questions" (pursuant to rule 334.31(1) of the *Federal Courts Rules* (the "*Rules*")) as that concept is understood in the class proceedings context. Individual questions are the residual

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[2] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at paras. 86-89, WBOA, Tab 1.

[3] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at para. 96, WBOA, Tab 1.

substantive issues, beyond the common issues, necessary to determine the class members' claims under the causes of action pleaded. The result is that none of the moving parties has a right of appeal under r. 334.31(1) of the *Rules*. Rather, the procedural fairness allegations are subject to the same test for leave under r. 334.31(2) as their claims bar allegation and they similarly do not satisfy the test.

8. Bruce Wenham requests that the Federal Court of Appeal deny Ms. Hébert leave to exercise his right of appeal as representative applicant in respect of the Settlement Order. This would be the right outcome on the law and the facts, and would allow for implementation of the Settlement to commence as quickly as possible.

9. While Mr. Wenham deeply empathizes with the plight of the moving parties and their exclusion by Canada from revisions to the TSCP, their motion for leave to appeal the approval of the Settlement in this class proceeding is not in the best interests of the class and is standing in the way of implementing that Settlement which provides significant benefits to class members.

PART II - THE FACTS

10. This proceeding concerns an attempt to appeal the order of Justice Phelan dated May 8, 2020, approving the Settlement of the underlying class proceeding (the "Settlement Order").[4] The facts of the underlying class proceeding, the procedural history, the process leading to Settlement and the nature of the Settlement agreement are comprehensively set out by Justice Phelan in his reasons for approving the Settlement.[5] Several facts must be highlighted for purposes of this motion.

11. First, the birthdate parameters in the CTSSP were created as a result of the Order-in-Council ("OIC") that set out the legal basis for that new program.[6] The Settlement negotiations had to take account of the terms of the OIC and Canada's unwillingness to change them.

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[4] *Wenham v. Canada (Attorney General)*, 2020 FC 587, WBOA, Tab 2.

[5] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at paras. 1-47, WBOA, Tab 1; Exhibit M to the Affidavit of Noëlla Hébert, Moving Party's Motion Record ("MP-MR"), Tab 6(M), at p. 189.

[6] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at paras. 39-41, WBOA, Tab 1.

12. Second, none of the Proposed Appellants initiated judicial review applications of their own denials under the Thalidomide Survivor Contribution Program ("TSCP"), either before Bruce Wenham converted his judicial review application into a proposed class proceeding in late December 2016 or afterward. Ms. Hébert, for example, received her denial letter on July 9, 2016.[7] If any of the Proposed Appellants had opted-out of the class proceeding in March-May 2019 and had initiated individual challenges of their denials under the TSCP at that time, they would have faced the AGC's position that their challenge was barred by the 30-day time bar in s. 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.[8] This limitation issue was also a live one in the class proceeding and was certified as a common issue by the Federal Court of Appeal.[9]

13. Third, none of the Proposed Appellants brought a motion to opt-out of the class after the opt-out window had closed.[10] This sort of motion would be exceptional in a class proceeding context. To the extent the Proposed Appellants' written and oral submissions on the Settlement approval motion raised this notion, explicitly or implicitly, the procedural context of that request did not allow for either the Applicant or the Defendant to have proper notice of such a request and provide a responding position to the Court, if necessary through evidence and argument. The procedural context of the settlement approval hearing was limited by Justice Phelan's prior order regarding the notice of settlement approval hearing[11] and the fact that the Court's substantive jurisdiction on the motion was limited to a determination of whether the Settlement proposed was fair, reasonable and in the best interests of the class as a whole.[12]

14. Fourth, there is no evidence in the record that any person – whether Class Counsel, Bruce Wenham, the AGC or Justice Phelan during the hearing or in his reasons – ever represented that approval of the Settlement agreement would preclude any person denied under the CTSSP from challenging that denial via judicial review. To the contrary, care was taken in negotiation of the

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[7] Exhibit I to the Affidavit of Noëlla Hébert, MP-MR, Tab 6(I), at p. 171

[8] *Wenham v. Canada (Attorney General)*, 2018 FCA 199, at para. 57, WBOA, Tab 3; *Wenham v. Canada (Attorney General)*, 2020 FC 588, at para. 67, WBOA, Tab 1.

[9] *Wenham v. Canada (Attorney General)*, 2018 FCA 199, WBOA, Tab 3.

[10] Affidavit of Emily Bell, at para. 7, Wenham Responding Motion Record ("W-MR"), Tab 1, p. 2.

[11] *Wenham v. Canada (Attorney General)*, 2019 FC 1539, WBOA, Tab 4; Exhibit B to the Affidavit of Emily Bell, W-MR, Tab 1(B), p. 14.

[12] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at para. 48, WBOA, Tab 1.

Settlement agreement to avoid this very potentiality by circumscribing the release to claims relating to the TSCP only.[13] Furthermore, the Proposed Appellants had notice that the Settlement would not affect their ability to challenge a future denial under the CTSSP via the notice of settlement approval hearing:

> **10. Does having opted out prevent me from applying for compensation under the 2019 Canadian Thalidomide Survivors Support Program?**
>
> No. The judicial review application only relates to the 2015 Thalidomide Survivors Contribution Program (TSCP). You may apply for compensation under the new program whether or not you chose to Opt Out of the class proceeding concerning the old program.[14]

15. The Settlement Order could not be clearer on this topic as it provides:

> *"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."*[15]

16. Fifth, Bruce Wenham delayed the adjudication of his own judicial review application significantly by converting it to a class proceeding so that the 167 other Thalidomide survivors denied under the TSCP could benefit under the umbrella of his case. This was a selfless act. The cost of that delay to Bruce ranged from $50,000 - $200,000 had Bruce simply continued with his individual case and been successful. Justice Phelan heeded these facts and found that Bruce "played a critical role" in the litigation, granting him an honorarium in consideration of his efforts.[16] Bruce's efforts led to the results achieved, including providing all class members with another chance for consideration for monetary support,[17] which chance did not exist after the Proposed Appellants' deadline to initiate a judicial review of their rejections under the TSCP expired in the summer or fall of 2016.

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[13] Settlement Agreement, art. 5.01, Exhibit R to the Affidavit of Noëlla Hébert, MP-MR, Tab 6(R), at pp. 250-251

[14] Notice of Settlement Approval Hearing, Exhibit S to the Affidavit of Noëlla Hébert, MP-MR, Tab 6(S), at p. 342

[15] *Wenham v. Canada (Attorney General)*, 2020 FC 587, at para. 17, WBOA, Tab 2.

[16] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at para. 92-95, WBOA, Tab 1.

[17] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at paras. 55-56, WBOA, Tab 1; *Wenham v. Canada (Attorney General)*, 2020 FC 590, at para. 56, WBOA, Tab 5.

PART III - THE ISSUES

17. The two issues in this motion are:

(a) Whether Noëlla Hébert ought to be granted leave to exercise the right of appeal of the representative applicant under r. 334.31(2) in respect of the Settlement Order?

(b) Whether the breaches of procedural fairness alleged by Noëlla Hébert, Raye Singmaster, Janice Kim Cartwright and Paul Richard are "individual questions" for which they have a right of appeal under r. 334.31(1)? If not, do they qualify as grounds for leave to exercise the right of appeal of the representative applicant under r. 334.31(2) in respect of the Settlement Order?

PART IV - ARGUMENT

A. Ms. Hébert Has Not Met The Test For Leave To Exercise The Representative Applicant's Right of Appeal

18. The Federal Court of Appeal has held that a two-pronged test for leave to exercise the right of appeal of a representative applicant under r. 334.31(2) applies: (1) a class member must show that he or she will fairly and adequately represent the class on appeal, and (2) that the appeal is itself in the best interests of the class.[18] The issues raised in the Notice of Appeal filed by Ms. Hébert, Ms. Singmaster, Ms. Cartwright and Mr. Robichaud fail to meet either branch of the test.

19. The core premise of the appeal is that the Settlement incorporates the CTSSP birthdate parameters, such that any class member wishing to judicially review their CTSSP denial on grounds that the birthdate parameters are unlawful is precluded from doing so.[19] This premise is plainly wrong as the Settlement does no such thing. This conclusion alone is fatal to Ms. Hébert's

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[18] *Frame v. Riddle*, 2018 FCA 204, at para. 24, WBOA, Tab 6; *Ottawa v. McLean*, 2019 FCA 309, WBOA, Tab 7.

[19] Proposed Appellants' Amended Memorandum of Fact and Law, at paras. 86, 90, 101, MP-MR, Tab 8.

position that an appeal of the Settlement Order is in the best interests of the class. It also undermines the notion that Bruce Wenham has a conflict with class members and that Ms. Hébert could fairly and adequately represent the class in any appeal of the Settlement Order.[20] Regardless of the CTSSP's effect, the notion that Bruce Wenham has a conflict with class members is unsupported by evidence and contrary to the rulings of the Federal Court and Federal Court of Appeal.

i. The Approved Settlement Does Not Preclude Judicial Review of CTSSP denials

20. The purpose of the class proceeding was to provide class members, all of whom had their applications denied under the TSCP, a second chance to apply for support and recognition as Thalidomide survivors and have their applications fairly determined. The Federal Court found that the class proceeding indeed played a role in the creation of the CTSSP[21] and in improving the CTSSP and adding protections for class members who make CTSSP applications, thereby providing a fairer second chance for class members to receive support and recognition.[22]

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[20] Proposed Appellants' Amended Memorandum of Fact and Law, at paras. 55, 72, MP-MR, Tab 8.

[21] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at paras. 55-56, WBOA, Tab 1; *Wenham v. Canada (Attorney General)*, 2020 FC 590, at para. 56, WBOA, Tab 5.

[22] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at para. 58, WBOA, Tab 1.

21. In the negotiations to reach the Settlement, Class Counsel took pains to ensure that the Settlement would not prejudice the rights of class members to challenge future denials of applications under the CTSSP, including the CTSSP itself. This was in part due to Class Counsel's awareness that certain class members might wish to challenge certain parameters of the CTSSP as unreasonable. The release found at article 5.01 of the Settlement is narrowly worded so that it **only applies to claims relating to the TSCP**:

> **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.[23] (emphasis added)

22. The Settlement Order adds further clarity on the issue of what rights the class members were deemed to release and what rights were not released as it explains that "*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 any decisions made thereunder.*[emphasis added]"[24]

23. Class Counsel and the AGC have at all times taken the position that the Settlement, upon its approval by the Court, would not preclude judicial review by any class member who applied for support under the CTSSP and was denied. The evidence from the Notice of Settlement

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[23] Settlement Agreement, art. 5.01, Exhibit R to the Affidavit of Noëlla Hébert, MP-MR, Tab 6(R), at pp. 250-251

[24] *Wenham v. Canada (Attorney General)*, 2020 FC 587, at para. 17, WBOA, Tab 2.

Approval disseminated before the hearing before Justice Phelan is consistent with that position.[25] Moreover, Class Counsel understands that the AGC has taken the position on this motion that it **will not** use the Settlement to argue that class members are precluded from challenging the CTSSP's birthdate parameters on judicial review.

24. Ms. Hébert appears to have formed her concern that the Settlement will preclude the Proposed Appellants from seeking judicial review of denials under the CTSSP based on her own errant interpretation of the agreement's effect.

25. The notion that the Settlement incorporates the CTSSP by reference and therefore precludes judicial review of denials under the CTSSP is wrong. Ms. Hébert argues that the wording of sub-article 4.02(a) of the Settlement substantively incorporates the CTSSP's birthdate parameters.[26] That provision appears in Section IV of the Settlement, which prescribes additional protections to ensure the application process for determining eligibility under the CTSSP is designed and operated more fairly than under the TSCP and could not be unilaterally changed by Canada after the fact. Article 4.02 as a whole reads as follows:

> **4.02 Process for determining Eligibility for the Canada Thalidomide Survivors Support Program**
>
> Canada agrees to take all necessary steps to ensure that the process established by the Third Party Administrator to determine eligibility pursuant to subparagraph 3(1)(c) of the OIC, is consistent with the following parameters, provided that in so doing, the discretion of the Third Party Administrator to act pursuant to the terms of the OIC is not fettered in any way:
>
> a) 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;

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[25] Notice of Settlement Approval Hearing, Exhibit S to the Affidavit of Noëlla Hébert, MP-MR, Tab 6(S), at p. 342

[26] Exhibit C to the Affidavit of Emily Bell, W-MR, Tab 1(C), p. 36.

b) the Third-party administrator will use a balance of probability standard in its preliminary assessment to determine whether the nature of the person's congenital malformations are consistent with known characteristics of congenital malformations linked to thalidomide;

c) the Diagnostic Algorithm referred to in subparagraphs 3(5) and 3(6) of the OIC that is intended to be used at the second stage of the process as a diagnostic tool by the Third Party Administrator, is known as the Diagnostic Algorithm for Thalidomide Embryopathy also referred to as (DATE); and it shall be considered by the Multi-disciplinary Committee referred to in the OIC in determining a person's eligibility under the Program pursuant to subparagraph 3(1)(c) of the OIC;

d) in the event the Diagnostic Algorithm results in a finding by the algorithm other than "probable", the Third Party Administrator shall provide the applicant with reasonable opportunities to present more information before it denies the application on the basis that the information does not produce a finding of 'probable'; and

e) where a final decision is made to deny an application at any step of the three-step process, the Third Party Administrator shall advise an applicant of the reasons for the denial and shall afford the person an opportunity to provide additional information or submissions in writing for reconsideration.

26. Ms. Hébert asserts that mere recitation of the "three-step process set out in subparagraph 3(5) of the OIC", which includes the birthdate parameters, incorporates the parameters substantively into the Settlement.

27. Ms. Hébert fails to explain how mere recitation of the OIC in art 4.02 overcomes: (i) the narrow wording of the release in the Settlement; (ii) the consistent positions of all parties that the Settlement does not bar challenges to denials of applications under the CTSSP, on whatever grounds; (iii) the AGC's position in response to this motion that it will not argue such a bar exists; and/or (iv) the wording of the Settlement Order made by this Court that states "this

release shall not impact a Class Member's right or entitlement to bring any court proceedings with respect to the CTSSP or any decisions made thereunder."[27]

28. In addition, the approval of the Settlement by the Federal Court does not result in any determination about the CTSSP or any judicial review of a decision under the CTSSP – it only determined whether the negotiated conclusion of the class proceeding relating to the TSCP was fair, reasonable and in the best interests of the class in the circumstances.

29. Given the above it is highly unlikely, if not impossible, to imagine a judge of the Federal Court finding, on its own motion since none of the parties would, that the approved Settlement prevents the Proposed Appellants from challenging the CTSSP's birthdate parameters in future judicial review proceedings.

ii. The Court Approved the Settlement as Fair, Reasonable and in the Best Interests of the Class as a Whole With Full Knowledge of its Effects on All Class Members

30. At the settlement approval hearing before Justice Phelan, the Court's task was limited to whether to approve the proposed Settlement before it. The Court properly understood the case law as forbidding it from rewriting the terms of the agreement, including by altering the certified class definition on which the Settlement was based:

> Recent case law in this Court and in other superior courts (see *Manuge v R*, 2013 FC 341 at paras 5-6, 227 ACWS (3d) 637; *Hunt v Mezentco Solutions Inc*, 2017 ONSC 2140 at paras 162-163, 278 ACWS (3d) 482) have emphasized that **the settlement must be looked at as a whole and particularly it is not open to the Court to rewrite the substantive terms of the settlement or assess the interests of individual class members in isolation from the whole class.**

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[27] *Wenham v. Canada (Attorney General)*, 2020 FC 587, at para. 17, WBOA, Tab 2.

> This principle addresses many of the points of opposition where the objector wishes the Court to impose an important term or delete a particular provision.[28]

31. Justice Phelan correctly observed that the Court had to assess the proposed Settlement as a "take it or leave it" proposition.[29]

32. The Proposed Appellants each made their concerns about the birthdate parameters known to Justice Phelan in their written and/or oral objections. The Court gave these objections a full and sympathetic hearing. Justice Phelan's reasons for approving the Settlement were attentive to the birthdate parameter concerns.

33. However, those concerns could not be considered in isolation – they had to be considered in the context of the Settlement's benefits and additional protections for class members as a whole. Nor could the birthdate parameters be altered by the Court in the context of settlement approval, where the Court's jurisdiction was not to review the CTSSP, including the OIC, in general. The reasonableness or otherwise unlawful nature of the birthdate parameters would only arise properly on a future judicial review of someone's denial under the CTSSP. The jurisdiction on the settlement approval motion was limited to approving the Settlement or not without altering its terms. This is the exercise that Justice Phelan undertook, weighing the birthdate parameter concerns against the benefits of the Settlement to the class as a whole:

> The birthdate parameters were a consistent concern. Some of the individuals failed to qualify by a matter of a few weeks – their stories were tragic and compelling. Class Counsel recognized the problem but on this issue Canada was intractable.

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[28] *McLean v. Canada*, 2019 FC 1075, at paras. 68-69, WBOA, Tab 8. (emphasis added)

[29] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at para. 51, WBOA, Tab 1.

> Canada's explanation for its rigid approach, while coldly scientific, lacked the compassion for the individual which the government espoused. It potentially punished the innocent who had not engaged themselves in "unauthorized use". There 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.
>
> If it was in the power of this Court, it would have struck out these date parameters but that would have put the Settlement in jeopardy. Regrettably, the Court is powerless to do anything about this issue, other than to encourage a compassionate reconsideration. **A rejection of the Settlement would be unfair to the Class and others and is not a viable alternative**.

34. Mr. Wenham understands Justice Phelan's comment that he would have struck out the birthdate parameters had it been within his power to be a reflection of his understanding that the reasonableness of those parameters was not squarely before him, as it would have been on a judicial review of a CTSSP denial because of the birthdate parameters. Rather, his jurisdiction was limited to the Settlement as proposed. Weighing all the pros and cons and considering the effect on the class as a whole, he determined the Settlement was fair, reasonable and in the best interests of the class as a whole.[30]

35. Settlement approval decisions are discretionary as the reviewing Court determines whether the Settlement falls within a large zone or range of reasonableness.[31] As Justice Phelan explained in his recent reasons for approving a settlement in *McLean v. Canada*:

> Reasonableness does not dictate a single possible outcome so long as the settlement falls within the zone. Not every provision must meet the test of

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[30] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at para. 96, WBOA, Tab 1.

[31] *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.), WBOA, Tab 9; *Ontario New Home Warranty Program v Chevron Chemical Co* (1999), 46 OR (3d) 130 (Ont. S.C.J.) at para 89, WBOA, Tab 10; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.), affd 2015 ONCA 158, WBOA, Tab 11; *McLean v. Canada*, 2019 FC 1075, at para. 76, WBOA, Tab 8.

> reasonableness - some will, some will not. This result is inherent in the negotiation and compromises of a settlement.[32]

36. A class proceeding settlement does not have to benefit all class members to the same degree to be fair and reasonable in the circumstances. The Federal Court has observed that this follows naturally from the fact that the risks faced by class members in achieving success in their individual claim may be different:

> No class action settlement will ever be perfect. Recovery is always limited to those who meet the definition of a class member under the terms of certification. **In cases like this involving thousands of unique individual claims, it is impossible and undesirable to treat every beneficiary equally in either financial or administrative terms. It is inevitable that a settlement like this one will leave a few people behind or benefit some ahead of others.** In this case those distinctions are of insufficient weight to reject the proposed settlement.[33]

37. The fact that a settlement is "less than ideal for any particular class member is not a bar to approval for the class as a whole."[34] Settlements providing no benefits for certain class members have been approved by Courts.[35]

38. Here, one benefit sought to be retained by Mr. Wenham in the Settlement for such individuals or others who thought components of the CTSSP were unfair or unlawful, is that the Settlement and Settlement Order in no way bar their right or entitlement to judicially review a

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[32] *McLean v. Canada*, 2019 FC 1075, at para. 77, WBOA, Tab 8.

[33] *Manuge v. R.*, 2013 FC 341, at para. 24, WBOA, Tab 12.

[34] *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.), at para. 79, affd 2015 ONCA 158, WBOA, Tab 11.

[35] Endorsement of Justice Belobaba in *Panacci v. Volkswagen Aktiengesellschaft et al*, dated Feb 10 and March 23, 2020 (Court File No. CV-16-559393-CP), settlement approved despite class members not sharing in the award where they had repaired their defective car before the car failed; sold the car before it was repaired; or had exceeded certain time or mileage limitations. However, note that class members had an opt-out to pursue a small claims action because there was a certification for settlement purposes.

rejection of their applications to the CTSSP on the basis of the unfairness or unlawfulness of the birthdate parameters or some other term of the CTSSP.

39. In addition, cases where an opt-out right existed as part of settlement because a class was certified for settlement purposes,[36] or where the settlement approval closely followed certification,[37] are not analogous to the Court's limited authority in these circumstances. In those cases the Court does not *create* an opt-out right but rather approves the proposed settlement, which includes an opt-out right. Ms. Hébert relies on several cases where objectors could opt-out of a settlement that are distinguishable on this basis.[38]

40. Ms. Hébert premises her case for leave on a wrong interpretation of the Settlement's effect as barring class members who fall outside the CTSSP's birthdate parameters from challenging those parameters via judicial review. This interpretation was not put before the Court at the settlement approval hearing. Even if the interpretation were arguable, it would be difficult to justify launching an appeal on the basis of an issue that was not before the Court at first instance.

41. To the extent Ms. Hébert raises other objections for why the Settlement was not fair and reasonable, such as the lack of an opt-out right included in the Settlement, the Court gave a full hearing to those objections and exercised its discretion to approve the Settlement as fair, reasonable and in the best interests of the class as a whole. Any appeal would be an impermissible exercise in re-weighing discretionary considerations.

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[36] For example, *Merlo v. R.*, 2017 FC 51 (certification for settlement purposes), WBOA, Tab 13, and *Merlo v. Canada*, 2017 FC 533 (settlement approval) WBOA, Tab 14.

[37] For example, *McLean v. Canada*, 2019 FC 1075, at paras. 28, 54, WBOA, Tab 8.

[38] *Stewart* v. *General Motors of Canada Ltd.*, 2008 CanLII 57167 (ON SC), at paras. 7, 30, 41, WBOA, Tab 15; *Riddle v. Canada*, 2018 FC 901, at para. 3, WBOA, Tab 16; *McLean v. Canada*, 2019 FC 1075, at para. 54, WBOA, Tab 8.

42. Permitting a class member to appeal the approved Settlement in these circumstances would be seriously problematic for the Federal Court's class proceedings regime. Here, there was an opt-out period that had closed before the Settlement was reached, Class Counsel supported the proposed Settlement, the Court heard extensive written and oral objections from the parties impacted, considered those objections and determined the Settlement was in the best interest of the class.

43. Given the Proposed Appellants have not lost their ability to judicially review a future denial under the CTSSP, and given the Court's assessment of the Settlement, Ms. Hébert has not shown that the appeal is in the best interest of the class. The only thing an appeal would do is continue to hold up the implementation of the Settlement and the provision of benefits and protections to all other class members.

iii. Bruce Wenham Has No Conflict With Class Members

44. Ms. Hébert's claim that she could fairly and adequately represent the class on an appeal of the Settlement, but that Bruce Wenham could not, rests on the false notion that Bruce has a conflict with class members who fall outside the CTSSP's birthdate parameters.

45. For a Representative Applicant to be disqualified from representing the class or for a subclass to be created, a conflict *on the common issues* would have to exist.[39] The common issues in this proceeding addressed the fairness of the TSCP – in particular the Evidentiary Criteria and Documentary Proof Requirements. Bruce had no conflict with any other class member on the common issues.

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[39] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, at paras. 76, 78, WBOA, Tab 17.

46. The opposite is true. Bruce's interest is and always has been that as many Thalidomide survivors as possible get the support and recognition they deserve from the Canadian government.

47. Bruce gave up his chance to expeditiously reach the merits of his individual judicial review of his TSCP denial in order to champion a class proceeding on behalf of others who faced the same unfair process as he, but almost none of whom had initiated their own judicial review within the limitation period. This selfless decision cost Bruce in time, effort, and potentially three years of substantial annual payments under the TSCP.[40]

48. The Federal Court of Appeal approved of Bruce as a representative applicant and the Federal Court approved of the "critical role" he played in the litigation.[41] At all times Bruce has acted in the best interests of the class as whole.

49. As explained above, the Settlement does not preclude the class members who fall outside the CTSSP's birthdate parameters from challenging those parameters on judicial review. Bruce specifically negotiated the release provision in the Settlement and Settlement Order that leaves these class members the ability to try to challenge the birthdate parameters, or other aspects, of the CTSSP on judicial review. Thus Ms. Hébert's argument that Bruce has a conflict on this basis is unsupportable – he recognized the issue and took steps to protect their right to assert their positions before the Federal Court in the future.

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[40] *Wenham v. Canada (Attorney General)*, 2020 FC 588, at para. 92-95, WBOA, Tab 1.

[41] *Wenham v. Canada (Attorney General)*, 2018 FCA 199, at para. 106, WBOA, Tab 3; *Wenham v. Canada (Attorney General)*, 2020 FC 588, at para. 92-95, WBOA, Tab 1.

50. Moreover, it is not the case that Bruce had or has a conflict simply because he supports the Settlement which provides benefits and protections that may not apply equally to all class members. This outcome is not uncommon in class proceedings[42] - the Representative Applicant must act in the best interests of the class as a whole. Bruce did so when he made the decision to enter into the Settlement.[43]

51. As Bruce has no conflict of interest with class members, there is no basis for suggesting he cannot and should not continue to act as the certified representative of the class.

B. The Proposed Appellants Have No "Claims" In Respect of "Individual Questions" to Appeal

52. The Proposed Appellants assert an interpretation of the right to appeal under r. 334.31(1) that fundamentally misunderstands the nature of "individual questions" in class proceedings generally and in the scheme of the *Rules* in particular. In class proceedings individual questions (aka, "individual issues") are the residual substantive issues, beyond the common issues, necessary to determine those class members' claims under the causes of action pleaded.[44]

53. In a class proceeding, the common issues certified (Rule 334.17(1)) are determined at the common issues trial (Rules 334.24 and 334.25). Only common questions of fact or law are determined at the common issues stage (Rule 334.25). Any substantive individual questions of fact or law that remain unresolved in the proceeding are to be addressed in an individual process

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[42] *Manuge v. R.*, 2013 FC 341, at para. 24, WBOA, Tab 12; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.), at para. 79, affd 2015 ONCA 158, WBOA, Tab 11.

[43] Class Counsel's submissions at the settlement approval on the issue of the birthdate parameters are set out at p. 97, Line 24 to P. 99, Line 14 of the transcript of the hearing: Exhibit A of the affidavit of Michel Doucet, MP-MR, Tab 7(A), at pp. 599-601.

[44] *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879, at paras. 34-37, WBOA, Tab 18, where Justice Perell explains the three stages of a class proceeding – certification, common issues and individual issues.

determined by the Court (Rule 334.26(1)). Rule 334.26 specifies a framework for a determination of the individual questions of fact and law.

54. Under r. 334.26(1) individual questions are the "questions of law or fact that apply only to certain individual class or subclass members" as determined by the class proceeding case management judge. Where the judge determines that individual questions of law or fact exist, the judge "shall set a time within which those members may make claims in respect of those questions". The judge has further discretion to design a process fit for dealing with such claims. Pursuant to r. 50(3) a Prothonotary may hear a claim in respect of one or more individual questions where the class member's individual claim does not exceed $50,000 in value, exclusive of interest and costs.

55. Bruce submits that based on the text of r. 334.26(1) and r. 50(3), the nature of an "individual question" is a substantive issue law or fact necessary to complete an individual's claim. The principles of statutory interpretation demand that the same meaning must be ascribed to the use of the term "individual question" in r. 334.31(1), which provides the appeal right from "any order determining or dismissing the member’s claim in respect of one or more individual questions."

56. An issue of procedural fairness that may arise in respect of a particular class member participant in a settlement approval motion (Rule 334.29), as is alleged here, is not an "individual question" that engages the right of appeal under r. 334.31(1). Rule 334.31(1) refers to the individual questions determined pursuant to Rule 334.26 – no such individual question was at issue, was raised or was determined here.

57. It appears the Proposed Appellants assert that the individual question that establishes their right to appeal was a request to opt-out of the class proceeding after the opt-out deadline. However, none of the Proposed Appellants brought a motion to opt-out after the opt-out deadline had passed.[45] Therefore, even if such a motion could qualify under Rule 334.31(1), no such motion was brought.

58. All that was before Justice Phelan was a motion to approve the Settlement. For those negatively impacted by the Settlement, including Ms. Hébert , Class Counsel specifically advised and encouraged those class members to submit their objections to the court.[46] The Proposed Appellants participated in that process, submitted objections and made oral submissions at the hearing.

59. If a class member or any person seeks relief from the Federal Court, the appropriate processes of the Rules should be followed – including a motion as specified in the Rules. Ms. Hébert , a lawyer in her own right, ought to have known there were processes to be followed if she wanted to seek specific relief from the Court.[47]

60. Those processes not only provide procedural fairness to the moving party, they also provide procedural fairness to the responding parties. If a standalone motion were brought by the Proposed Appellants, the AGC and Mr. Wenham would have been provided with advanced

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[45] Affidavit of Emily Bell, at para. 7, W-MR, Tab 1, p. 2.

[46] Exhibit V to the Affidavit of Noëlla Hébert, MP-MR, Tab 6(V).

[47] At para 52 of the Proposed Appellants' Amended Memorandum of Fact and Law it was noted in support of Ms. Hébert's ability to adequately represent the class that she "as a lawyer herself, is fully capable and available to instruct counsel on this appeal and make decisions for the benefit of the class.": Proposed Appellants' Amended Memorandum of Fact and Law, at para. 52, MP-MR, Tab 8. In addition the notice of settlement approval hearing specifically advised class members that "If you want to be represented by or receive advice from another lawyer, you may hire one to appear in court for you at your own expense." – Notice of Settlement Approval Hearing, Exhibit B to the Affidavit of Emily Bell, W-MR, Tab 1(B), p. 21.

warning, evidence in support of such motion, written submissions in support of such motion, an opportunity to submit responding evidence, an ability to cross-examine witnesses and an opportunity to provide written submissions. None of that was provided in this instance if the Proposed Appellants are found to have initiated a motion.

61. At best, the submissions of the Proposed Appellants show that their written objection to the Settlement expressed a desire to bring a motion (in the future) to permit them to initiate their own judicial reviews.[48]

62. In addition, it appears that the Proposed Appellants assert that a request to opt-out was made during orals submissions.[49] However, questions and answers between a judge and a participant in the context of discussing the reasons for their objections on a motion to approve a settlement could not be considered a separate motion which would be subject to an appeal right.

63. If it were determined that the Proposed Appellants initiated an informal motion at a hearing in which all that was to be determined was whether the proposed Settlement was fair and reasonable, the responding parties here are the ones who were not provided procedural fairness. At the hearing, Mr. Wenham and the AGC addressed the objections raised by the Proposed Appellants. They did not provide a fulsome response to a motion to opt-out of the proceeding as no such motion was brought.

64. Even if all of the above were accepted and it were found that the Proposed Appellants initiated an appropriate motion during or returnable at the settlement approval hearing to seek an opt-out after the opt-out deadline, the appeal would not be of the Settlement Order, it would be

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[48] Proposed Appellants' Amended Memorandum of Fact and Law, at paras. 114-118, MP-MR, Tab 8.

[49] Proposed Appellants' Amended Memorandum of Fact and Law, at paras. 119-122, MP-MR, Tab 8.

of a decision on whether to permit them to opt-out or not. As such, the Settlement Order ought to remain in force and the Settlement implementation proceed regardless of the Proposed Appellants' appeal.

PART V - ORDER SOUGHT

65. Mr. Wenham requests that the Federal Court of Appeal deny Ms. Hébert leave to exercise his right of appeal as representative applicant in respect of the Settlement Order, and further requests that the Federal Court of Appeal find that the Proposed Appellants' appeal regarding their alleged opt-out requests is improperly brought as an appeal under r. 334.31(1) and should be struck.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th DAY OF AUGUST, 2020.

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PART VI - AUTHORITIES

Caselaw:

1. *Wenham v. Canada (Attorney General)*, 2020 FC 588
2. *Wenham v. Canada (Attorney General)*, 2020 FC 587
3. *Wenham v. Canada (Attorney General)*, 2018 FCA 199
4. *Wenham v. Canada (Attorney General)*, 2019 FC 1539
5. *Wenham v. Canada (Attorney General)*, 2020 FC 590
6. *Frame v. Riddle*, 2018 FCA 204
7. *Ottawa v. McLean*, 2019 FCA 309
8. *McLean v. Canada*, 2019 FC 1075
9. *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.)
10. *Ontario New Home Warranty Program v Chevron Chemical Co* (1999), 46 OR (3d) 130 (Ont. S.C.J.)
11. *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.), affd 2015 ONCA 158
12. *Manuge v. R.*, 2013 FC 341
13. *Merlo v. R.*, 2017 FC 51
14. *Merlo v. Canada*, 2017 FC 533
15. *Stewart* v. *General Motors of Canada Ltd.*, 2008 CanLII 57167 (ON SC)
16. *Riddle v. Canada*, 2018 FC 901
17. *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1
18. *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879

Legislation:

19. *Federal Courts Rules*, SOR 98-106, rr. 50(3) and 334
20. *Federal Courts Act*, RSC 1985, c F-7, s. 18.1

Secondary Sources:

21. Endorsement of Belobaba J. in *Panacci v. Volkswagen Aktiengesellschaft et al*, dated Feb 10 and March 23, 2020 (Court File No. CV-16-559393-CP)

Court File No. A-139-20

FEDERAL COURT OF APPEAL

NOELLA HEBERT, ET AL.

Appellants

- and -

BRUCE WENHAM, ET AL.

Respondents

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT

(Filed this 28th day of August, 2020)

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Court File No. A-139-20

FEDERAL COURT OF APPEAL

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MOTION RECORD OF THE RESPONDENT

(Filed this 28th day of August, 2020)

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