

**FEDERAL COURT**

**B E T W E E N :**

**BRUCE WENHAM**

**Applicant**

**- and -**

**THE ATTORNEY GENERAL OF CANADA, EPIQ CLASS ACTION SERVICES  
CANADA INC.**

**Respondents**

*Class Proceeding*

**NOTICE OF MOTION**

**TAKE NOTICE THAT THE PLAINTIFF** will make a motion to the Court on a date to be determined by the Honourable Mr. Justice Phelan as Case Management Judge under Rule 385 of the *Federal Court Rules*.

**THE MOTION IS FOR:**

- a) an order declaring that The Attorney General of Canada, through its agent Epiq Class Action Services Canada Inc. that acts as the Canadian Thalidomide Survivors Support Program ("CTSSP") Administrator ("**Administrator**"), is in breach of article 4.02(e) of the settlement agreement approved by the Federal Court in its order and reasons dated May 8, 2020 (the "**Settlement Agreement**");
- b) an order requiring the Administrator to provide lawful reasons upon denying the application of any class member at Step 2 of the CTSSP application process, including on:
  - a. all of the possible answers to the questions listed under the valiDATE Analysis document;
  - b. what the "probable" standard under the valiDATE algorithm means as a standard of proof; and
  - c. how the informational inputs to the valiDATE algorithm are weighed in determining whether an applicant is given a "probable" finding.

- c) an order requiring the Respondents to report to this Court, forthwith, on:
  - a. all of the possible answers to the questions listed under the valiDATE Analysis document;
  - b. what the "probable" standard under the valiDATE algorithm means as a standard of proof; and
  - c. how the informational inputs to the valiDATE algorithm are weighed in determining whether an applicant is given a "probable" finding.
- d) an order tolling the limitation period under s. 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for class members who have had their applications denied under Step 2 of the CTSSP application process, until such time as the relief sought in paragraphs a) and c) is ruled upon;
- e) an order requiring the Administrator to report the information in the Appendix to this Notice of Motion to Class Counsel forthwith, and on a periodic basis going forward; and
- f) costs of this motion

**THE GROUNDS FOR THE MOTION ARE:**

1. This Court approved the Settlement Agreement in this class proceeding by order and reasons dated May 8, 2020, and retained jurisdiction over the Settlement Agreement.
2. Article 4.02(e) of the Settlement Agreement states that "where a final decision is made to deny an application at any step of the three-step process, the [Administrator] shall advise an applicant of the reasons for the denial".
3. Class members making applications for recognition and support under the CTSSP must pass through a three-step process.
4. Step 2 requires class members to provide information that is processed by valiDATE, a diagnostic algorithm for thalidomide embryopathy.
5. Class members must receive a finding of "probable" from the valiDATE algorithm in order to proceed to Step 3 of the CTSSP application process.
6. Through review of the results of class member's applications to Step 2, the other two possible findings from the algorithm appear to be "uncertain" or "unlikely".
7. The Administrator is denying class members' applications based on the valiDATE algorithm's findings of "uncertain" or "unlikely" without providing reasons that allow class members to understand what standards the findings are correlated to, or how their information was weighed in order to arrive at an outcome.

8. The Administrator's reasons do not explain whether the valiDATE algorithm determines a CTSSP applicant is "probable" when a threshold of 90% certainty is reached, or 66% certainty, or 50% + 1 certainty, or something less.
9. The Administrator's reasons do not explain – at all – how the various informational inputs class members are required to provide in the CTSSP application process are weighed by the valiDATE algorithm.
10. Class Members have a right to reasons and the reasons must justify the Administrator's decision to them in order to be lawful.
11. The Administrator's reasons contain fundamental gaps, are not transparent or intelligible, and do not allow class members to trace or understand the Administrator's reasoning, via the valiDATE algorithm, in denying applications.
12. The Respondent Attorney General of Canada executed the Settlement Agreement and is bound by this Court's order approving the Settlement Agreement.
13. The Attorney General of Canada cannot by virtue of delegation to the Administrator defeat class members' right to reasons under article 4.02(e) of the Settlement Agreement.
14. Addressing the Administrator's inadequate reasons through a multiplicity of individual judicial review proceedings brought by class members whose applications to the CTSSP have been denied under Step 2 is inefficient, contrary to the goals of class proceedings, and ignores this Court's continuing jurisdiction over the Settlement Agreement and its proper implementation.
15. Class Counsel requested the information listed in the Appendix to this Notice of Motion from the Respondents in correspondence in November and December 2020. The Respondents have not provided the information sought.
16. Class Counsel has requested the information in order to ensure Class Counsel and this Court can properly oversee implementation of and compliance with the Settlement Agreement, including that class members are aware of the CTSSP and are applying should they chose.
17. Class Counsel is entitled to the requested information by virtue of its role as court-appointed class counsel and in furtherance of this Court's order respecting its fees, which depend on the uptake of applications to the CTSSP by class members.
18. The Court has broad powers under rule 385 of the *Federal Courts Rules*, SOR/98-106, to make any orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits.
19. Proper implementation of the Settlement Agreement is crucial for class members to receive the full benefits and protections thereunder.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

a) Affidavits to be served

February 2, 2021



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**Lawyers for the Respondent, The Attorney General of Canada**

## APPENDIX

1. a listing of class members who have submitted an application to the CTSSP;
2. the total number of class members:
  - a. who have satisfied Step 1;
  - b. who have received a result from the algorithm used at Step 2;
  - c. who have satisfied Step 2;
  - d. who have received a recommendation from the multi-disciplinary committee (MDC) at Step 3; and
  - e. who have satisfied Step 3 and have been accepted into the CTSSP.
3. the status of each class members' application including:
  - a. whether the class member's application is still being reviewed in Step 1;
  - b. whether the class member's application has satisfied Step 1 of the CTSSP or was denied at that step;
  - c. if they have satisfied Step 1:
    - i. whether the class member's application is still being reviewed in Step 2;
    - ii. whether the class member's application has satisfied Step 2 or not;
    - iii. what result was obtained for each class member from the algorithm used at Step 2; and
    - iv. whether the class member submitted information for reconsideration that is still under review;
  - d. if they have satisfied Step 2:
    - i. whether the class member's application is still being reviewed by the MDC in Step 3;
    - ii. whether the class member's application has been provided with a recommendation from the MDC in Step 3;
    - iii. what recommendation was provided for each class member from the MDC at Step 3; and
    - iv. whether the class member submitted information for reconsideration that is still under review.

**FEDERAL COURT**

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BRUCE WENHAM

Plaintiff

- and -

**THE ATTORNEY GENERAL OF CANADA**

Defendant

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