

CANADA / JUDGMENT

Wenham v. Canada (Attorney General)

2020 FC 587

COURT
Federal CourtDECIDED
8 May 2020

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Wenham v. Canada (Attorney General) Court (s) Database Federal Court Decisions Date 2020-05-08 Neutral citation 2020 FC 587 File numbers T-1499-16 Decision Content Date: 20200508 Docket: T-1499-16 Citation: 2020 FC 587 Ottawa, Ontario, May 8, 2020 PRESENT: The Honourable Mr. Justice Phelan CLASS PROCEEDING BETWEEN: BRUCE WENHAM Applicant and ATTORNEY GENERAL OF CANADA Respondent ORDER (Settlement Approval) WHEREAS the Applicant and the Respondent have entered into a Final Settlement Agreement dated October 22, 2019 [the Settlement Agreement] in respect of the claims of the Representative Applicant and the Class against the Respondent; AND WHEREAS this Honourable Court approved the form of notice of certification and opt out process in this class proceeding by Order dated March 28, 2019 and has since approved the form and plan for distribution of the notice of this motion [the Approval Hearing Notice Order]; UPON BEING ADVISED of the Parties' consent to the form and content of this Order; AND WHEREAS the motion for approval of the Settlement was heard on February 26, 2020 in Toronto and by video conference from the Federal Court Registries in Vancouver, Montreal and Fredericton, and was available for viewing by webcast facilitated by the Federal Court; AND UPON HEARING the oral submissions of counsel for the Parties, and all interested parties, including any objections, written and oral; and AND THE COURT HAVING issued Reasons for Order approving the Settlement; THIS COURT ORDERS that: For the purposes of this Order, the following definitions shall apply: "Approval Date" means the date that this Order is executed; "Canada" or "Government of Canada" means Her Majesty the Queen in Right of Canada, and all current and former Ministers, employees, officials, departments, Crown agents, agencies, and Crown servants, including in particular, Health Canada as represented by the Attorney General of Canada; "Class Counsel" means Koskie Minsky, LLP; "Class Members" mean all persons who meet the class definition set out in paragraph 3 below and who did not opt out of the proceeding; "Notice of Settlement Approval" means the notice to the Class of the approval of the Settlement and discontinuance of this application substantially in the form attached as Appendix "C" and Appendix "D" (French). "Opt Out Deadline" means May 27, 2019; "Settlement Agreement" means the final Settlement Agreement, including the Schedules listed at Section 1.07 thereof, executed between the parties on October 22, 2019, and attached as Appendix "A" to this Order. "Third Party Administrator" means the entity with which the federal Health Minister has entered into an agreement for the purposes of administering the Canadian Thalidomide Survivors Support Program [CTSSP], and which previously administered the Thalidomide

Survivors Contribution Program [TSCP]; All applicable parties have adhered to and acted in accordance with the Approval Hearing Notice Order. Class Definition and Revocation of Opt-Outs The certified class is defined as “all individuals whose applications to the Thalidomide Survivors Contribution Program were rejected on the basis of failing to provide the required proof of eligibility” pursuant to the Order of the Federal Court of Appeal dated November 1, 2018. 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. Any Class Member who now wishes to revoke their opt out in order to benefit from the settlement shall deliver a Revocation of Opt Out Form substantially in the form attached as Appendix “B” to this Order, to Class Counsel post-marked no later than August 6, 2020 [the Revocation Deadline]. Class Counsel shall, within 15 days of the Revocation Deadline, serve on Canada, and file with the Court, an affidavit with the Court which lists the individuals who have revoked their opt outs and attaches the forms received. Mr. O’Neil, Mr. Declavasio, and Mr. Porto, each of whom filed notices of motion seeking an extension of time to commence individual judicial review applications, bearing court file numbers 17-T-12, 17-T-13 and 17-T-14 respectively, which matters were stayed by Order of the Court of April 11, 2017, are deemed to be Class Members upon discontinuing their respective motions for extension of time. Settlement Approval The Settlement of this application on the terms set out in the Settlement Agreement, as attached as Appendix “A” and which is expressly incorporated by reference into this Order, is fair and reasonable and in the best interests of Class Members as a whole, and is approved, on the consent of the parties. The Settlement Agreement shall be implemented in accordance with its terms, this Order and any further orders of this Court. 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. This Court, without in any way affecting the finality of this Order, reserves exclusive and continuing jurisdiction over this proceeding, the Applicant, the Class Members and the Respondent for the limited purposes of implementing and enforcing the Settlement Agreement and this Order, subject to the terms of the Settlement Agreement. Mr. Bruce Wenham shall receive the sum of \$10,000 as an honorarium to be paid in accordance with section 6.01 of the Settlement Agreement. Notice of Settlement Approval shall be provided directly by the Applicant to all Class Members and to all individuals who have opted out of the Application within the Opt Out Deadline, within ten (10) days after the Approval Order as follows:

- (a) by delivery by Class Counsel by regular mail or email to the Class Members on the class list provided by Canada on March 7, 2019 pursuant to the Order of the Court of February 26, 2019;
- (b) by forwarding by email or regular mail to any person who requests it from Class Counsel or the Respondent;

- (c) by being posted on Class Counsel's Website devoted to this proceeding: <https://kmlaw.ca/cases/thalidomide-survivors-contribution-program-class-action/>; and
- (d) by being posted prominently on the Health Canada website: <https://www.canada.ca/en/health-canada/services/thalidomide-survivors-contribution-program.html> and the CTSSP website: <https://tsspcanada.ca/>; and
- (e) by being referenced in a press release to be issued via the CNW Group - Canadian Basic Network which press release shall advise of the Settlement Approval, and direct the reader to Class Counsel's website (paragraph 1(c) above) for a copy of the Notice of Settlement Approval. The above notice provisions satisfy the requirements of Rules 334.23, 334.32, 334.34, 334.35 and 334.37 of the Federal Courts Rules and constitutes sufficient and adequate notice to the Class Members and other affected parties. Notice of Settlement Approval shall be given generally in the form(s) attached as Appendix "C" (English) and Appendix "D" (French) to this Order. Canada shall pay the reasonable costs of notice of approval of the settlement, which under no circumstances may exceed twelve thousand, five hundred dollars (\$12,500.00). Discontinuance and Release The present application, and the claims of the Class Members and the Class as a whole, are discontinued against the Respondent and Canada. 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, each Class Member, their estate executors and their respective legal representatives, successors, heirs and assigns fully, finally and forever release and discharge Canada from any and all actions, suits, proceedings, causes of action, pursuant to common law, Quebec civil law or statute, equitable obligations, contracts, claims, losses, costs (except pursuant to paragraph 18 below), grievances and complaints and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs (except pursuant to paragraph 18 below), expenses and interest which any Class Member, their estate executors or their respective legal representatives, successors, heirs and assigns may ever have had, may now have, or may in the future have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned rights or otherwise with respect to or in relation to any aspect of this Application. 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. Legal Fees and Disbursements and Costs Class Counsel's entitlement to and the quantum of legal fees, disbursements and taxes payable by Class Members, and the Applicant's entitlement to, and the quantum of any costs payable by the Respondent, shall be dealt with by separate order(s) of the Court. blank "Michael L. Phelan" blank Judge

Appendix “A” – Settlement Agreement Appendix “B” – Revocation of Opt Out Form Appendix
“C” – Notice of Settlement Approval (English) Appendix “D” – Notice of Settlement Approval
(French)

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