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Court File No. T- 1499-16

FEDERAL COURT

BETWEEN:

**BRUCE WENHAM**

Applicant

and

**B.A. WEISS IN HIS CAPACITY AS THALIDOMIDE SURVIVORS CONTRIBUTION  
PROGRAM ADMINISTRATOR AND JANE PHILPOTT IN HER CAPACITY AS  
MINISTER OF HEALTH**

**THE ATTORNEY GENERAL OF CANADA**

Respondents

APPLICATION UNDER S.18.1 OF *THE FEDERAL COURTS ACT*

AMENDED NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at 180 Queen Street West #200.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN

IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

September 12, 2016  
(Amended: \_\_\_\_\_, 2016)

Issued by: \_\_\_\_\_

Address of local office: 180 Queen Street West  
Suite 200  
Toronto, ON M5V 3L6

TO:

The Attorney General of Canada  
Department of Justice Canada  
Ontario Regional Office  
130 King Street West, Suite 3400  
Toronto, Ontario M5X 1K6

B.A. Weiss, Thalidomide Survivors Contribution Program Administrator  
3-505-133 Weber St. N.  
Waterloo, ON N2J 3G9

AND TO:

The Honourable Dr. Jane Philpott, MP, Minister of Health  
70 Colombine Driveway,  
Tunney's Pasture  
Postal Location: 0906G  
Ottawa, ON K1A 0K9

## APPLICATION

This is an application for judicial review in respect of the decision of the Thalidomide Survivors Contribution Program Administrator dated August 12, 2016 (the "Decision").

The Applicant makes application for:

- a. an order, pursuant to section 317 of the *Federal Courts Rules*, SOR/98-106, for production of all Orders in Council, minutes, memoranda, agreements and constituting documents establishing the Thalidomide Survivors Contribution Program, the Extraordinary Assistance Plan in 1991 and the jurisdiction of the Thalidomide Survivors Contribution Program Administrator to administer the Thalidomide Survivors Contribution Program, which are in the possession of the Respondents;
- b. an Order quashing the Decision of the Thalidomide Survivors Contribution Program Administrator;
- c. in the alternative, an Order setting aside the Decision and referring it back to the Thalidomide Survivors Contribution Program Administrator or the Minister of Health for determination in accordance with such directions as this Honourable Court considers to be appropriate;
- d. his costs of this proceeding; and
- e. such further and other relief as this Honourable Court deems just.

The grounds for the application are:

1. The Thalidomide Survivors Contribution Program (the "TSCP") was established by the Respondent through Health Canada. The TSCP provides significant funding and support to eligible thalidomide victims. The Minister of Health delegated the administration of the TSCP to Crawford Class Action Services acting as the Thalidomide Survivors Contribution Program Administrator (the "Administrator");
2. On July 4, 2016, the Applicant submitted a Qualification Application and supporting documents for assessment of his eligibility for the TSCP to the Administrator;
3. In a letter dated August 12, 2016, B.A. Weiss, acting as the Administrator, informed the Applicant of the Administrator's Decision that the Applicant was not eligible for support through the TSCP;
4. The program to compensate thalidomide victims was initially established by the Government of Canada in 1990 under the *HIV-infected persons and Thalidomide Victims Assistance Order*, P.C. 1990-4/872, as amended (the "Order in Council"). This program was referred to then and is referred to now in the TSCP as the Extraordinary Assistance Plan for Thalidomide Victims of 1991 (the "EAP");

5. Applicants to the EAP had a reasonable expectation of a hearing of their application;
6. In 2015, Health Canada established the new TSCP. The TSCP directly referred to meeting the eligibility criteria of the EAP. It was intended that TSCP was an extension of the EAP and, in addition to increased funding for those who successfully applied to the EAP, applicants who otherwise did not previously apply or were not previously accepted to the EAP could now apply for compensation. The EAP and the current TSCP were established for the same purpose pursuant to the Order in Council;
7. The Order in Council defined a "Thalidomide Victim" as: *a person born in Canada (a) whose mother was administered in Canada, and took Kevadon or Talimol during the first trimester of pregnancy, and (b) who suffered deformities consistent with the defined clinical syndrome of thalidomide deformities as a consequence;*
8. The Respondents established restrictive evidentiary criteria for applicants to meet the definition of Thalidomide Victim in the Order in Council;
9. The Applicant provided sworn affidavit evidence as proof of the maternal ingestion of thalidomide in Canada during the first trimester of pregnancy, however the Administrator rejected the Applicant's application suggesting that he did not provide the specific documentary evidence required by the Administrator (being "documentary proof (e.g., medical or pharmacy records) of the maternal ingestion of Thalidomide (brand names Kevadon or Talimol) in Canada during the first trimester of pregnancy") without providing a reason for reaching such conclusion;
10. The Applicant was not provided with a hearing before or after the Decision was made by the Administrator;
11. The Respondents exceeded ~~their~~ its jurisdiction in making the Decision by applying criteria that were not required or established by the Order in Council. In particular, the Order in Council did not specify what type of evidence was required to establish entitlement. The Respondents unduly restricted the application of the Order in Council by requiring the Applicant to submit specifically identified documentary evidence. Respondents had no jurisdiction to restrict the application of the Order in Council;
12. The Respondents failed to provide procedural fairness to the Applicant and failed to observe principles of natural justice by:
  - a. contrary to the EAP, failing to provide a hearing to the Applicant, which the Applicant had a reasonable expectation of;
  - b. failing to provide sufficient reasons for reaching the Decision;
  - c. failing in their duty to give appropriate information to the Applicant about the evidence that was required from him; and
  - d. failing to provide the Applicant with an appellate or reconsideration mechanism to review the Decision.

13. The Respondents made an error in law by requiring specific restrictions on the types of evidence they would accept in rendering the Decision, contrary to the Order in Council;
14. The Respondents based the Decision on an erroneous finding of fact without regard for the material before it. In particular, in reaching its Decision, the Administrator only assessed the application based on the requirement of very specific documentary evidence and failed to consider persuasive evidence that the Applicant's mother had taken thalidomide during the first trimester of her pregnancy and that the Applicant was a Thalidomide Survivor as defined in the Order in Council;
15. Section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7; and
16. Rule 317 of the *Federal Courts Rules*, SOR/98-106.

This application will be supported by the following material:

1. the affidavit of the Applicant, to be sworn, and the exhibits thereto;
2. the affidavit of the Applicant, sworn July 4, 2016, and the exhibits thereto;
3. the affidavit of Dr. James McNally, sworn June 30, 2016;
4. the affidavit of Dr. David Chitayat, sworn July 4, 2016, and the exhibits thereto;
5. the affidavit of David Mark Wenham, sworn June 29, 2016;
6. the affidavit of Dianne White, sworn July 4, 2016; and
7. such other materials as counsel may advise and this Honourable Court may permit.

September 12, 2016 (Amended: November 3, 2016)



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Toronto, ON M5H 3R3

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**Lawyers for the Applicant**