

FEDERAL COURT

B E T W E E N :

BRUCE WENHAM

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

Class Proceeding

**NOTICE OF MOTION
(MOTION FOR FEE APPROVAL RETURNABLE FEBRUARY 26 & 27, 2020)**

TAKE NOTICE THAT Class Counsel will make a motion to the Court on February 26 and 27, 2020, at 9:30 am at 180 Queen St. W., Toronto, ON.

THE MOTION IS FOR:

1. an order approving Class Counsel fees, disbursements and taxes payable by class members in Federal Court file T-1499-16 as follows:
 - (a) Class Counsel fees and disbursements to be paid on the basis of maximum of 15% of the amounts payable by the CTSSP to class members who are determined eligible pursuant to the CTSSP up to a maximum of \$2,131,297.05 (being \$1,850,000 in fees, plus HST of \$240,500, plus disbursements of \$40,797.05) (referred to as the "**Maximum Fee and Disbursements**") to be paid as follows:
 - (i) all costs awarded by the court to be paid to Class Counsel to be deducted from the Maximum Fee and Disbursements;
 - (ii) any remaining Maximum Fee and Disbursements shall first be satisfied by a deduction of 15% of each lump sum payment awarded to class members pursuant to the CTSSP;

- (iii) then, any amounts remaining of the Maximum Fee and Disbursements, shall be satisfied by a deduction of 15% of annual payments payable pursuant to the CTSSP for a maximum 10 annual payments, or until the amount remaining of the Maximum Fee and Disbursements is satisfied; and
 - (iv) then any amounts still remaining of the Maximum Fee and Disbursements shall not be recoverable.
- 2. an order directing the Respondent or the administrator of the CTSSP to hold back 15% of the lump sum payments and each of the first 10 annual payments payable to the class members pursuant to the CTSSP and pay such funds to Class Counsel on account of the Maximum Fee and Disbursements until such time as the Maximum Fee and Disbursements are paid in accordance with paragraph 1 above.
- 3. an order directing that class members and Class Counsel may enter into individual retainer agreements for the representation and assistance by Class Counsel during any reconsiderations, appeals or judicial reviews of a rejection of the class member's applications to the CTSSP and the fee for such services is approved to be a maximum of 10% of any recovery to class member resulting therefrom plus disbursements.
- 4. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. This proceeding challenged the rejection of Thalidomide survivors' applications for financial support under the Thalidomide Survivors Contribution Program ("TSCP") on grounds that the TSCP imposed fundamentally unfair evidentiary criteria and documentary proof requirements. After this class proceeding was certified following over two years of litigation, Canada revised the TSCP by implementing the Canadian Thalidomide Survivors Support Program ("CTSSP") in 2019;
2. The design of the CTSSP effectively delivers some of the relief sought in the certified class proceeding by providing class members with a new opportunity to apply for financial support, absent the barrier posed by the fundamentally unfair evidentiary criteria and documentary proof requirements that existed under the TSCP;
3. The CTSSP is a direct result of this class proceeding;
4. For those deemed eligible pursuant to the CTSSP, the following monetary support is provided:
 - (a) a lump sum payment of \$250,000; and
 - (b) annual payment of \$25,000 to \$100,000 depending on the level of the applicant's disabilities.
5. Class Counsel in the within application is Koskie Minsky LLP;
6. Class Counsel undertook and completed substantial work on behalf of the class members on a contingency fee basis;
7. Class Counsel undertook significant risk in taking on this class application and agreed to only be paid for their work in the event that the proceeding was successful;
8. Class Counsel incurred \$40,797.05 in unrecovered disbursements on behalf of the class to prosecute this class proceeding;

9. the Representative Applicant engaged in extensive, hard-fought, arm's length negotiations with the Respondent throughout 2019. The parties executed a Settlement Agreement (the "Settlement") on October 22, 2019, immediately prior to the common issues hearing on the merits;
10. the proposed Settlement requires court approval pursuant to Rule 334.29 of the *Federal Courts Rules*;
11. the proposed Settlement provides, among other terms:
 - (a) the Representative Applicant (or his designate) may provide input on the attributes, knowledge, experience and expertise of the members of the Multi-disciplinary Committee;
 - (b) the Third Party Administrator's preliminary assessment of whether a person's congenital malformations are consistent with those linked to thalidomide will be based on a balance of probabilities standard;
 - (c) where the diagnostic algorithm does not find a "probable" link between a class member's congenital malformations and thalidomide, the applicant will be provided with reasonable opportunities to present more information;
 - (d) where a class member's CTSSP application is denied, the applicant will be provided with the ability to seek reconsideration based on new evidence, written submissions, and/or an oral hearing depending on the step at which denial occurred;
 - (e) where a class member's application is successful, their annual payments will be made retroactive to June 3, 2019;
 - (f) class members' applications under the CTSSP will be dealt with in priority to non-class members' applications;
 - (g) three persons who had filed notices of motion seeking time extensions for individual judicial reviews are confirmed as class members; and
 - (h) Canada will pay the costs of implementing the Notice Plan;
12. the proposed Settlement is fair, reasonable and in the best interests of the class, particularly in light of the procedural fairness guarantees achieved for the class in the CTSSP application process, and the inherent risks, costs and further delay associated with resolving the common issues on the merits;


13. the proposed Settlement provides that Class Counsel may bring a motion on entitlement to and quantum of fees, disbursements and taxes payable by class members;
14. the Representative Applicant executed a retainer agreement with Class Counsel, which provides for fees to be paid only in the event of success and on the basis of 25% of the Recovery, plus applicable taxes;
15. Class Counsel is seeking fees of up to a maximum of being \$1,850,000 in fees, plus HST of \$240,500, plus disbursements of \$40,797.05 to be paid by virtue of a maximum deduction of 15% of the lump sum payment and 10 years' of annual payments available to class members, which is substantially less than the 25% reflected in the retainer agreement;
16. the retainer agreement and corollary fee request is consistent with other retainer agreements and fee requests in class proceedings that are routinely approved by the supervising courts;
17. the fee requested is fair and reasonable compensation in light of the:
 - (a) importance of the proposed Settlement to each class member;
 - (b) need to provide an incentive to lawyers to initiate these types of class judicial review applications in Federal Court on a contingency basis;
 - (c) the inability of the class to fund and prosecute this class proceeding against the Defendant, being a public entity with significantly greater litigation resources;
 - (d) particular risks undertaken by Class Counsel in litigating this class judicial review proceeding, and all of the risks undertaken by Class Counsel in other class proceedings;
 - (e) results achieved for the class members;
 - (f) the percentage of the fee being well within the judicially accepted range;
 - (g) the public importance of this litigation;
18. the Representative Applicant supports the fee request and considers it reasonable;
19. Rule 334.4 of the *Federal Court Rules*; and

20. Such other grounds as counsel may advise and this Honourable Court may permit.

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

- (a) the affidavit of Bruce Wenham sworn December 13, 2019;
- (b) the affidavit of Jonathan Ptak sworn December 13, 2019; and
- (c) such other material as counsel may advise and this Honourable Court may permit.

December 13, 2019



KOSKIE MINSKY LLP
900-20 Queen St. W.
Toronto, ON M5H 3R3

David Rosenfeld LSO#: 51143A
Tel: (416) 595-2700/Fax: (416) 204-2894

Lawyers for the Applicant

TO: DEPARTMENT OF JUSTICE CANADA
Ontario Regional Office
400-120 Adelaide Street West
Toronto, ON M5H 1T1

Christine Mohr
Tel: (647) 256-7538/Fax: (416) 952-4518
Negar Hashemi
Tel: (647) 256-0731/Fax: (416) 954-8982
Melanie Toolsie
Tel: (647) 256-0567/Fax: (416) 973-0809

Lawyers for the Respondent, The Attorney General of Canada

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(Filed this day of December, 2019)

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900-20 Queen St. W.

Toronto, ON M5H 3R3

David Rosenfeld LSO#: 51143A

Tel: (416) 595-2700/Fax: (416) 204-2894

Lawyers for the Applicant