

FEDERAL COURT

B E T W E E N :

BRUCE WENHAM

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

Class Proceeding

JOINT WRITTEN REPRESENTATIONS

(Motion for Settlement Approval returnable February 26-27, 2020)

**DEPARTMENT OF JUSTICE
CANADA**
National Litigation Sector
400-120 Adelaide Street West
Toronto, ON M5H 1T1

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

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

David Rosenfeld
Tel: (416) 595-2700
Fax: (416) 204-2894
Charles Hatt
Tel: (416) 595-2124
Fax: (416) 204-2890

**Counsel for the Respondent, the
Attorney General of Canada**

**Counsel for the Applicant,
Bruce Wenham**

TABLE OF CONTENTS

PART I - OVERVIEW AND FACTS	1
A. Overview	1
B. Background	2
i. Thalidomide in Canada.....	2
ii. Support for Thalidomide survivors – EAP and TSCP..	2
iii. Rejection from the TSCP.....	6
C. Class Proceeding initiated and certified	7
D. CTSSP announcement.....	9
E. Settlement	11
PART II - ISSUES TO BE DETERMINED.....	14
PART III - LEGAL SUBMISSIONS	14
A. The Settlement should be approved.....	14
i. Test for settlement approval	14
ii. Legal principles applicable to settlement approval.....	15
iii. The factors militate in favour of approving the Settlement	16
a. Terms and conditions of Settlement benefiting Class Members	16
b. Class Size.....	18
c. Likelihood of success or recovery	19
d. Amount and nature of discovery, evidence or investigation.....	22
e. Future expense and likely duration of litigation	23
f. The presence of arm's length bargaining and the absence of collusion	24
g. The degree and nature of communications with class members during the litigation.....	25
h. Recommendation and experience of Class Counsel ...	26
B. The Settlement is fair, reasonable and in the best interest of class members.....	26
C. The Honorarium To The Representative Plaintiff is Appropriate	26
PART IV - ORDER REQUESTED.....	30
PART V - STATUTES AND REGULATIONS	31
APPENDIX "A" - LIST OF AUTHORITIES	34

PART I - OVERVIEW AND FACTS

A. Overview

1. The proposed settlement puts an end to this litigation. The proceeding was commenced as an individual judicial review application in September 2016, and was certified in November 2018 on behalf of applicants to the Thalidomide Survivors Contribution Program ("**TSCP**") whose applications for financial support were denied.

2. The certified proceeding challenged the TSCP's evidentiary criteria and documentary proof requirements. Shortly after it was certified, Canada replaced the TSCP with the Canadian Thalidomide Survivors Support Program ("**CTSSP**") in 2019, which addressed concerns raised in Parliament and in this proceeding. The proposed settlement, executed by the Applicant and Respondent on October 22, 2019 (the "**Settlement**" or "**Settlement Agreement**"), provides for procedural fairness and other benefits to the Class relating to the CTSSP.

3. The CTSSP provides much of the same relief sought in the certified class proceeding. Class members have a new opportunity to apply for financial support that was denied to them under the TSCP, the evidentiary criteria and documentary proof requirements of which were at issue in this class proceeding. The CTSSP was made available commencing in June 2019 and the program will remain open until June 2024, to any person seeking recognition as a thalidomide survivor. The Settlement Agreement provides procedural fairness safeguards and other benefits to members of the class who are ultimately found eligible under the CTSSP.

4. The Settlement and the CTSSP address many of the concerns expressed by Class Members about the TSCP, and is fair, reasonable and in the best interests of the Class Members.

B. Background

i. *Thalidomide in Canada*

5. Thalidomide was originally developed and sold as a non-addictive sedative, and was also found to be effective in combatting symptoms associated with morning sickness; it was prescribed off-label for this purpose. According to Ms. Moriarty, Director General of Health Canada's Health Program & Strategic Initiative Directorate, the drug was launched in West Germany on October 1, 1957.¹

6. In Canada, thalidomide was distributed under the trade names Kevadon and Talimol,² and was authorized for use in sample format on June 23, 1959. It was subsequently approved for prescription use on April 1, 1961 until March 2, 1962, when it was recalled because a linkage between first trimester maternal ingestion of thalidomide and miscarriages or birth defects was confirmed.³ A Canadian registry was established by the federal government between 1964 and 1973 initially identified 115 affected children in Canada.⁴

ii. *Support for Thalidomide survivors – EAP and TSCP*

7. On May 10, 1990, the Governor in Council promulgated Order in Council P.C. 1990-4/872, an "Order respecting *ex gratia* payments to persons infected with the human immunodeficiency virus (HIV) through blood products in Canada and to Canadian thalidomide victims." The Order in Council defined "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

¹ Affidavit of Cindy Moriarty dated February 5, 2020, ("Moriarty Affidavit"), para 6; **Joint Motion Record (Settlement Approval), JMR-SA, tab G, p 1354.**

² *Ibid*, para 7, **JMR-SA, tab G, p 1354.**

³ *Ibid*, para 8, **JMR-SA, tab G, p 1354.**

⁴ *Ibid*, para 11, **JMR-SA, tab G, p 1355.**

- (b) who suffered deformities consistent with the defined clinical syndrome of thalidomide deformities as a consequence."⁵

8. By a second Order in Council (P.C. 1991-7/2543) on December 16, 1991, the application deadline was extended from February 14, 1991 to September 1, 1991.⁶

9. Canada distributed the support through what was known as the Extraordinary Assistance Plan (the "EAP").⁷ The EAP required an applicant to meet one of the following criteria:

- (a) verifiable information of the receipt of a settlement from the drug company; or
- (b) 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; or
- (c) listing on an existing government registry of Thalidomide victims.⁸

("Evidentiary Criteria")

10. Under the 1991 EAP, there were 108 successful applicants to whom support was provided.⁹

11. In 2014, a motion passed unanimously in Parliament to provide additional support to thalidomide survivors to meet their increasing medical needs.¹⁰

12. In 2015, Canada announced new support for Canadian thalidomide survivors under the TSCP, which was to provide payments to two classes of eligible recipients: (1) those who received payments pursuant to the earlier 1990 EAP, and (2)

⁵ Affidavit of Jonathan Ptak, sworn February 11, 2020, ("Ptak SA Affidavit"), para 7, **JMR-SA, tab F, p 357.**

⁶ Moriarty Affidavit, para 20, **JMR-SA, tab G, p 1358.**

⁷ *Ibid*, para 22, **JMR-SA, tab G, p 1358.**

⁸ *Ibid*, para 25, **JMR-SA, tab G, p 1359.**

⁹ *Ibid*, para 25, **JMR-SA, tab G, p 1359.**

¹⁰ *Ibid*, para 27, **JMR-SA, tab G, p 1360.**

those who submitted applications before May 31, 2016 and who met one of the same criteria that had been applied in the EAP (the Evidentiary Criteria).¹¹

13. The TSCP required specific types of objective evidence to satisfy the second criteria:

- (i) copies of doctor's prescription; OR
- (ii) hospital birth records OR other medical/pharmacy records; OR
- (iii) if no records are available, proof in the form of a sworn statement (affidavit) from persons with direct knowledge of the event may be acceptable, e.g. physician stating that he/she prescribed the drug to the individual's mother."¹²
("Documentary Proof Requirements")

14. Eligible persons under the TSCP would receive:

- 1) a tax-free lump-sum of \$125,000.00 to help support immediate health needs;
- 2) ongoing support payments, based on level of disability, throughout the course of the individual's lifetime; and
- 3) access to the Extraordinary Medical Assistance Fund for assistance with extraordinary health costs.¹³

15. The TSCP was to be delivered with dispatch to the aging population.¹⁴

16. The second Evidentiary Criteria required specific documentary proof of the maternal ingestion of thalidomide in Canada during the first trimester of pregnancy when the drug would have effect on the fetus. The Documentary Proof Requirements considered records of a doctor's prescription, hospital birth, medical or pharmacy records, or, if those were unavailable, a sworn statement from a medical professional with direct knowledge of the event as acceptable proof. A non-medical

¹¹ *Ibid*, para 31, **JMR-SA, tab G, p 1361.**

¹² Ptak SA Affidavit, para 13, **JMR-SA, tab F, p 361.**

¹³ Moriarty Affidavit, para 32, **JMR-SA, tab G, p 1361.**

¹⁴ *Ibid*, para 33, **JMR-SA, tab G, p 1362.**

professional's (e.g., mother's/father's, relative's, friend's, etc.) assertion would not constitute documentary proof. With the Documentary Proof Requirements, the second Evidentiary Criteria was not designed to be met on a balance of probabilities standard.¹⁵

17. The TSCP did not provide an applicant with a right to a hearing of their application.¹⁶

18. The absence of time parameters in the TSCP eligibility criteria provided for the possibility that a person might submit proof, but from outside of the known time period for thalidomide's distribution and recall in Canada. In doing so, persons whose mother ingested thalidomide remaining in medicine cabinets after the drug's withdrawal from the market would not be precluded.¹⁷ Ms. Moriarty states that in designing the TSCP Health Canada had regard to the matters raised by the Thalidomide Victims Association of Canada that a person's conditions should not be wrongly attributed to thalidomide, if the congenital anomaly actually related to one of the other conditions with similar manifestations. According to the Thalidomide Victims Association of Canada this support a person's ability to manage their health based on accurate information and not misdiagnosis, and the scientific knowledge of the thalidomide tragedy remains accurate.¹⁸

19. On October 26, 2015, following a required competitive selection process, Health Canada entered into a Contribution Agreement with Crawford & Company (Canada) Inc. to be the independent third party administrator of the TSCP ("Administrator").¹⁹

20. By October 2016, the TSCP Administrator had advised nearly every applicant to the TSCP whether they were found eligible or not under the criteria. Out

¹⁵ *Ibid*, para 36, **JMR-SA, tab G, p 1362.**

¹⁶ Ptak SA Affidavit, para 15, **JMR-SA, tab F, p 359.**

¹⁷ Moriarty Affidavit, para 37, **JMR-SA, tab G, p 1363.**

¹⁸ *Ibid*, paras 18 and 29, **JMR-SA, tab G, pp 1357 and 1360.**

¹⁹ *Ibid*, para 34; **JMR-SA, tab G, p 1362.**

of 193 individuals who applied to the TSCP (and who had not received payments under the 1991 EAP), 25 were newly approved.²⁰

21. Of those 25 new eligible persons, 16 had provided the required documentary proof of maternal first trimester thalidomide ingestion. The other nine qualified under the first or third criteria.²¹

22. Of the 193 TSCP applicants, about 41 were born between 1940 and 1958. However, Thalidomide was only launched in Germany on October 1, 1957 and was only authorized for use in sample format on June 23, 1959 in Canada. More than 40 of the TSCP applicants were born between 1963 and 1973, after the drug's Canadian distribution and sale date had stopped. Finally, 33 of the applicants submitted no supporting documentation at all in support of their TSCP applications. One hundred and sixty eight (168) persons were found ineligible.²²

iii. Rejection from the TSCP

23. Bruce Wenham's mother became pregnant with him in 1957. Mr. Wenham's evidence was that his mother told family members that she was provided with Thalidomide to relieve her of the morning sickness she was experiencing during her first trimester of pregnancy.²³

24. Mr. Wenham was born on July 14, 1958, at Mount Sinai Hospital, in the City of Toronto, Ontario, with bilateral malformations to his arms. He was the only child in a family of five siblings who was born with malformations.²⁴

25. Mr. Wenham's family relocated back to England in 1959. He was never registered in the Canadian government registry as a Thalidomide victim, nor was he registered in England. All records from his mother's visits to Mount Sinai Hospital

²⁰ *Ibid*, para 38, **JMR-SA, tab G, p 1363.**

²¹ *Ibid*, para 39, **JMR-SA, tab G, p 1363.**

²² Moriarty Affidavit, para 40, **JMR-SA, tab G, p 1363.**

²³ Affidavit of Bruce Wenham, sworn December 13, 2019, ("Wenham Affidavit"), para 3, **JMR-SA, tab B, p 5.**

²⁴ Wenham Affidavit, para 4, **JMR-SA, tab B, p 6.**

have since been destroyed and the consulting physician is no longer available.²⁵ He had applied to the EAP in 1991, but provided no records to establish his mother's ingestion of thalidomide and was not found eligible.²⁶

26. When Mr. Wenham applied to the TSCP program upon hearing of it in 2016, he submitted the following documentation, which was all that was available to him:

- (a) The affidavit of Dr. David Chitayat (expert geneticist), sworn July 4, 2016, which provided an expert opinion for the causal link between Bruce's malformities and thalidomide exposure;
- (b) The affidavit of Dr. James McNally (family physician), which stated that Bruce's physical condition is consistent with *in utero* thalidomide exposure;
- (c) Mr. Wenham's own affidavit, which provided information about his mother's ingestion of Thalidomide, his birth, his siblings' lack of deformities, his parents' death, the consulting physician's presumed death, and the lack of medical records from Mount Sinai Hospital where I was born;
- (d) The affidavit of Mr. Wenham's brother, David Mark Wenham, sworn June 29, 2016, which outlined the dates when he and his siblings were born. It also stated that Bruce was the only child in the family who was born with disabilities; and
- (e) The affidavit of Mr. Wenham's wife, Dianne White, which stated that his mother discussed with Dianne about taking the medication when pregnant with Mr. Wenham.²⁷

27. On August 12, 2016 the TSCP Administrator informed Mr. Wenham that his application to the TSCP was denied because he did not satisfy the criteria.²⁸

C. Class Proceeding initiated and certified

28. On September 12, 2016, the Applicant commenced an application for judicial review of the denial of his TSCP application.²⁹ He alleged that the Evidentiary

²⁵ *Ibid*, para 5, **JMR-SA, tab B, p 6.**

²⁶ Moriarty Affidavit, para 26, **JMR-SA, tab G, p 1359.**

²⁷ Wenham Affidavit, para 6, **JMR-SA, tab B, p 6.**

²⁸ *Ibid*, para 7, **JMR-SA, tab B, p 7.**

²⁹ Ptak SA Affidavit, para 20 and Exhibit 3, **JMR-SA, tab F, pp 360 and 397.**

Criteria and Documentary Proof Requirements were ultra vires and procedurally unfair.

29. Through the certified tribunal record, it became clear to Mr. Wenham that 168 individuals were denied eligibility in the TSCP , and Mr. Wenham entered into a retainer agreement with class counsel at that time in order to pursue certification of the application as a class proceeding.³⁰

30. Canada responded to the proposed class judicial review proceeding and objected to certification.³¹ A similar judicial review application challenging the TSCP's criteria and evidentiary requirements was dismissed by the Federal Court as non-justiciable prior to the hearing of the Applicant's certification motion.³²

31. The certification motion was heard on May 9, 2017.³³

32. The motion for certification was dismissed by the Federal Court on July 6, 2017.

33. In January 2017, an E-Petition prepared by a Member of Parliament which advocated for changes to the TSCP criteria to include medical assessments had received 927 signatures;³⁴ and the Parliamentary Standing Committee on Health (HESA) made recommendations to the Health Minister on June 8, 2017 after public hearings on May 7 and 9, 2017 to change the TSCP's criteria and evidentiary requirements to include clinical evaluation and assessment of the likelihood of thalidomide exposure on a balance of probabilities standard.³⁵ The Applicant immediately sought to be consulted with respect to any proposed changes to the

³⁰ *Ibid*, para 28, **JMR-SA, tab F, p. 361**; Wenham Affidavit, paras 10, 15, **JMR-SA, tab B, pp 7 and 8**.

³¹ A full review of the steps in this litigation can be found at paras 20-98 of the Ptak SA Affidavit, **JMR-SA, tab F, pp 360-373**, and the chronology of the litigation found at Exhibit "1" of the Ptak SA Affidavit, **JMR-SA, tab F-1, p 381**

³² Moriarty Affidavit, para 41, **JMR-SA, tab G, p 1364**.

³³ Ptak SA Affidavit, para 38, **JMR-SA, tab F, p 362**.

³⁴ Moriarty Affidavit, para 45, **JMR-SA, tab G, p 1365**.

³⁵ *Ibid*, paras 46-50, **JMR-SA, tab G, pp 1365-1366**.

CTSSP. The Respondent replied by letter dated June 22, 2017, stated that “[y]ou will appreciate that DOJ cannot commit Health Canada to a hypothetical course of action, not yet crystallized in the legislative or Parliamentary realm, and only the subject of parliamentary committee discussion”. AGC counsel also indicated that “if there is some further development, which you believe impacts the litigation, certainly we can discuss further then, or non-litigation inquiries may always be addressed to Health Canada directly”.³⁶

34. The appeal of the Federal Court’s decision to deny certification was heard on January 9, 2018. The Health Minister publicly responded to HESA on January 9, 2018 stating it would continue to consider its recommendations.³⁷ On February 27, 2018, Canada announced that the TSCP “would be expanded” as part of its 2018 Budget,³⁸ Soon after the 2018 Budget announcement, the Applicant requested to be consulted.³⁹ Instead of in-person consultation, Health Canada invited the Applicant to provide written submissions on proposed changes to the TSCP to Health Canada in April 2018, which he did through his counsel.⁴⁰ The class was ultimately certified by the Federal Court of Appeal on November 1, 2018.⁴¹

D. CTSSP announcement

35. In November 2018, immediately after the Federal Court of Appeal certified this class proceeding, the Applicant sought to provide notice of certification to the Class.⁴²

³⁶ Ptak SA Affidavit, paras 36 and 37 and Exhibits 12 and 13, **JMR-SA, tab F, p 362, tab F-12, p 658, and tab F-13, p 660.**

³⁷ Moriarty Affidavit, para 52 and Exhibit S, **JMR-SA, tab G, p 1367 and pp 1709-1710.**

³⁸ *Ibid*, paras 52-53, **JMR-SA, tab G, p 1367.**

³⁹ Ptak SA Affidavit, paras 42-51, **JMR-SA, tab F, pp 363-365.**

⁴⁰ *Ibid*, paras. 42-48, **JMR-SA, tab F, pp 363 -364.**

⁴¹ *Wenham v Canada (Attorney General)*, 2018 FCA 199, **Joint Book of Authorities for Settlement Approval (“JBA”), tab 1; Ptak SA Affidavit, para 52, JMR-SA, tab F, p 365.**

⁴² Ptak SA Affidavit, para 54-58, **JMR-SA, tab F, pp 365-366.**

36. On January 9, 2019, the Government of Canada announced a new financial support program for eligible Thalidomide survivors called the Canadian Thalidomide Survivors Support Program ("CTSSP"). The announcement promised "the CTSSP will provide a fair and comprehensive approach to identifying thalidomide survivors that is based on international best practices." It also stated that the application period would launch in spring 2019.⁴³

37. On April 5, 2019 the Ministry of Health established the CTSSP by an Order-in-Council that provided the eligibility criteria and evidentiary requirements of the CTSSP.⁴⁴ That Order-in-Council was announced on April 10, 2019.⁴⁵ It provided that persons found eligible in the 1991 EAP or the 2015 TSCP, or if they are listed on a Canadian government registry, will be eligible for the CTSSP. All other applicants' eligibility will be determined by considering all relevant information provided by applicants. Specifically, the OIC requires the Administrator to use the following three-step process, to determine the person's eligibility:

- a) it must conduct a preliminary assessment of the person's eligibility based on the following criteria:
 - i. the date of birth of the person in Canada falls within the period beginning on December 3, 1957 and ending on December 21, 1967;
 - ii. the person's date of birth or any other information available is consistent with maternal ingestion of thalidomide in the first trimester of pregnancy; and
 - iii. the nature of the person's congenital malformations is consistent with known characteristics of congenital malformations linked to thalidomide;
- b) if the third party administrator considers that it is likely based on the preliminary assessment that the person's congenital malformations are the result of maternal ingestion of thalidomide in the first trimester of pregnancy, it must assess the probability that the person's congenital malformations are consistent with known patterns of thalidomide embryopathy using a diagnostic algorithm for thalidomide embryopathy that it has selected; and

⁴³ *Ibid*, para 59, **JMR-SA, tab F, p 366**.

⁴⁴ Moriarty Affidavit, para 55, **JMR-SA, tab G, p 1368**.

⁴⁵ Ptak SA Affidavit, para 70, **JMR-SA, tab F, p 369**.

- c) if the diagnostic algorithm for thalidomide embryopathy shows that it is probable that the person's congenital malformations are consistent with known patterns of thalidomide embryopathy, the third-party administrator must refer the person's application to a multi-disciplinary committee of medical and legal experts that it has selected, and the committee must provide the third-party administrator with its recommendation on whether the person should be eligible under the Program. At this third stage, the term "probable" is the highest point on the three-point scale of the diagnostic algorithm for thalidomide embryopathy. The multi-disciplinary committee must base its recommendation on the totality of the information related to the application and any other evidence that it considers to be relevant, including any genetic test results and medical exams it may requisition.⁴⁶

38. According to Ms. Moriarty, the date of birth parameters in the CTSSP were devised by Health Canada in light of the drug's critical impact period, and its availability in Canada and globally.⁴⁷

E. Settlement

39. While the litigation continued following the announcement of the CTSSP in January 2019, following the announcement of the OIC the parties began arm's length settlement discussions at a dispute resolution conference on June 17, 2019. Settlement discussions followed that conference over the next several months.⁴⁸

40. Eventually the Settlement Agreement was executed on October 22, 2019.⁴⁹

41. The key terms of Settlement include:

- (a) procedural fairness safeguards with respect to the CTSSP application process, including:
 - (i) confirmation of that the Administrator will use a balance of probability standard in its preliminary assessment at Stage 1;
 - (ii) at Stage 2, those who do not receive a "probable" finding by the Diagnostic Algorithm determining eligibility will be given

⁴⁶ *Canadian Thalidomide Survivors Support Program Order*, P.C. 2019-0271.

⁴⁷ Moriarty Affidavit, paras 60-67, **JMR-SA, tab G, pp 1370-1372.**

⁴⁸ Ptak SA Affidavit, paras 88-89, **JMR-SA, tab F, p. 371.**

⁴⁹ *Ibid*, para 90, **JMR-SA, tab F, p. 371.**

- opportunity to provide more information for the consideration by the Administrator before their application is denied;
- (iii) Where a final decision is made to deny an application at any step of the three-step process, the Administrator will provide
 - (1) reasons for the denial;
 - (2) an opportunity to provide additional information or submissions in writing for reconsideration; and
 - (3) the right to seek reconsideration upon presentation of new evidence, so long as such applications are received prior to June 3, 2024; and
 - (iv) Class Members whose applications are denied at the third stage described in subparagraph 3(7) of the OIC, after recommendation by the Multi-disciplinary Committee, shall be entitled to provide written submissions and/or an oral hearing with Third Party Administrator and at least one representative of the Multi-disciplinary Committee. Oral hearings shall be conducted by teleconference or videoconference or, in person at the applicant's own expense, if they so request; and
- (b) that the Representative Applicant or such other Class Members as may be designated, would be invited to provide input with respect to the attributes, knowledge, experience and expertise of the members of the Multi-disciplinary Committee involved in Stage 3;
 - (c) the review of class member applications to the CTSSP in priority to others;
 - (d) Class Members who are found eligible, shall receive their annual payments retroactive to June 3, 2019; regardless of when they submit their application during the application period; and
 - (e) payment of the lump sum payment to Class Members' estates if they pass away after being determined to be eligible to the CTSSP but before the payment issues;
 - (f) an honorarium payment of \$10,000 to the Applicant;
 - (g) a discontinuance of the class proceeding; and
 - (h) the Settlement is without admission of liability.

42. The Settlement Agreement does not provide for the payment of legal fees. Canada reserved the right to seek to make submissions on the motion, and agreed that nothing in the Settlement Agreement prevented the Applicant from bringing a

motion seeking costs.⁵⁰ On December 20, 2019, Justice Phelan granted the Respondent's request to make submissions on the motion for the approval of fees only on "the programs and on the way in which they came about that goes to the issue of "success" or the "results of the litigation."

43. In accordance with the Justice Phelan's Order of December 3, 2019, notice of the settlement approval hearing was disseminated on December 5, 2019, as follows:⁵¹

- (a) by delivery by Class Counsel by regular mail and email to the Class Members on the class list provided by the Respondent on March 7, 2019 pursuant to the Order of the Court of February 26, 2019;
- (b) by forwarding by email and 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/>;
- (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 /](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 Hearing and direct the reader to Class Counsel's website (paragraph 3(c) above) for a copy of the Notice of the Settlement Approval Hearing.

44. This motion seeks approval of the Settlement as being fair, reasonable and in the best interests of class members and the approval of the honorarium payment to Mr. Wenham.

⁵⁰ Settlement Agreement, Exhibit 57 to the Ptak SA Affidavit, **JMR-SA, tab F-57, p 1161.**

⁵¹ Ptak SA Affidavit, paras 95-98, **JMR-SA, tab F, pp 372-373.**

PART II - ISSUES TO BE DETERMINED

45. This Court must determine the following legal issues on this application:
- (a) whether this Court should approve the proposed Settlement as fair, reasonable and in the best interests of the class?
 - (b) whether this Court should approve the payment of an honorarium to the Applicant?
46. The answer to each of the above questions ought to be "Yes".

PART III - LEGAL SUBMISSIONS

A. The Settlement should be approved

i. *Test for settlement approval*

47. Rule 334.29 of the *Federal Court Rules* provides that a "class proceeding may be settled only with approval of a judge."⁵² In approving a class proceeding settlement the test to be applied is whether the settlement is "fair, reasonable and in the best interests of the class".⁵³

48. The factors considered by Federal Courts on settlement approval include:

- (a) the likelihood of recovery or likelihood of success;
- (b) the amount and nature of discovery, evidence or investigation;
- (c) terms and conditions of the proposed settlement;
- (d) the future expense and likely duration of litigation;
- (e) the recommendation of neutral parties, if any;
- (f) the number of objectors and nature of objections;
- (g) the presence of arm's length bargaining and the absence of collusion;
- (h) the information conveying the Court the dynamics of, and the positions taken, by the parties during the negotiations;

⁵² *Federal Court Rules*, SOR/98-106, Rule 334.29 [*Rules*], Schedule "B".

⁵³ *Merlo v Canada*, 2017 FC 533, para 16, **JBA, tab 2**.

- (i) the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and
- (j) the recommendation and experience of counsel.⁵⁴

ii. *Legal principles applicable to settlement approval*

49. Settlements do not need to be perfect, but need only fall "within a zone or range of reasonableness".⁵⁵ In any complex negotiated agreement, there has inevitably been 'give and take' by all parties on a broad range of issues. For this very reason, settlement approval courts have determined that "it is inappropriate to apply a standard of perfection to the end product. Considerable deference must be shown to the process underlying the negotiated settlement."⁵⁶

50. When considering whether to approve a settlement pursuant to Rule 334.29, it is not open to the Court to rewrite the substantive terms of the agreement nor is it permissible to place the interests of a handful of class members over the interests of the class as a whole.⁵⁷ The approving Court "has no authority to alter a settlement reached by the parties or to impose its own terms upon them. The Court is limited to either approving or rejecting a settlement in its entirety."⁵⁸

51. Additionally, there is a "strong initial presumption of fairness" when the settlement is, as in this case, negotiated at arms' length and recommended by experienced counsel:

Where the parties are represented –as they are in this case – by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that

⁵⁴ *Condon v Canada*, 2018 FC 522, para 19, **JBA, tab 3**; *McLean v Canada*, 2019 FC 1077, para 25, **JBA, tab 4**.

⁵⁵ *Condon v Canada*, 2018 FC 522, paras 17-18, **JBA, tab 3**; *Merlo v Canada*, 2017 FC 533, para 18, **JBA, tab 2**.

⁵⁶ *Fontaine v Canada (Attorney General)*, 2006 NUCJ 24, para 38, **JBA, tab 5**.

⁵⁷ *Manuge v Canada*, 2013 FC 341, para 5, **JBA, tab 6**; *Dabbs v Sun Life Assurance Co of Canada*, [1998] OJ No 1598 (SC), paras 10–11, **JBA, tab 7**.

⁵⁸ *Manuge v Canada*, 2013 FC 341, para 19, **JBA, tab 6**.

class counsel is staking his or her reputation and experience on the recommendation.⁵⁹

52. Taking into account each of these factors in these actions, the Settlement ought to be approved by this Honourable Court.

iii. *The factors militate in favour of approving the Settlement*

a. Terms and conditions of Settlement benefiting Class Members

53. This class proceeding sought a reconsideration of class members' applications to the TSCP without the allegedly unfair Evidentiary Criteria and Documentary Proof Requirements. Reconsideration would have provided the Class Members with another chance to obtain the monetary support provided by the TSCP without the allegedly unfair Evidentiary Criteria and Documentary Proof Requirements.

54. The CTSSP now provides Class Members with another opportunity to obtain monetary support. The monetary support available in the CTSSP is of the same nature as available in the TSCP: The CTSSP provides a lump sum payment of \$250,000 whereas the TSCP provided \$125,000; and the CTSSP provides the same annual payments - \$25,000 to \$100,000 – assessed on the same basis as the TSCP.

55. The CTSSP application process imposes no restriction on the evidence an applicant can submit to be considered a thalidomide survivor. As a result, the CTSSP addressed the primary remedy sought in this Class Proceeding: providing Class Members with another chance to obtain the monetary support made available without the allegedly unfair Documentary Proof Requirements.

56. The CTSSP is foundational to the Settlement. Without the CTSSP, or another different chance for Class Members to obtain the monetary support available under the TSCP, there would be no Settlement.

⁵⁹ *Serhan (Trustee of) v Johnson & Johnson*, 2011 ONSC 128, para 55, **JBA, tab 8** (emphasis added).

57. When the CTSSP was announced, including when the Order-in-Council establishing the CTSSP was announced, the Applicant was of the view that certain aspects of the application process appeared to be unclear or were not detailed.

58. The Settlement acknowledges the impact of the CTSSP on the remedies sought in the class proceeding and clarifies and provides for procedural fairness safeguards and other benefits to the Class given the CTSSP's announcement including:

- (a) procedural fairness safeguards with respect to the CTSSP including:
 - (i) confirmation of that the Administrator will use a balance of probability standard in its preliminary assessment at Stage 1;
 - (ii) at Stage 2, those who do not receive a "probable" finding by the Diagnostic Algorithm determining eligibility will be given opportunity to provide more information for the consideration by the Administrator before their application is denied;
 - (iii) reasons for a denial of an application shall be provided;
 - (iv) Where a final decision is made to deny an application at any step of the three-step process, an opportunity to provide additional information or submissions in writing for reconsideration shall be provided;
 - (v) the right to seek reconsideration upon presentation of new evidence, so long as such applications are received prior to June 3, 2024;
 - (vi) where an applicant is denied at Stage 3 they shall be entitled to provide written submissions and/or an oral hearing with Third Party Administrator and at least one representative of the Multi-disciplinary Committee; and
- (b) that the Representative Applicant or such other Class Members as may be designated, would be invited to provide input with respect to the attributes, knowledge, experience and expertise of the members of the Multi-disciplinary Committee involved in Stage 3;
- (c) the review of class member applications to the CTSSP in priority to others;
- (d) Class Members shall receive their annual payments retroactive to June 3, 2019; regardless of when they submit their application during the application period; and

- (e) payment of the lump sum payment to Class Members' estates if they pass away after being determined to be eligible to the CTSSP.⁶⁰

59. In consideration for the above and having regard to the impact of the CTSSP, a discontinuance of this class proceeding was agreed to.

60. All Class Members benefit from the procedural fairness safeguards regardless of whether they are ultimately accepted by the CTSSP. The procedural fairness requirements for the process for a determination of whether they are entitled to benefits under the CTSSP are stronger than those provided under the TSCP.

61. This Class Proceeding was about the procedural fairness of the TSCP and seeking another chance to receive the monetary support available. The procedural fairness safeguards and other benefits provided in the Settlement and outlined above are of benefit to the Class and achieved many of the results sought in this class proceeding.

b. Class Size

62. Initially 167 Class Members were identified by the Respondent at the time of notice of certification. Twelve class members opted out. Three of those who opted out, rescinded their opt outs shortly after the opt out deadline.

63. Mr. Gorham, an expert actuary, estimated a range of approximately 157 to 409 Thalidomide survivors expected to be in Canada with a pointed estimate of 261.⁶¹ 135 individuals have already been recognized as Thalidomide survivors under the EAP and TSCP.⁶² Therefore, based on Mr. Gorham's estimates, it is possible that anywhere from 20 Class Members to all Class Members could be Thalidomide

⁶⁰ Settlement Agreement, Exhibit 57 to the Ptak SA Affidavit, **JMR-SA, tab F-57, p 1161.**

⁶¹ Report of Mr. Peter Gorham titled "Thalidomide Survivors in Canada" dated December 6, 2019, Exhibit 69 to the Ptak SA Affidavit, **JMR-SA, tab F-69, p 1332.**

⁶² *Ibid*, para 20, p 5, Exhibit 69 to the Ptak SA Affidavit, **JMR-SA, tab F-69, p. x.**

survivors.⁶³

64. Of the one hundred and sixty eight (168) persons found to be ineligible to the TSCP, thirty one (31) were born before December 3, 1957 and 11 were born after December 21, 1967, the threshold dates for the TSCP.⁶⁴ Accounting for Ms. Briand and Mr. Rodrigue, 124 Class Members will meet the CTSSP date of birth parameters and 42 will not.⁶⁵

65. However, regardless of the number of Class Members who ultimately are approved by the CTSSP, all Class Members benefit from the procedural fairness safeguards provided by the Settlement to ensure the process for a determination of whether they are entitled to benefits under the CTSSP is fairer than that provided under the TSCP.

c. Likelihood of success or recovery

66. This factor must be assessed in light of the announcement of the CTSSP in January and April 2019, immediately after the certification of this class proceeding by the Federal Court of Appeal. The CTSSP provided another chance for Class Members to obtain the monetary benefits available for thalidomide survivors. This class proceeding was premised on obtaining that chance. Therefore, once the CTSSP was announced, what remained in this litigation was for the Class to (1) argue that the CTSSP was not fair, and was not an adequate alternate remedy to the class proceeding and that the class proceeding was not moot and should continue in the face of the CTSSP to seek reconsideration of applications under the TSCP, and (2) to seek

⁶³ Mr. Peter Gorham also estimated that the average age of Class Members is 58 and their average life expectancy is 80.6 years. Therefore, on average, one can estimate approximately 22 annual payments for each Class Member who is accepted to the CTSSP. See report of Mr. Peter Gorham titled "Future Life Expectancy of Thalidomide Survivors in Canada" dated December 6, 2019, Exhibit 68 to the Ptak SA Affidavit, **JMR-SA, tab F-68, p 1337.**

⁶⁴ Moriarty Affidavit, para 68, **JMR-SA, tab G, p 1372.**

⁶⁵ *Ibid*, **JMR-SA, tab G, p 1372.**

retroactive annual payments and interest to the date the class members applications to the TSCP were improperly rejected, which the CTSSP did not provide for.

67. The purpose of a settlement is to avoid the risks of an ultimate hearing on the merits.⁶⁶ There were various defences available to the Respondent before the CTSSP was announced, and additional arguments and defences became available, once another chance to seek the monetary support available was provided to the Class through the CTSSP.

68. In particular, the Applicant faced significant legal challenges in establishing the grounds for the remedies sought in the application, in overcoming the statutory limitations period, in establishing that the issues were justiciable and, even if successful, in obtaining the remedies sought given that the application related to an *ex gratia* program.

69. In particular, the most significant of those risks was the argument that the CTSSP would be considered an adequate alternate remedy resulting in the class proceeding being dismissed or be considered as having rendered this class proceeding moot. The CTSSP provided another chance for Class Members to obtain the monetary benefits available for thalidomide survivors, which was the primary remedy in this class proceeding. Once the CTSSP was announced by Canada, the Respondent argued that the class proceeding should be dismissed as the issues were moot or that the CTSSP provided an adequate alternative remedy. The Respondent even initiated a motion to dismiss on this basis, raising considerable risk that the application would be dismissed, particularly in light of *Strickland v. Canada*, 2015 SCC 37 and *Borowski v. Canada*, [1989] 1 S.C.R. 342.⁶⁷

70. In addition, even if, as the Applicant argued, the CTSSP did not provide a complete alternate remedy to the remedies sought in the class proceeding as

⁶⁶ *Chateauneuf v Canada*, [2006] FCJ No 363 (FC), para 7, **JBA, tab 9**.

⁶⁷ *Strickland v Canada*, 2015 SCC 37, **JBA, tab 10**; *Borowski v Canada*, [1989] 1 SCR 342, **JBA, tab 12**; and Respondent's Written Representations (Motion to Dismiss) paras 36-56; Ptak SA Affidavit, Exhibit "56", **JMR-SA, tab F-56, pp 1151- 1157**.

it did not address the potential for retroactive payments available under the TSCP from the date of denial to the date of acceptance in the CTSSP, there was considerable risk that such a remedy would not be imposed by the court at all given judicial review principles, the *ex gratia* nature of the program and the argument that the CTSSP is an adequate alternate remedy.⁶⁸

71. Even if it could overcome the issues of mootness and the availability of retroactive payments as a remedy, the Class still faced other significant litigation risks to continue the litigation including:

- (a) **Limitation period risk:** Subsection 18.1(2) of the *Federal Courts Act*⁶⁹ provides a basic 30 day limitation period to commence a judicial review. The vast majority of Class Members did not commence individual judicial reviews. The Respondent raised this limitation in response to the motion for certification of this class proceeding. A common issue was certified by the Federal Court of Appeal asking "Is the proceeding barred by the limitation period in subsection 18.1(2) of the *Federal Courts Act*? To the extent that an extension of time is required, should one be granted?" There was a serious risk that this issue would not be determined in favour of the class as the ordering of a blanket exception to such limitation period is novel;
- (b) **Justiciability risk:** The Respondent alleged that the TSCP, the subject matter of the proceeding, was an *ex gratia* program and, as such, the issues raised by the proceeding about the program were not justiciable. The Respondent maintained that defence through certification and raised it in its Responding Application Record on the merits, despite the Federal Court of Appeal's decision to the contrary on a reasonable cause of action standard on certification.⁷⁰ The nature of the TSCP and whether the issues raised with its operation were justiciable appeared to

⁶⁸ Typically reconsideration is the traditional remedy in judicial reviews, not *mandamus* or even directing damages: see Respondent's Memorandum of Fact and Law (Judicial Review), paras 80-90, Ptak SA Affidavit, Exhibit "52", **JMR-SA, tab F-52, pp 1117-1121**. The Applicant cited *D'Errico v Canada (Attorney General)*, 2014 FCA 95, **JBA, tab 13**, and *Giguère v Chambre des notaires du Québec*, 2004 SCC 1, **JBA, tab 14**, and others for the proposition that, in exceptional circumstances, such as this case, the court can direct payments/entitlements be provided as part of a successful judicial review application.

⁶⁹ *Federal Courts Act*, RSC, 1985, c F-7, s 18.1(2), Schedule "B".

⁷⁰ Respondent's Memorandum of Fact and Law (Judicial Review), paras 44-62, Ptak SA Affidavit, Exhibit "52", **JMR-SA, tab F-52 pp 1110-1112**. *Wenham v Canada*, 2018 FCA 199, paras 58-65, **JBA, tab 1**.

still be a live issue on the merits. There was risk that the court may find that issues raised about an *ex gratia* program were not something that the court could adjudicate, as the Federal Court held in *Fontaine v. Canada* in contrast to the decisions in *Briand v. Canada* and *Rodrigue v. Canada*;⁷¹

- (c) **General class proceeding litigation risks:** As with many class proceedings, there was the risk that a court would not find there to be sufficient evidence or inferences necessary to determine the certified common issues across the entire class;
- (d) **Risk of prolonged litigation:** if a decision on the merits on the common issues was rendered, there is a high likelihood of an appeal given the novelty of the issues at play in the proceeding. An appeal to the Federal Court of Appeal would add another year to a year and a half to the litigation; and
- (e) **Risk of delay and uncertainty of individual assessments:** Even if successful on the common issues after appeals, individual assessments of eligibility to the TSCP would have been required. Conducting an assessment of each individual's application to the TSCP, with argument, could have taken a significant amount of time and delay recovery for Class Members. It would also have been potentially duplicative of the CTSSP application process. It is estimated that such a process could take another year to complete. In addition, that process may result in appeals or further judicial reviews.

72. These risks to this class proceeding increased following the announcement of the CTSSP. The benefits obtained in the Settlement must be considered and assessed in view of these serious risks.

d. Amount and nature of discovery, evidence or investigation

73. The closer to the ultimate hearing on the merits, the more likely that the class proceeding settlement is fair and reasonable and in the best interests of the class.⁷² Given the timing of this settlement, the parties were well-situated to negotiate and agree to this resolution for the benefit of Class Members.⁷³

⁷¹ See also: *Fontaine v Canada*, 2017 FC 431, **JBA, tab 11**; *Briand v Canada*, 2018 FC 279, **JBA, tab 15**, and *Rodrigue v Canada*, 2018 FC 280, **JBA, tab 16**.

⁷² *Clegg v Ontario*, 2016 ONSC 2662, para 35, **JBA, tab 17**.

⁷³ *Condon v Canada*, 2018 FC 522, paras 38, 43, **JBA, tab 3**.

74. The Settlement Agreement was executed the day before the scheduled hearing of the merits of the application. At that time the merits of this proceeding were fully briefed:

- (a) the certification motion and appeal were prepped, briefed, heard and decided, including many of the issues to be addressed on the merits;
- (b) affidavit evidence for the common issues hearing was prepared and served;
- (c) cross examinations were conducted, and motions arising were prepared and briefed;
- (d) application records were prepared including written submissions addressing all the issues on the merits; and
- (e) the Respondent's motion to dismiss and responding record were prepared and briefed.

75. The parties could not have been in a greater state of understanding of their cases and the risk of success or failure unless the hearing of the merits proceeded and judgement rendered thereafter.⁷⁴

e. Future expense and likely duration of litigation

76. While the Settlement was reached very shortly before the date scheduled for the common issues hearing, without a settlement there would still be significant litigation remaining.

77. In particular, given the novelty of the issues, an appeal to the Federal Court of Appeal would likely have been initiated, which would have added another 1-1.5 years before moving to the next phase of the class proceeding. If the litigation of this matter proceeded, it is estimated that both Class Counsel and AGC counsel would have devoted many additional hours to the litigation. Class counsel estimates that they would likely have incurred an additional \$25,000 to \$30,000 in disbursements on the common issues hearing and appeal.

78. Even if successful on the common issues after appeals, individual assessments of eligibility to the TSCP could have been required. Conducting an

⁷⁴ *Clegg v Ontario*, 2016 ONSC 2662, para 34, **JBA, tab 17**.

assessment of each individual's application to the TSCP, with argument, could have taken a significant amount of time and delay recovery for class members – estimated to take a further year to complete. In addition, that process may result in appeals or further judicial reviews.

79. Given the history of the proceedings, an appeal and remaining litigation would likely have been equally responded to as it was up to the point of Settlement.⁷⁵

80. The fact that the Class is an aging, vulnerable and disabled population also required the prompt resolution of this matter.⁷⁶ As stated by the court on the settlement approval motion in *Seed*, "if this matter were not resolved currently, but continued or was dragged out by the normal effluxion of hearing time and appeals, many of the class members [...], would not either participate in any resolution or would not live long enough to realize some finality to this chapter of their respective lives."⁷⁷

81. The Settlement advances the objective of access to justice, reduces costs for all parties, and respects judicial economy in a timely fashion so Class Members who are found eligible, will benefit from the monetary support available to them for their remaining years.

f. The presence of arm's length bargaining and the absence of collusion

82. This litigation was fully responded to up to the execution of the Settlement. Even after the CTSSP was initially announced in January 2019 the parties continued the litigation including: exchanges about the timing of notice of certification, which required a motion; a motion which sought to enjoin the government from communicating with the class and to schedule a dispute resolution conference;

⁷⁵ *Merlo v Canada*, 2017 FC 533, paras 36-38, **JBA, tab 2**.

⁷⁶ Mr. Peter Gorham estimated that the average age of Class Members is 58: See report of Mr. Peter Gorham titled "Future Life Expectancy of Thalidomide Survivors in Canada" dated December 6, 2019, Exhibit 68 to the Ptak SA Affidavit, **JMR-SA, tab F-68, p 1319**.

⁷⁷ *Seed v Ontario*, 2017 ONSC 3534, para 13, **JBA, tab 18** [emphasis added].

continued completion of application records and a refusals motion; and a motion to dismiss.

83. While the parties initially participated in a Dispute Resolution Conference presided by Justice McDonald, a resolution was not achieved at that time. Several months of negotiations followed before a Settlement was reached, just days before the common issues hearing was scheduled to be heard.

84. No agreement on legal fees was made as part of the Settlement. As a result, motions for cost and to approve legal fees have been initiated. In addition, the parties could not agree on the Respondent's role at the fee approval motion and a court hearing and decision were required.

85. It should be clear based on the above that that the Settlement was achieved through arm's length bargaining without collusion.

g. The degree and nature of communications with class members during the litigation

86. Class Counsel was contacted by 200 individuals, which includes Class Members, family members and individuals who did not apply to the TSCP but were looking to be included in the class proceeding.

87. Throughout the course of these proceedings, Class Counsel has communicated in a variety of ways with various class members. Class Counsel have maintained an active website for this application, updated it regularly and posted court and other documents for class members to review.

88. Class Counsel has been actively involved in communicating to class members through the media including press releases and interviews with various media outlets. Class Counsel devoted over 240 hours of lawyer, student and clerk time in communicating with class members, family members or their representatives throughout the course of this proceeding.

89. Discussions with Class Members throughout the course of this litigation informed the Applicant and Class Counsel's decision making.

h. Recommendation and experience of Class Counsel

90. As described herein, the jurisprudence supports a strong initial "presumption of fairness" when the settlement is, as in this case, negotiated at arms' length and recommended by experienced counsel, particularly when the settlement was only reached after months of negotiations.⁷⁸

91. In this case, Class Counsel has significant experience in class proceedings, representing plaintiffs and applicants in dozens of class proceedings across Canada.⁷⁹ As a result of their involvement in other cases, Class Counsel has gained considerable experience in settlement mechanics and imperatives and the risks associated with this type of complex and novel litigation. Here, the recommendation of Class Counsel is an additional factor that militates in favour of approving the proposed settlement.

B. The Settlement is fair, reasonable and in the best interest of class members

92. Given the factors identified above and the applicable legal principles, this Court should have no concerns in approving the Settlement as it is clearly fair, reasonable and in the best interest of class members in the circumstances.

C. The Honorarium To The Representative Plaintiff is Appropriate

93. On a settlement approval motion, the court has jurisdiction to approve an honorarium payment to the representative plaintiff(s), paid over and above any individual compensation they may be awarded.⁸⁰ The parties here seek court approval of an honorarium of \$10,000.00 for the representative Applicant.

⁷⁸ *Serhan (Trustee of) v Johnson & Johnson*, 2011 ONSC 128, para 55, **JBA, tab 8**.

⁷⁹ Ptak SA Affidavit, paras 120-125, **JMR-SA, tab F, pp 377-380**.⁸⁰ *Anderson v Canada*, [2016] NJ No 376 (SC), para 79, **JBA, tab 19**; *Smith Estate v National Money Mart Co.*, 2011 ONCA 233, paras 133-36, **JBA, tab 20**. *Dolmage/Slark (Litigation Guardian of) v Ontario*, [2013] OJ No 5530 (SC), **JBA, tab 21**; *Johnston v The Sheila Morrison Schools*, 2013 ONSC 1528, para 43, **JBA, tab 22**.

⁸⁰ *Anderson v Canada*, [2016] NJ No 376 (SC), para 79, **JBA, tab 19**; *Smith Estate v National Money Mart Co.*, 2011 ONCA 233, paras 133-36, **JBA, tab 20**.

94. Awards of a similar nature and amount were very recently granted by the Federal Court in *McCrea v. Canada* (\$10,000), and *Riddle v. Canada* (\$10,000).⁸¹ Higher awards have been granted by this Court in *Toth v. Canada* (\$50,000), *Merlo v. Canada* (\$15,000), and *Manuge v. Canada* (\$50,000).⁸²

95. In *Merlo v. Canada*, McDonald J. most recently canvassed the following factors used to assess whether a representative plaintiff ought to receive an honorarium:⁸³

- (a) active involvement in the initiation of the litigation and the retention of counsel;
- (b) exposures to a risk of costs;
- (c) personal hardship or inconvenience in connection with the prosecution of the litigation;
- (d) time spent and activities undertaken in advancing the litigation;
- (e) communication and interaction with other class members; and
- (f) participation at various stages in the litigation, including discovery, settlement negotiations and/or trial.

96. The honorarium recognizes the time and effort that a representative put into the class proceeding.⁸⁴ Courts have granted similar awards in cases where there were "many obstacles in the path of the litigation" and the Representative Plaintiff required some "stamina" in fulfilling their duties and overcoming these obstacles.⁸⁵

97. Courts have also taken note of additional steps taken by representative plaintiffs to advance litigation. For example, in *Dolmage/Slark (Litigation Guardian of) v.*

Dolmage/Slark (Litigation Guardian of) v Ontario, [2013] OJ No 5530 (SC), **JBA, tab 21**; *Johnston v The Sheila Morrison Schools*, 2013 ONSC 1528, para 43, **JBA, tab 22**.

⁸¹ *McCrea v Canada*, 2019 FC 122, paras 81-86, **JBA, tab 23**; *Riddle v Canada*, 2018 FC 641, **JBA, tab 24**.

⁸² *Toth v Canada*, 2019 FC 125, paras 94-105, **JBA, tab 25**; *Merlo v Canada*, 2017 FC 533, paras 68-74, **JBA, tab 2**; *Manuge v Canada*, 2013 FC 341, para 53, **JBA, tab 6**.

⁸³ *Merlo v Canada*, 2017 FC 533, paras 68-74, **JBA, tab 2**, citing *Robinson v Rochester Financial Ltd.*, 2012 ONSC 911, para 43, **JBA, tab 26**.

⁸⁴ *Hislop v Canada (AG)*, [2004] OJ No 1867 (SC), para 22, **JBA, tab 27** (where \$10,000 and \$15,000 honorariums were awarded); *Eklund v Goodlife Fitness Centres Inc.*, 2018 ONSC 4146, paras 49-50, **JBA, tab 28** (where a \$10,000 honorarium was also awarded).

⁸⁵ *McCrea v Canada*, 2019 FC 122, para 85, **JBA, tab 23**.

Ontario, the Court took note of the fact that the representative plaintiffs participated in innumerable interviews to raise awareness of the class proceeding, in allowing an honorarium of \$15,000.⁸⁶

98. In the circumstances of this case, an honorarium is appropriate, deserving and fair. The Representative Applicant spent significant time and effort leading this class action through various complicated obstacles and lengthy stages of litigation, including:

- (a) preparation of affidavits for the judicial review;
- (b) a certification motion;
- (c) an appeal;
- (d) a motion for notice dissemination of notice;
- (e) a motion to dismiss;
- (f) a dispute resolution conference;
- (g) preparation for a common issues hearing;
- (h) participation in the negotiations that led to the Settlement.⁸⁷

99. The Representative Applicant undertook significant efforts on behalf of the Class, including:⁸⁸

- (a) agreeing to be a representative plaintiff on behalf of the other proposed class members;
- (b) retaining Class Counsel;
- (c) speaking to Class Counsel to discuss this case and his experience being denied under the TSCP;
- (d) working with Class Counsel to prepare various affidavits for various applications and motions;
- (e) preparing for a cross-examination by the Respondent on my affidavits;
- (f) corresponding with Class Members;
- (g) initiating and facilitating media interviews;
- (h) providing interviews for various media including:

⁸⁶ *Dolmage/Slark (Litigation Guardian of) v Ontario*, [2013] OJ No 5530 (SC), paras 49-51, **JBA, tab 21**.

⁸⁷ Wenham Affidavit, para 59-61, **JMR-SA, tab B, p. 18**.

⁸⁸ *Ibid*, para 61, **JMR-SA, tab B, p. 18**.

- (i) Thalidomide victims still waiting for compensation – Geoff Currier 680 CJOB (radio broadcast) – February 2017;
 - (ii) Thalidomide survivor shares his story – The Ryan Jespersen Show (radio broadcast) – February 2017;
 - (iii) Toronto Man files legal challenge over Thalidomide compensation program, Global News – February 15, 2017;
 - (iv) Thalidomide survivors sue federal government over mistreatment claims, Global National, Mike Drolet – February 15, 2017;
 - (v) Why Thalidomide survivors are launching a class action lawsuit, The Morning Show – February 15, 2017;
 - (vi) Thalidomide survivor who was rejected compensation launches lawsuit, Global News Morning Edmonton – February 15, 2017;
 - (vii) Alleged Thalidomide victims see hope in Federal budget, Global news – March 25, 2018; and
 - (viii) He says Thalidomide left him with deformed arms. Now he's leading a class-action case, Global News, Jesse Ferreras – November 1, 2018.
- (i) providing instructions to Class Counsel;
 - (j) participating in the Dispute Resolution Conference;
 - (k) reviewing, considering and commenting to Class Counsel about the Settlement terms before execution; and
 - (l) approving the Settlement and Settlement Agreement.

100. The Representative Plaintiff also went above and beyond by sharing his very personal experiences in the media in various interviews, for the benefit of the class action.

101. Class Members stand to benefit from the efforts of Mr. Wenham.

102. Finally, and most importantly, Mr. Wenham did not have to initiate this class proceeding. Mr. Wenham could have proceeded with his judicial review on an individual basis. If he had done so, his individual application would have been completed earlier even than *Briand v. Canada* and *Rodrigue v. Canada*,⁸⁹ both

⁸⁹ *Briand, supra*, JBA, tab 15; *Rodrigue, supra*, JBA, tab 16.

individual judicial reviews of rejections of the TSCP that were ultimately accepted. If he were found eligible for the TSCP as a result of a redetermination, Mr. Wenham could conceivably have started receiving annual payments in 2017/2018 instead of retroactive to June 2019 as per the Settlement Agreement. Mr. Wenham has potentially forgone \$50,000-\$200,000⁹⁰ by seeking to represent **all** those impacted unfairly by the TSCP and ensure they received the same remedy that he did. This selflessness on behalf of others should be encouraged.

103. A \$10,000 honorarium would be a small token of appreciation and recognition of Mr. Wenham's efforts on behalf of this Class of vulnerable persons.

PART IV - ORDER REQUESTED

104. The Applicant respectfully requests an order for:


- (a) an order approving the Settlement pursuant to Rule 334.29(1) of the *Federal Courts Rules*;
- (b) an order discontinuing the Application against the Respondent subject to the terms of the Settlement Agreement;
- (c) an order approving the form, content and manner of distribution of the proposed notice of settlement approval and revocation of opt-out forms;
- (d) an order approving the payment of a \$10,000 honorarium by the Respondent to the Applicant, Bruce Wenham, within 15 days after the settlement approval order is final;
- (e) such further or other order as this Honourable Court deems just and appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of February, 2020.



Christine Mohr / Melanie
Toolsie / Negar Hashemi

**Counsel for the Respondent,
Attorney General of Canada**


per: David Rosenfeld / Charles Hatt

**Counsel for the Applicant,
Bruce Wenham**

⁹⁰ Two annual payments worth between \$25,000 and \$100,000 each.

PART V - STATUTES AND REGULATIONS

Federal Courts Act, RSC, 1985, c F-7

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a

Loi sur les Cours fédérales (LRC (1985), ch F-7)

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

1990, ch. 8, art. 5, 2002, ch. 8, art. 27

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

1990, c. 8, s. 5; 2002, c. 8, s. 27.

Federal Courts Rules, SOR/98-106

Approval

334.29 (1) A class proceeding may be settled only with the approval of a judge.

Binding effect

(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.

SOR/2007-301, s. 7

Règles des Cours fédérales (DORS/98-106)

Approbation

334.29 (1) Le règlement d'un recours collectif ne prend effet que s'il est approuvé par un juge.

Effet du règlement

(2) Il lie alors tous les membres du groupe ou du sous-groupe, selon le cas, à l'exception de ceux exclus du recours collectif.

DORS/2007-301, art. 7

APPENDIX "A" - LIST OF AUTHORITIES

1. *Wenham v Canada* (Attorney General), [2018 FCA 199](#)
2. *Merlo v Canada*, [2017 FC 533](#)
3. *Condon v Canada*, [2018 FC 522](#)
4. *McLean v Canada*, [2019 FC 1077](#)
5. *Fontaine v Canada* (Attorney General), [2006 NUCJ 24](#)
6. *Manuge v Canada*, [2013 FC 341](#)
7. *Dabbs v Sun Life Assurance Co. of Canada*, [1998] [O.J. No. 1598 \(S.C.\)](#)
8. *Serhan (Trustee of) v Johnson & Johnson*, [2011 ONSC 128](#)
9. *Chateauneuf v Canada*, [\[2006\] F.C.J. No. 363 \(F.C.\)](#)
10. *Strickland v Canada*, [2015 SCC 37](#)
11. *Fontaine v Canada*, [2017 FC 431](#)
12. *Borowski v Canada*, [\[1989\] 1 S.C.R. 342](#)
13. *D'Errico v Canada* (Attorney General), [2014 FCA 95](#)
14. *Giguère v Chambre des notaires du Québec*, [2004 SCC 1](#)
15. *Briand v Canada*, [2018 FC 279](#)
16. *Rodrigue v Canada*, [2018 FC 280](#)
17. *Clegg v Ontario*, [2016 ONSC 2662](#)
18. *Seed v Ontario*, [2017 ONSC 3534](#)
19. *Anderson v Canada*, [\[2016\] N.J. No 376 \(S.C.\)](#)
20. *Smith Estate v National Money Mart Co.*, [2011 ONCA 233](#)
21. *Dolmage/Slark (Litigation Guardian of) v Ontario*, [\[2013\] O.J. No. 5530 \(S.C.\)](#)
22. *Johnston v The Sheila Morrison Schools*, [2013 ONSC 1528](#)
23. *McCrea v Canada*, [2019 FC 122](#)
24. *Riddle v Canada*, [2018 FC 641](#)

25. *Toth v Canada*, [2019 FC 125](#)
26. *Robinson v Rochester Financial Ltd.*, [2012 ONSC 911](#)
27. *Hislop v Canada (AG)*, [\[2004\] O.J. No. 1867 \(S.C.\)](#)
28. *Eklund v Goodlife Fitness Centres Inc.*, [2018 ONSC 4146](#)