Court File No.: T-1499-16

FEDERAL COURT

B E T W E E N :

BRUCE WENHAM

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

Certified Class Proceeding

RESPONDENT'S WRITTEN REPRESENTATIONS
(Applicant's motion for costs returnable February 26-27, 2020)

February 14, 2020

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INDEX

PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. There is no basis on the facts of this case for a costs award against Canada. The imposition of a costs sanction would run counter to rule 334.39 of the *Federal Courts Rules* as none of the exceptions to the no-costs rule apply. Adopting the expansive interpretation of the exceptions as urged by the Applicant would be wholly inconsistent with the Federal Court class proceedings regime, principles of procedural proportionality, and the public interest that is served by encouraging parties to litigation to enter into settlements.

2. The Applicant has argued that Canada ought to pay costs on the theory that the government only adopted the Canadian Thalidomide Survivors Support Program (CTSSP) in "anticipatory compliance" with the remedies sought in the application. The legislative history and the factual record plainly show that there is no basis for such an assertion. The Applicant's arguments reflect a fundamental misunderstanding of the broader context within which government programs like the Thalidomide Survivors Contribution Program (TSCP) and CTSSP are developed. Far from the litigation driving the political process in this case, the three individual proceedings and this class proceeding were peripheral at most. The record demonstrates that the CTSSP was developed in response to, and through, legitimate political processes. An objective review of the history of the programs, the parliamentary review, and the litigation chronology confirms that the CTSSP was not the "direct result" of this litigation.

3. The public interest will not be served if the government is required to fund litigation initiated in relation to matters that are more appropriately addressed through political or legislative processes. In these circumstances, it cannot be said that Canada's conduct gives rise to an exception to the no-costs rule, nor is there any basis for an order for solicitor-client costs. It was proper for Canada to address the concerns about the TSCP through the political and public policy making processes, while at the same time defending this proceeding and the related litigation.

B. STATEMENT OF FACTS

1) Thalidomide in Canada and the history of Health Canada's support for survivors

a) Thalidomide use in Canada

4. Thalidomide was originally developed as a non-addictive sedative and was found effective to combat symptoms of morning sickness. Launched on the market in West Germany on October 1, 1957,[1] it was only authorized on June 23, 1959 in sample form in Canada, and later by prescription.[2] The Department of National Health and Welfare recalled it on March 2, 1962 after linkage between first trimester maternal thalidomide ingestion and miscarriages and birth defects was confirmed.[3] In 1964, the federal government established a government registry. At that time, 115 affected children were identified in Canada, 74 of whom survived beyond early infancy.[4]

5. The thalidomide tragedy triggered extensive regulatory revisions globally, and in Canada.[5] No civil action is known to have been brought against Canada nor has there been any finding of liability on Canada's part in past, or in these proceedings, concerning thalidomide.[6] Indeed, since the tragedy Canada has endeavoured to identify and provide support to thalidomide survivors through three *ex gratia* payment programs.[7]

b) History of Health Canada's support programs for thalidomide survivors

i) 1990 Extraordinary Assistance Plan ("EAP")

6. In the 1980s, the Government of Canada's desire to assist the thalidomide tragedy survivors with financial support took shape.[8] On February 13, 1990, the Health Minister announced a plan to make payments to an estimated 75 to 100 living thalidomide survivors.[9]

[1] Affidavit of Cindy Moriarty dated January 24, 2020, para 6 ("Moriarty Affidavit (January)"), **Respondent's Motion Record (Costs), (RMR-Costs), tab 1, p 3.**
[2] *Ibid*, para 7 **RMR-Costs, tab 1, p 3.**
[3] *Ibid*, para 8 **RMR-Costs, tab 1, p 3.**
[4] *Ibid*, para 11 **RMR-Costs, tab 1, p 4.**
[5] *Ibid*, **RMR-Costs, tab 1, p 5.**
[6] *Ibid*, para 14, **RMR-Costs, tab 1, p 5.**
[7] *Ibid*, paras 26-50, 52-65, **RMR-Costs, tab 1, pp 9-20.**
[8] *Ibid*, para 26 **RMR-Costs, tab 1, p 9.**
[9] Moriarty Affidavit (January), para 29, **RMR-Costs, tab 1, p 10.**

The Governor in Council promulgated the "Order respecting *ex gratia* payments … to Canadian thalidomide victims." [10] *Ex gratia* payments are payments made by the Crown in the public interest where there is no legal liability on the part of the Crown, and where other reasonable means of compensation are absent.[11]

7. To be eligible for an *ex gratia* payment, EAP applicants had to meet any of three 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 use of Thalidomide (brand names Kevadon or Talimol) in Canada during the first trimester for pregnancy; or

(c) listing on an existing government registry of Thalidomide victims.[12]

8. The EAP criteria were developed through consultation with representatives of approximately 400 persons, the War Amps[13] and the Thalidomide Victims Association of Canada ("TVAC"), the organized voice for most thalidomide survivors since 1988, which advocated arduously for government support.[14] The study confirmed the inadequacy of information at the time on the incidence of congenital malformation. Distinguishing anomalies[15] caused by first trimester utero thalidomide exposure from other conditions that are genetic, chromosomal, from environmental exposure, infection, maternal health status, or otherwise posed a scientific challenge.[16] TVAC later confirmed important reasons to avoid incorrectly identifying anyone as a thalidomide survivor if their condition is not actually caused by thalidomide, including:

(a) for persons not to be misdiagnosed when the cause of the congenital anomaly is another condition, with similar manifestations, such as: Roberts-SC Phocomelia, Holt-Oran Syndrome, TAR Syndrome, Cornelia de Lange Syndrome, Fanconi's Panmyelopathy, LADD Syndrome, Poland Anomaly, FFU Syndrome, Goldenhar Syndrome, Wildervanck Syndrome, Möbius Syndrome, Duane Syndrome; and Vater Association, and Amniotic Band Lesions;

[10] Order in Council, PC 1990-4/872, **Respondent's Book of Authorities (Costs), (RBA-Costs) tab 1.**
[11] Moriarty Affidavit (January), para 31, **RMR-Costs, tab 1, p 10.**
[12] *Ibid*, para 32, **RMR-Costs, tab 1, p 11.**
[13] *Ibid*, para 33, **RMR-Costs, tab 1, p 11.**
[14] *Ibid*, para 27, **RMR-Costs, tab 1, p 9.**
[15] *Ibid*, para 1, **RMR-Costs, tab 1, p 1.**
[16] *Ibid*, para 10, **RMR-Costs, tab 1, p 4.**

(b) for persons not to be misdiagnosed for one's own health management which must be based on accurate information; and

(c) for accurate scientific knowledge concerning the actual incidence of conditions caused by thalidomide and to enable evaluation of the impact on individuals, families and the public health system.[17]

9. Health Canada distributed funding[18] to 108 successful EAP applicants.[19] The Representative Applicant applied to the EAP in August 1991 but was unable to meet any of the criteria at that time and requested no oral hearing. He did not seek judicial review.[20]

ii) Thalidomide Survivors Contribution Program (TSCP)

10. In 2014, a motion passed unanimously in Parliament to offer additional financial support to thalidomide survivors, to meet their medical needs while aging, and this triggered the creation of a new support program.[21] Announcing the new financial assistance on March 6, 2015,[22] the Health Minister exercised the executive's prerogative power to establish the TSCP.[23] The TSCP would provide payments to two eligible recipient classes:

(a) Individuals who received payments pursuant to the 1991 EAP; and

(b) Individuals who submitted TSCP applications before May 31, 2016, and who met one of the same three criteria applied in the 1991 EAP.[24]

11. Persons found eligible under the TSCP would receive:

(a) a tax-free lump-sum of $125,000.00 to help support immediate health needs;

(b) ongoing support payments, based on level of disability, throughout the course of the individual's lifetime; and

[17] Moriarty Affidavit (January), para 28, **RMR-Costs, tab 1, pp 9-10.**
[18] *Ibid*, para 34, **RMR-Costs, tab 1, p 11.**
[19] *Ibid*, para 35, **RMR-Costs, tab 1, p 11.**
[20] *Ibid*, para 36, **RMR-Costs, tab 1, p 12.**
[21] *Ibid*, para 37, **RMR-Costs, tab 1, p 12.**
[22] *Ibid*, para 38, **RMR-Costs, tab 1, p 12.**
[23] *Ibid*, para 43, **RMR-Costs, tab 1, p 14.**
[24] *Ibid*, para 41, **RMR-Costs, tab 1, p 13.**

(c) access to the Extraordinary Medical Assistance Fund for assistance with extraordinary health costs.[25]

12. The second eligibility criteria required documentary proof of the maternal ingestion of thalidomide in Canada during the first trimester of pregnancy when the drug would have effect. This criteria was not designed to be met on a balance of probabilities standard. Documentary proof included pharmacy or medical records or a sworn affidavit of a medical professional who provided the drug to an applicant's mother, but not assertions by persons with no direct knowledge or hearsay of friends and relatives.[26] The discretion of the TSCP's independent third party administrator (Administrator)[27] in applying the criteria was intentionally limited, so that there would be near certainty that those recognized, were in fact, thalidomide survivors.[28]

13. By October 2016, the Administrator had advised nearly all TSCP applicants of determinations on eligibility. Out of 193 applicants, 25 were newly approved.[29] Of those, 16 provided documentary proof of maternal first trimester thalidomide ingestion.[30] One hundred and sixty-eight persons were found ineligible.[31] About 41 were born between 1940 and 1958, when the drug did not exist or was not yet distributed in Canada. More than 40 other applicants were born years after the drug's distribution and sale had stopped.[32]

iii) Canadian Thalidomide Survivors Support Program ("CTSSP")

14. The background to the introduction of the CTSSP is set out in detail below. The new program was established by an Order in Council promulgated on April 9, 2019, which set outs what is required to qualify for support, namely that an Applicant:

(a) was determined to be eligible under the 1991 EAP for victims of thalidomide or under the 2015 TSCP;

[25] Moriarty Affidavit (January), para 42, **RMR-Costs, tab 1, pp 13-14.**
[26] *Ibid*, para 46, **RMR-Costs, tab 1, p 14.**
[27] *Ibid*, para 44, **RMR-Costs, tab 1, p 14.**
[28] *Ibid*, para 45, **RMR-Costs, tab 1, p 14.**
[29] *Ibid*, para 48, **RMR-Costs, tab 1, p 15.**
[30] *Ibid*, para 49, **RMR-Costs, tab 1, p 15.**
[31] *Ibid*, para 50, **RMR-Costs, tab 1, pp 15-16.**
[32] *Ibid*, para 71, **RMR-Costs, tab 1, p 23.**

(b) was not determined to be eligible under the 1991 EAP for victims of thalidomide or under the 2015 TSCP but they are listed on a Canadian government registry for thalidomide victims and that registry exists on the day on which this Order is made; or

(c) they are determined by the third-party administrator to be eligible.[33]

15. The OIC contemplates that a third party Administrator will administer the program as was the case for the TSCP. The Administrator has been receiving applications to the CTSSP since June 2019, which remains open until June 3, 2024. Approximately 42 class members have already applied and applications processing is ongoing.[34]

16. The Administrator is to determine eligibility by considering all information provided by applicants, by following the three-step process set by the OIC:

(a) conduct a preliminary assessment of the person's eligibility looking at:

(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 congenital malformations is consistent with the 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 embyopathy using a diagnostic algorithm for thalidomide embryopathy that it has selected; and

(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

[33] Moriarty Affidavit (January), para 68, **RMR-Costs, tab 1, p 21;** *Canadian Thalidomide Survivors Support Program Order*, PC 2019-0271, **RBA-Costs, tab 3.**
[34] *Ibid*, para 80, **RMR-Costs, tab 1, p 25.**

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.[35]

17. Considerable work was done to establish date of birth parameters for the new program given that the absence of parameters in the earlier TSCP program led to applications being submitted by individuals born well before the development or availability of thalidomide anywhere in the world and long after its removal from the Canadian market. Now in the CTSSP, individuals whose conditions could not be related to thalidomide ingestion may be identified.[36] Of the 168 denied TSCP applicants, 31 were born before December 3, 1957, and 11 were born after December 21, 1967. An estimated 124 class members will meet the CTSSP date of birth parameters if they apply, and 42 will not.[37]

2) History/chronology of the political and judicial proceedings

a) Early concerns about the TSCP – May to November 2016

18. Beginning in March 2016, before TSCP application processing was concluded, Health Canada received feedback from a Chief Medical Health Officer of British Colombia, urging changes to allow TSCP applicants to rely on medical opinion evidence.[38]

19. Beginning on May 9, 2016, and on various occasions thereafter, Members of Parliament also raised concerns in the House of Commons about:

(a) the absence of any professional, in-person medical examination; and

(b) that the eligibility process did not entail an interview; and

(c) that some *bona fide* survivors may not have been able to meet the required proof; and

(d) the absence of an appeal mechanism from eligibility refusals.[39]

[35] Canadian Thalidomide Survivors Support Program Order, PC 2019-0271, **RBA-Costs, tab 3.**
[36] Moriarty Affidavit (January), para 71, **RMR-Costs, tab 1, p 23.**
[37] *Ibid*, para 79, **RMR-Costs, tab 1, p 25.**
[38] *Ibid*, para 52, and Exhibit N, **RMR-Costs, tab 1, pp 16, 312-313.**
[39] Moriarty Affidavit (January), para 53 and Exhibit N (Hansard, Commons Debates ("Debates"), May 9, 2016, at 3071, **RMR-Costs, tab 1, pp 17, 316**. See also: Debates between September 23, 2016 and November 28, 2016, **RBA-Costs, tabs 28-31.**

b) Initiation of individual judicial review applications – September 2016

20. Four individual applications for judicial review of ineligibility decisions were initiated in September of 2016, presenting similar challenges to the TSCP, from:

(a) Guy Fontaine (T-1513-16) in respect of an August 23, 2016 ineligibility decision, represented by Merchant Law Group in Winnipeg;

(b) Claudie Briand (T-1584-16) in respect of an August 24, 2016 ineligibility decision, initially represented by Caza Saikaley srl, and later Gowlings LLP in Ottawa;

(c) Denis Rodrigue (T-1712-16) in respect of a September 7, 2016 ineligibiliy decision, commenced by law firm Caza Saikaley srl, in Ottawa; and

(d) Bruce Wenham (T-1499-16) in respect of an August 12, 2016 decision, commenced in Toronto.[40]

c) Initiation of the study by the HESA and the E-Petition – December 13, 2016

21. On December 13, 2016, the late Member of Parliament (MP) Gordon Brown presented a motion before HESA on behalf of MP Rachel Harder asking that HESA undertake a study (a) focused on the forgotten survivors of thalidomide; and b) to examine the TSCP's effectiveness.[41]

22. Shortly thereafter, on January 30, 2017, Member of Parliament Brown made an E-Petition for "Canada's Forgotten Thalidomide Survivors" asking Parliament to change the criteria and include medical assessment. By the end of May, 927 signatures were collected. Within a week, the Minister of Health responded to the petitioners to confirm the recommendations were being "actively assessed".[42]

d) Applicant's conversion to a proposed class proceeding and subsequent steps - December 23, 2016 to March 2017

23. On December 23, 2016, after the Respondent had taken all steps in the Wenham judicial review application and provided available dates for the hearing requisition, the Applicant served a notice of motion to certify the application for judicial review as a class proceeding under rule

[40] Affidavit of Negar Hashemi, affirmed January 22, 2020, paras 5-6, ("Hashemi Affidavit"), **RMR-Costs, tab 2, pp 538-539.**
[41] Moriarty Affidavit (January), para 54, **RMR-Costs, tab 1, p 17;** HESA Evidence, **RBA-Costs, tab 32.**
[42] Moriarty Affidavit (January), para 55, **RMR-Costs, tab 1, pp 17-18.**

334.16.[43] No prior notice of any intention to seek certification was given, although the Applicant and his counsel had entered into a class action contingency fee agreement in early November 2016, the terms of which reflected that the Applicant had even had a period of time to obtain independent legal advice before signing the agreement.[44]

24. On December 29, 2016, the Applicant served his affidavit supporting certification, including a Litigation Plan prepared by his counsel. The Applicant framed the main common issue to be whether the "establishment and/or application of the evidentiary criteria or documentary proof requirements by Canada in the TSCP [are] unlawful pursuant to s.18.1(4) of the *Federal Courts Act."* If found to be so, then he sought, *inter alia*, the following relief:

(a) that the TSCP's Administrator be re-constituted to include a medical professional panel; and

(b) that on reconsideration, the panel be required to consider all evidence, "which shall be accepted unless there is a good reason to doubt the truth thereof;" and

(c) providing for a hearing in person or by videoconference; and

(d) that decisions be rendered within 14 days; and

(e) and that the costs of the panel members, the TSCP Administrator and related implementation costs be paid by the Respondent.[45]

25. Early on, AGC counsel sought clarification from Applicant's counsel about ambiguities in the certification motion materials and litigation plan. Inquiries by AGC counsel about a claim's essence and scope accords with AGC policy to consider settlement possibilities at a legal dispute's earliest possible stages, to reduce litigation costs and protect the public purse.[46] She inquired of Applicant's counsel about:

(a) the nature of the remedy, given that the Applicant contemplated a monetary award and a re-constituting of the eligibility process by the Court, whereas the relief on a judicial review application under the s.18(1) *Federal Courts Acts* would not include monetary relief, nor the extensive kind of *mandamus* type order sought to re-design the TSCP;

[43] Hashemi Affidavit, paras 12-14, **RMR-Costs, tab 2, pp 540-541.**
[44] *Ibid*, para 15, **RMR-Costs, tab 2, p 541.**
[45] Hashemi Affidavit, para 17, **RMR-Costs, tab 2, p 542.**
[46] *Ibid*, para 21, **RMR-Costs, tab 2, p 543.**

(b) what was being proposed to address the statutory 30 day limit for commencement of a judicial review application required by s.18.1(2) of the *Federal Courts Act*;

(c) what the Applicant's view was on rule 114 of the *Federal Courts Rules* - representative proceedings;

(d) the extent of the amendments sought to the Notice of Application for the proposed proceedings;[47] and

(e) whether any of the individual judicial review applicants had advised Applicant's counsel of intention to join the class proceeding, given it appeared he'd taken no steps to inquire before seeking to stay their proceedings, and because another counsel had already confirmed to AGC counsel an intention to proceed individually and not in a class.[48]

26. Respondent's counsel responded that the questions posed were legal ones to be addressed in AGC's responding materials and submissions at certification, and that it should not take two weeks to agree to a timetable.[49] The AGC proposed a timetable for affidavit, cross examinations and facta exchange by March 29, 2017, to which Applicant's counsel agreed.[50]

27. On February 3, 2017 Applicant's counsel filed two motions for extensions of time to commence judicial review applications for Michel O'Neil and Ermano Declavasio regarding ineligibility decisions of August 12 and September 7, 2016,[51] returnable April 25, 2017. AGC counsel proposed including the motions in the timetable before requiring Canada's evidence and factum given that their adjudication could affect the scope and existence of a class. Applicant's counsel did not agree the motions should be dealt with before certification, and a couple of weeks later filed a third such motion for Michael Porto.[52]

28. On February 20, 2017, AGC counsel advised the Court of the parties' available dates for the certification motion, and of their disagreement: on timetabling of the three extension of time motions, the Applicant's refusal to answer the Respondent's written cross examination questions, and whether to schedule the certification motion at the same time as the judicial review

[47] *Ibid*, para 20, and Exhibit D, **RMR-Costs, tab 2, pp 543, 581-582,**
[48] *Ibid*, paras 23, 28-29, **RMR-Costs, tab 2, pp 544-545.**
[49] *Ibid*, para 22, **RMR-Costs, tab 2, p 544.**
[50] Hashemi Affidavit, para 26, **RMR-Costs, tab 2, pp 544-545.**
[51] *Ibid*, para 32, **RMR-Costs, tab 2, p 546.**
[52] *Ibid*, paras 33-34 **RMR-Costs, tab 2, p 546.**

hearing.[53] Applicant's counsel insisted the certification motion and judicial review hearing should be heard together. The AGC urged for separate hearings for three reasons in the proposed class members' interests, otherwise to be overridden by Class counsel's proposed scheduling:

(a) it would allow for the possibility of participation by other class members at the common issues hearing;

(b) it would provide an opportunity to class members to raise any individual issues, that might need to be addressed, which would be efficient; and

(c) it would allow for adequate notice to be given to putative class members if the proceedings were certified, and would allow for them to opt out.[54]

29. On April 11, 2017, the Case management Judge McDonald J, confirmed the propriety of the AGC's written cross examination questions and ordered:

(a) the Applicant to answer the refused cross-examination questions;

(b) the motions for extension of time of Messrs. O'Neil, Declavasio and Porto to commence their judicial reviews were put in abeyance pending final determination on certification, in accord with Applicant counsel's express decision not to seek immediate adjudication of them; and

(c) that the certification motion be set for hearing May 9, 2017 separate from the judicial review application hearing.

e) The Fontaine application is heard – April 2017

30. On April 24, 2017, the Federal Court heard the individual *Fontaine* judicial review application. Strickland J. dismissed it declining review the Crown's exercise of prerogative power to make *ex gratia* payments or the reasonableness of the Minister's TSCP criteria choice as not justiciable and beyond the Court's jurisdiction.[55]

f) The Fontaine application is dismissed as non-justiciable – May 2, 2017

31. On May 2, 2017, The Honourable Madam Justice Strickland released her decision dismissing the application for judicial review brought by Guy Charles Fontaine. As Justice Strickland explained:

[53] *Ibid*, paras 36, 40 **RMR-Costs, tab 2, pp 546-548.**
[54] *Ibid*, paras 38-41 **RMR-Costs, tab 2, pp 547-548.**
[55] Hashemi Affidavit, paras 45-46, 52, **RMR-Costs, tab 2, pp 549-550.**

> ….For the reasons below, I do not believe that the Administrator could, or that this Court can, provide the remedy that the Applicant seeks.
>
> It is clear from the record that the Program is a compassionate one, providing *ex gratia* payments to thalidomide victims. By way of example, I note that on May 22, 2015, the Minister stated that the government, even in the absence of a legal obligation to provide support, had a clear moral obligation to help meet the changing needs of thalidomide survivors.
>
> Thus, the Program is a voluntary humanitarian effort. It is not founded on a legal obligation arising from statute, contract or otherwise to provide this support and this is not disputed by the Applicant. The Moriarty Affidavit states that the *ex gratia* payments are funded by Health Canada's existing budget, pursuant to the Minister's authority to promote and preserve the physical well-being of the people of Canada pursuant to s 4(2) of the Act. The Respondent submits that the Program was effected by prerogative power, therefore, it is not subject to judicial review by this Court.[56]

g) The motion for certification is heard – May 9, 2017

32. On May 9, 2017, the *Wenham* certification motion was heard.

h) HESA Standing Committee hearings – May 9 and 11, 2017

33. Nonetheless, consideration of the program through the political process continued to progress. In May 2017, the HESA held consultations in its study of the concerns raised in Parliament.[57] The evidence reflecting historical, scientific, behavioural, and moral dimensions presented by witnesses and experts[58] was considered by Parliament's elected members who made up HESA, including from:

(a) Dr. Martin Johnson, the former U.K. Thalidomide Trust Director;

(b) Dr. Neil Vargesson, Medical Science, University of Aberdeen;

(c) Health Canada officials - Theressa Bagnall and Cindy Moriarty;

(d) Terry Bolton, Canada's Still Forgotten Thalidomide Survivors';

[56] *Fontaine v Canada*, 2017 FC 431, paras 30-33, **Joint Book of Authorities – Settlement Approval, (JBA), tab 11.**
[57] Moriarty Affidavit (January), para 56, Exhibits "P" and "Q", **RMR-Costs, tab 1, pp 18, 340-342 and 344-346;** Evidence, Standing Committee on Health, HESA, May 9, 2017 and May 11, 2017, and Debates, June 13, 2017, **RBA-Costs, tabs 34, 35, 39.**
[58] *Ibid*, para 58, **RMR-Costs, tab 1, p 18.**

(e) Douglas Levesque, an individual denied TSCP applicant;

(f) Mr. Ivor Ralph Edwards, Professor of Medicine and former Chair of 2014 World Health Organization expert thalidomide embryopathy meeting; and

(g) the TSCP's Administrator, Crawford.[59]

34. Ms. Cindy Moriarty, the Director General of Health Canada's Health Programs & Strategic Initiatives Directorate (but the Executive Director then), appeared before HESA on May 9, 2017 to give information and answer questions about the TSCP.[60]

35. On June 8, 2017, the HESA Chair wrote to the Health Minister to confirm their specific concerns and recommend the TSCP's eligibility criteria be revised and include clinical evaluation to determine the likelihood of thalidomide exposure on a balance of probabilities in accord with international best practices and focused on the UK model.[61]

i) The motion for certification is dismissed – July 6, 2017

36. On July 6, 2017, the Applicant's motion for certification of this application as a class proceeding was dismissed by McDonald J. The Court held that none of the five requirements for certification were met.[62] The Applicant's appeal would not be heard until early 2018.[63]

j) Health Canada engages in policy work in response to HESA's recommendations – June 2017 to January 2018

37. In early June 2017, HESA provided its recommendations to change the eligibility criteria, and include clinical evaluation to determine on a balance of probabilities the likelihood of thalidomide exposure in accordance with international best practices and focused upon the U.K. model. The Minister of Health responded to the HESA and acknowledged its specific input, as well as a related petition to the House of Commons and the input of others advocating for criteria change. [64]

[59] *Ibid*, para 57, **RMR-Costs, tab 1, p 18.**
[60] *Ibid*, para 3, **RMR-Costs, tab 1, p 2.**
[61] Moriarty Affidavit (January), para 59, **RMR-Costs, tab 1, pp 18-19.**
[62] Hashemi Affidavit, para 47, **RMR-Costs, tab 2, p 549.**
[63] *Ibid*, paras 49-51, **RMR-Costs, tab 2, pp 549-550.**
[64] Moriarty Affidavit (January), Exhibit S, **RMR-Costs, tab 1, pp 355-356.**

38. These two key communications reflected the culmination of the work of Health Canada's Health Programs & Strategic Initiatives Directorate ("Directorate") to design an expanded support program and its administration, having considered a richness of information.[65] To ensure adequate resourcing and earmarking funds in the next year's federal budget is a long and involved process seldom spanning less than many months.[66]

k) 2018 Budget Announcement of the government's commitment to expand eligibility and funding – February 27, 2018

39. On February 27, 2018, the Government's commitment to expand eligibility given some claimants could not obtain documentary proof that they were survivors, was publicly confirmed in the Federal Budget. It sets out the government's plan for annual sustainable planning, including planned direct spending initiatives.[67]

l) Health Canada continues its work on program design and implementation approvals – March 2018 to January 2019

40. Through the summer and fall of 2018, the Directorate's work continued on program design and implementation approvals, reviewing the input of many stakeholders, experts, including submissions received in April 2018 from Mr. Rosenfeld.[68] Around this time, Applicant's counsel threatened a motion to enjoin Canada's activities implementing the HESA recommendations and Budget 2018 announcement, despite the fact that the application was not certified.[69]

m) Briand and Rodrigue application decisions released – March 2018

41. On March 9, 2018, the Federal Court released decisions in the individual *Briand* and *Rodrigue* applications following their December 4 and 6th, 2017 hearings. Contrary to the decision of Strickland J. in *Fontaine*, Annis J. found the Court could review the Minister's 2015 policy choice establishing the TSCP's second eligibility criteria, which he found unreasonable. The ineligibility decisions were set aside.[70] Further in *Briand*, the Court made a factual finding that

[65] *Ibid*, paras 59-61, **RMR-Costs, tab 1, pp 18-19.**
[66] *Ibid*, paras 16-25, 60-62, **RMR-Costs, tab 1, pp 6-9, 19-20.**
[67] Moriarty Affidavit (January), para 63, **RMR-Costs, tab 1, p 20.**
[68] *Ibid*, para 66, **RMR-Costs, tab 1, pp 20-21.**
[69] Hashemi Affidavit, paras 60-62, **RMR-Costs, tab 2, pp 552-553.**
[70] Moriarty Affidavit (January), para 52, **RMR-Costs, tab 1, p 16.**

thalidomide was available and being prescribed in Canada in fall 1958, notwithstanding that such date countered any fact ever unearthed by Health Canada in the previous sixty years. The Court accepted as the applicant's evidence that her mother used thalidomide in the first trimester and declared Ms. Briand to be "a victim of thalidomide" who was eligible for support.[71] In the *Rodrigue* decision, Annis J. referred the eligibility determination to the Administrator for reconsideration in light of his factual finding in *Briand* of the drug's availability in 1958 in Canada.[72]

n) The Federal Court of Appeal certifies the Application – November 1, 2018

42. On November 1, 2018, the Federal Court of Appeal released its decision from the January 2018 appeal, and reversed the certification refusal.[73] The deadline for Canada to file a leave to appeal this decision to the SCC was January 18, 2019.

o) The CTSSP is formally announced – January 9, 2019

43. On January 9, 2019, the Minister confirmed that a new program, the CTSSP, would replace the TSCP. The identification of thalidomide survivors would be by reference to international best practices over a five year period and the *ex gratia* lump sum payments were increased from the TSCP's $125,000 to $250,000.[74]

p) The Applicant brings motions to enjoin the Minister of Health from making public announcements and to disseminate Notice of Certification – January - March, 2019

44. After the January 9, 2019 announcement, the Applicant brought a motion to enjoin the government from making public announcements, alleging that they amounted to unauthorized communications with class members.

45. Class counsel sought immediate dissemination of certification notice, prior to the expiry of the January 18, 2019 deadline for the AGC to seek leave to appeal the certification to the

[71] *Briand v Attorney General of Canada*, 2018 FC 279, **JBA, tab 15.**
[72] *Rodrigue v Canada*, 2018 FC 280, **JBA, tab 16.**
[73] *Ibid*, para 55, **RMR-Costs, tab 1, p 551.**
[74] Moriarty Affidavit (January), Exhibit U (News Release), **RMR-Costs, tab 1, pp 362-364**.

Supreme Court of Canada,[75] and despite that the release of the new program details were imminently expected.[76]

46. On March 26, 2019, notice of certification was ordered before a Dispute Resolution Conference was held, and against the AGC's objection that issuance of notice to the class could lead to confusion for class members given the new program.[77] Some class members were concerned about paying 25% to Class counsel and wanted to know the program's full details before deciding on opt out.[78]

q) The CTSSP is formally established by Order in Council – April 5, 2019

47. On April 5, 2019, the OIC formally establishing the CTSSP by the Governor in Council came into effect. It set out new eligibility and evidentiary requirements. To qualify, CTSSP applicants are to meet one of the OIC's criteria:

(a) that they were determined as eligible under the 1991 EAP or 2015 TSCP;

(b) that they are listed on a Canadian government registry for thalidomide victims; or

(c) they are determined by the third party administrator to be eligible. [79]

48. The OIC established that the Administrator is to determine eligibility by considering all information provided by applicants, following a comprehensive three step process as detailed in the published OIC.[80]

r) The parties file materials to proceed on the merits and attend a DRC

49. With the formal establishment of the CTSSP by the April 5, 2019 OIC, the TSCP was replaced, and Health Canada instructed counsel to bring a motion to dismiss the application on the basis that the issues raised in Mr. Wenham's application were moot and an adequate alternative remedy was open to (and beyond) the class.[81]

[75] Hashemi Affidavit, para 69, **RMR-Costs, tab 2, p 555.**
[76] *Ibid*, para 74, **RMR-Costs, tab 2, p 556.**
[77] *Ibid*, paras 77-78, **RMR-Costs, tab 2, pp 557-558.**
[78] *Ibid*, para 76, **RMR-Costs, tab 2 p 557.**
[79] Moriarty Affidavit (January), para 65, **RMR-Costs, tab 1, p 20.**
[80] *Canadian Thalidomide Survivors Support Program Order*, P.C. 2019-0271.
[81] Hashemi Affidavit, paras 79-82, **RMR-Costs, tab 2, pp 558-559.**

50. Before any hearing of the AGC's motion, the parties agreed to attend a Dispute Resolution Conference ("DRC") on June 17, 2019.[82] At the DRC, Mr. Wenham voiced his concerns, and development of settlement terms which provided certain benefits to Class Members otherwise not available to non-class CTSSP applicants got underway.[83]

s) The parties reach a final settlement agreement

51. By October 22, 2019, the parties reached a final settlement agreement to provide some limited benefits to class members not otherwise available to (non-class) CTSSP applicants. Canada stipulated in the settlement at 8.02 that it did not concede that the TSCP was procedurally unfair or unreasonable, or that it represented any form of admission of liability.[84]

52. The parties proceeded with the settlement agreement despite not being able to agree on settlement terms respecting entitlement to or quantum of Class counsel's legal fees payable by the Class.

53. The parties worked cooperatively to prepare the notices required for settlement approval. Canada facilitated and paid for the translation of all materials and for notice dissemination.[85]

54. On December 20, 2019, in view of the potential for conflict in relation to fee approval, the Court ordered that Canada's submissions on how programs come about, which goes to the issue of success or results of the litigation, would be allowed.

PART II – POINTS IN ISSUE

55. The points in issue on this motion are:

(a) whether any exception to the no-costs rule in rule 334.39 of the *Federal Courts Rules* ("*Rules*") applies; and

(b) if a cost award is appropriate, whether it should be awarded on the basis of the Tariff, as a lump sum, or on a solicitor-client basis.

[82] Moriarty Affidavit (January), para 86, **RMR-Costs, tab 1, p 27;** Hashemi Affidavit, paras 84-86, **RMR-Costs, tab 2, p 560,**
[83] Moriarty Affidavit (January), para 87, **RMR-Costs, tab 1, p 28.**
[84] Hashemi Affidavit, paras 83 and 87-89, **RMR-Costs, tab 2, pp 559-561.**
[85] Hashemi Affidavit, paras 90-91, **RMR-Costs, tab 2, p 561.**

PART III – SUBMISSIONS

A. THE FEDERAL COURT IS A NO COSTS REGIME FOR CLASS PROCEEDINGS

56. The no costs provision in rule 334.39 is one of only two exceptions to the Court's broad grant of discretion to award costs.[86] It applies once the parties to a proceeding are parties to the certification motion.[87]

57. The no costs provision is intended to remove the financial barriers to bringing class proceedings.[88]

58. The rule precludes costs "against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding, or to an appeal arising from a class proceeding."

59. Accordingly, the limit on costs should be presumed to apply unless at least one of three exceptions is made out on the particular facts of a case, namely that:

(a) a party's conduct unnecessarily lengthened the proceeding's duration;

(b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or

(c) exceptional circumstances make depriving a successful party of costs unjust.

60. The interpretation and application of the exceptions to the rule against costs must be purposive and should be guided by the specific imperatives underlying rule 3 of the *Rules*, which requires they "be interpreted and applied to secure the just, most expeditious and least expensive determination of every proceeding on its merits."[89]

61. In approaching the interpretation of the exceptions Canada agrees that some consideration of the objectives of class proceedings is appropriate. However, invoking the fact that the matter is (or is proposed to be) a class proceeding does not automatically lead to a relaxation of the *Rules*. As the Federal Court of Appeal has cautioned in respect of pleadings, "the launching

[86] *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, Rule 22.
[87] *Campbell v Canada* 2012 FCA 45, para 45 ("*Campbell*"), **RBA-Costs, tab 4.**
[88] *Ibid*, paras 26-27 citing Federal Court of Canada Rules Committee's *Class Proceedings in the Federal Court of Canada: A Discussion Paper* (Ottawa: 9 June 2000), **RBA-Costs**, **tab 21.**
[89] *Interpretation Act*, RSC 1985, c I-21, s 15; *Federal Courts Rules*, SOR/98-106, rule 3.

of a proposed class proceeding is a matter of great seriousness, potentially affecting many class members' rights and the liability and interests of defendants. Complying with the Rules is not trifling or optional, mandatory and essential it truly is."[90] The Federal Court of Appeal has strictly applied rule 334.39 to date, and has overturned costs awards in class proceedings where an exception was not found or factually supported.[91]

62. It follows that a truly purposive and contextual inquiry is required. In addition to general class proceeding objectives, the interpretation of the exceptions should also take into account two other important principles.

63. First, an interpretation of the exceptions should give regard to the instruction of the Supreme Court and of this Court respecting "procedural proportionality," and what that means in the context of the unique federal court scheme which was specifically crafted to ensure "the better administration of the laws of Canada".[92] The federal class proceedings regime, which since 2007 has permitted the certification of judicial review applications is unique. These summary proceedings with their extraordinary public law remedies (including declaratory relief) are already streamlined to encourage and enhance access to justice, judicial economy and behaviour modification. An interpretation of rule 334.39 should not uncritically import judicial pronouncements concerning other provincial legislative schemes aimed more directly at incentivizing class proceedings involving purely private matters, while indirectly amending the substantive content of the *Rules*,[93] which otherwise facilitate the important and timely review of many public law issues.[94]

64. Second, the interpretation of the exceptions should also consider the instruction of the Supreme Court and this Court that parties in an overcrowded justice system should be encouraged

[90] *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, at para 40, emphasis added, **RBA-Costs, tab 5.**
[91] *Voltage Pictures, LLC v. Salna*, 2017 FCA 221, paras 15-6, **RBA-Costs, tab 6;** *R. v. John Doe*, 2016 FCA 191, para 73, **RBA-Costs, tab 7.**
[92] *Hryniak v. Mauldin*, 2014 SCC 7, paras 28-33, **RBA-Costs, tab 8.** The proportionality principle means that the best and most timely forum for resolving a dispute is not always that with the most painstaking procedure. See also *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s.101.
[93] *Manitoba v Canada*, 2015 FCA 57, paras 11-17, **RBA-Costs, tab 9,** citing Stratas J.; See *Samson First Nation v Canada*, 2015 FC 836, para 92, **RBA-Costs, tab 10.**
[94] *Strickland v Canada (Attorney General)*, 2015 SCC 37, paras 17-19, 24, 37-45, **RBA-Costs, tab 11.**

to settle legal disputes.[95] Mediated and negotiated settlements produce solutions that can exceed those available through courts and judicial processes. In view of the court's recognition of the public interest in encouraging parties to reach settlements, [96] courts must be cautious not to make orders which could have a chilling effect on settlements.

65. Finally, the Applicant's incongruent assertion that the reciprocal nature of the no costs rule is more apt for a class of defendants/respondents who could face an adverse costs award, rendering such proceeding impractical is without merit. That the Crown should attract like treatment as a litigant vis-à-vis costs is well supported in the *Crown Liability and Proceedings Act*.[97] Were the Applicant's logic accepted, the Crown would become an insurer in all federal class or proposed class proceedings with any public interest dimension, which was clearly not intended.

B. NONE OF THE EXCEPTIONS IN RULE 334.39 ARE MET

66. The Applicant argues that the exceptions to rule 334.39 are met on the basis that (1) it has circumvented the class proceeding by 'anticipatorily complying' with the remedies sought, and so was unnecessary, improper and/or exceptional; or that (2) if the announcement of the CTSSP was not influenced by the litigation, that Canada unnecessarily lengthened the duration of the proceedings in failing to stay the proceedings. He further argues that he had success in the settled litigation, and that either solicitor-client costs or a lump sum costs amount should follow.

67. Canada unequivocally maintains that no exception is made out and that the facts tell a very different story; one of the respondent's diligence in responding to thalidomide survivors and in seeking to streamline these proceedings throughout to avoid costs thrown away.

[95] *Union Carbide Canada Inc v Bombardier Inc.*, 2014 SCC 35, para 32, **RBA-Costs, tab 12**; *Randall v Caldwell First Nation of Point Pelee and Pelee Island Band Council*, 2006 FC 1054, **RBA-Costs, tab 13.**
[96] *Randall, supra,* para 21, **RBA-Costs, tab 13**.
[97] *Crown Liability and Proceedings*, RSC 1985, c C-50, s 28.

1) Canada did not take any steps that were improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution

68. Canada's conduct in developing the CTSSP and in promulgating it through an Order in Council, was entirely appropriate and there is absolutely no basis to warrant invoking the exception under rule 334.39(1)(b).

69. Anticipatory compliance as a justification for costs awards has been rarely applied and in individual proceedings only. The idea is that costs may be appropriate where a government respondent took some step outside the litigation rendering the litigation moot. This jurisprudence has no application here. The cases relied upon were not determined in the federal class proceedings context, nor entailed any review of rule 334.39. Even in individual proceedings, for anticipatory compliance to form a basis to award costs to the party initiating the individual proceeding, the court considers at least two factual matters: (i) whether the applicant was right to commence the litigation in the first place; and (ii) that "as far as can be known" the respondent's compliance was on account of the litigation.[98]

70. Even if this jurisprudence applied, these requirements are not made out on these facts. First, Canada takes no issue with the Applicant's decision to initiate his individual judicial review, but takes issue with pursuit of certification over other more efficient procedures, and to continuing after the announcement of the new program in January 2019. On the second branch, Canada strongly disputes the Applicant's narrative that the CTSSP's adoption was in any way improper or an attempt to circumvent litigation. The legislative history and the factual record demonstrates that the CTSSP was properly developed in response to, and through, legitimate political processes.

a) The decision to press for certification over other procedures unnecessarily lengthened the proceedings

71. From the time the certification motion was served, Applicant's counsel had a singular focus on certification over the objection of AGC counsel who sought to explore other methods for a more timely and cost effective adjudication than a class proceeding. When the Applicant first brought the certification motion in December 2016, no other putative class member was identified

[98] *Tetzlaff v. Canada (Minister of the Environment)* [1991] FCJ No 113, at p 6, **ABOA – Costs, tab 13.**

beyond a reference to any other TSCP judicial review applications, stay of which was sought without apparent verification of the Applicants' intentions. They all proceeded individually.[99]

72. In early January 2017, about two weeks after receiving the certification motion, the AGC inquired of the Applicant's views on *Rules'* rule 114 for Representative Proceedings. Without any express basis, Applicant's counsel refused to canvass such option,[100] despite its potential usefulness, comparatively lower complexity, and the availability of costs, all of which has been noted by the Federal Court and bar alike.[101]

73. In March 2017, Applicant's counsel pushed to schedule the hearing of the certification motion and merits together, seemingly more focused on the class proceedings' establishment than the interests of putative class members. Hearing the motion and application together as he pressed for would have foreclosed any opportunity for class members to participate at a common issues hearing, raise individual issues, or meaningfully exercise an opt out option prior to the merits hearing. The Court agreed with Canada and scheduled only the certification motion.[102]

74. In March 2018, after the federal budget announcement which committed the government to expanding eligibility, and while the appeal decision of the July 2017 certification refusal remained under reserve, Applicant's counsel threatened a motion to enjoin Canada from moving forward to amend the TSCP.[103] In January 2019, Applicant's counsel actually brought a motion to enjoin the Government from making public announcements about the TSCP or CTSSP, although he ultimately agreed not to pursue the motion.[104]

75. In all, Class counsel's repeated attempts to tether the ongoing Parliamentary and policy making processes to the proposed (and eventually certified) class judicial review proceedings were ill-conceived at best. Efforts to commandeer or harness governmental decision making to such extent go well beyond the important purposes and scope of judicial review.

[99] Hashemi Affidavit, paras 14-16, 23, 26, 28-33, **RMR-Costs, tab 2, pp 541-541,544-546**
[100] *Ibid,* paras 20-22, **RMR-Costs, tab 2, pp 543-544.**
[101] Lutfy, Hon. A and Emily McCarthy, "*Rule Making in a Mixed Jurisdiction: The Federal Court (Canada)*", 2010 49 SCLR (2d), paras 33-48, **RBA-Costs, tab 21.**
[102] Hashemi Affidavit, paras 34-42, **RMR-Costs, tab 2, pp 546-548.**
[103] *Ibid*, para.60, **RMR-Costs, tab 2, p 552**, See Ptak Affidavit, **Applicants Motion Record (Costs), vol 2, Exhibits 22, 23, pp 365-371**
[104] Hashemi Affidavit, para 66, **RMR-Costs, tab 2, p 554**. See Ptak Affidavit, **Applicant's Motion Record (Costs), vol 2, Exhibits, 37, 38 pp 462-470**

b) The adoption of the CTTSP was not the 'direct result' of the litigation

76. The Applicant asserts that the decision made by the Governor in Council, to establish the CTSSP was improper, outside the Court's supervisory role, and constitutes a circumvention of the class proceeding. As part of this narrative, he asserts that the CTSSP was the "direct result" of the litigation and would not have occurred but for his persistence.

77. Neither assertion is factually or legally supported. The Applicant's position represents a fundamental misunderstanding of the respective roles of the judicial and executive branches within the Canadian parliamentary system. Canada's conduct in responding to the concerns raised in the House of Commons is an example of the proper functioning of our democratic political processes and executive decision-making. Those processes held the greatest capacity for the Respondent to consider and fulsomely respond to all stakeholders' concerns about the TSCP.

78. Through the Parliamentary and budget processes, the Health Minister took swift action in 2015 to establish the TSCP, and thereafter, actively engaged with constituents, Members of Parliament and petitioners to the House of Commons to review the TSCP's effectiveness.

79. The political and policy making activities which were initiated in early 2016 and continued through to the issuance of the Order in Council in April 2019 were entirely appropriate and were undertaken in the public interest.

80. Concerns about the TSCP were first raised in March of 2016, not long after the TSCP Administrator began to process applications and make decisions. From this point on, Health Canada actively examined the issues and considered the government's options. After reviewing the concerns and the HESA recommendations, Health Canada's work in this area led to the Health Minister's January 9, 2018 public response to HESA and the February 2018 budget announcement. The announcements cemented the government's financial commitment to create a new and improved support program for thalidomide survivors.[105]

81. At the time the government made that commitment, the litigation against Canada had not been successful. Far from Health Canada's activities being driven by the litigation, they were undertaken and continued <u>despite</u> the dismissal of the *Fontaine* application - where the Federal

[105] Moriarty Affidavit (January), paras 52-63, **RMR-Costs, tab 1, pp 16-20.**

Court held the Minister's choice of criteria in the *ex gratia* program to be non-justiciable – and despite this Court's decision to deny certification in this case in June 2017.

82. The formal commitment to expand eligibility in February 2018 was also made prior to the adverse decisions in the related individual applications in *Briand* and *Rodrigue*. The evidence demonstrates that Health Canada continued to focus on implementing the commitment confirmed in February 2018, irrespective of developments in the litigation.[106]

83. A significant amount of work was done by Health Canada between the Budget announcement in February of 2018, and April of 2019. This initiative was just one of many that form part of the government's larger agenda to be managed by government, and over which timing, Health Canada did not have full control. Many details were in the public domain making it clear that the Government was responding to the HESA recommendations to enhance access to support for thalidomide survivors.[107]

84. In addition to considering the information provided by stakeholders, throughout this period, Health Canada continued to consult, and received the written submissions of the Applicant through his counsel, in April 2018. As with the input of the other stakeholders and experts, the submissions were considered in the development of the new program.[108]

85. The CTSSP's 2019 launch was the culmination of those fruitful and timely democratic processes. The mere fact that litigation was initiated and proceeded in parallel, does not render the government's engagement in the political processes a nefarious circumvention of the judicial processes. Rather, democracy operated precisely as it was designed to: citizens brought their concerns to their Members of Parliament, who in turn advocated for the improvement of public policies and programs through the parliamentary processes and structures, leading to executive decisions responsive to those concerns.

86. The history and chronology set out above, supported by the evidence filed, demonstrates that this litigation, with the related litigation in *Fontaine, Rodrigue and Briand*, were

[106] *Ibid*, para 85, **RMR-Costs, tab 1, pp 16-20.**
[107] Moriarty Affidavit (January), para 66, **RMR-Costs, tab 1, pp 20-21.**
[108] *Ibid*, para 67, **RMR-Costs, tab 1, p 21.**

but one factor considered in the broader policy process that led to the development of the CTSSP. It was not a "direct result" of, nor did it circumvent the litigation.

87. Accordingly, there is no basis to find that the government's development and introduction of the CTSSP was in any way improper within the rule 334.39(1)(b) exception.

2) <u>Canada's conduct did not lengthen the proceeding</u>

88. Canada's conduct of the litigation was at all times appropriate and cannot be construed as supporting the exception in rule 334.39(1)(a) either. The Applicant's alternative argument is that the onus was on Canada to bring a halt to his litigation while the parliamentary review and subsequent policy work to develop the new program was ongoing. This argument is also without merit. Had Canada attempted to seek such relief, it would no doubt have been resisted, just as entertaining other avenues was resisted from the start.

89. It is correct that the evidence on this motion establishes that Health Canada was actively engaged in policy work from March 2016 forward. It was not in any way improper for Health Canada to seek written submissions from the Applicant rather than meeting with him for purposes of consulting on the program, during its development. Government officials are not at liberty to share information concerning the policy making process with litigants where the information may be subject to one or more privileges, or where the government, for other valid reasons, has not yet chosen to make the information public. The record demonstrates that as soon as information could be provided to the Applicant, Health Canada moved quickly to share information, as demonstrated by the multiple affidavits provided by Ms. Moriarty in March and April of 2019.

90. Moreover, the government's position in this litigation was that the issues raised on the propriety of the criteria established for the *ex gratia* program were not justiciable. Given the broader importance of that legal issue to the Crown, and given the Federal Court had dismissed the *Fontaine* application on that basis in May 2017, Canada cannot be faulted for its measured response to the judicial review proceeding, while continuing with its policy making mandate.

91. Canada's conduct in managing and responding to this litigation and bringing it to an ultimate resolution was exemplary. Initially, the litigation proceeded promptly until the Applicant decided to seek certification. All steps in the individual application from service of the Notice of

Application to the provision of dates for the requisition the hearing occurred in less than 15 weeks.[109]

92. On December 23, 2016, only after all steps had been taken in the individual application did the Applicant seek to change the procedural trajectory by pursuing class certification. It appears he had this intention for nearly two months, but did not advise counsel for Canada.[110]

93. The certification motion was ready for hearing just four months after service upon the AGC in late December 2016. Certainly no steps were taken by Canada that unnecessarily lengthened the proceedings. Rather, counsel for Canada made efforts to address ambiguities in the motion materials, agreed and adhered to a streamlined timetable, conducted cross examination in writing, and addressed issues with Applicant's counsel and Case Management promptly. It was the Applicant who refused to answer proper questions and who forced a case management motion to address this and the timetabling of the certification and merits hearings.

94. However, the most significant factor lengthening the proceedings can be attributed to the time it took from the commencement of the Applicant's appeal of the certification refusal to the release of the Federal Court of Appeal's November 2018 decision reversing on certification, and this delay can in no way be attributed to Canada.

95. In short, there is no factual foundation upon which either of the first two exceptions might be constructed.

3) <u>Settlements do not produce "successful parties"</u>

96. Because there is no 'successful party' where the litigation is resolved by way of a settlement agreement, the last exception set out in rule 334.39(1)(c) has no application. It would be improper for the court to assess the merits of the case or to assign "success" to one or the other party given the concept is inherently an elusive one, viewed differently by the parties.[111] The focus

[109] Hashemi Affidavit, paras 5, 10, **RMR-Costs, tab 2, pp 538-540.**
[110] *Ibid*, paras 11-15, **RMR-Costs, tab 2, pp 540-541.**
[111] *Randall*, *supar*, para 15, **RBA-Costs, tab 13.**

of the courts in the settlement context should be on whether the settlement is fair, reasonable and in the best interests of class members. [112]

97. The Federal Court has held that courts should not award costs to parties who have reached a settlement agreement, unless there are compelling reasons to do so. [113] Given that settlement is to be encouraged, and where the parties freely chose to resolve the litigation by way of a settlement agreement, no costs award should issue. The imposition of a costs awards would have a chilling effect on defendants and respondents, including the Crown. [114]

98. Noting all of the above, the Applicant as a class representative in the Federal Courts with the advice of sophisticated and experienced class counsel should have been well prepared for the very real possibility that no costs would be ordered in this proceeding.

C. IF A COSTS AWARD IS MADE IT SHOULD BE LIMITED TO THE TARIFF AMOUNTS

1) Any costs award should be limited to the Tariff amounts

99. In the extraordinary event that this Court were to find an exception applied and that a costs award against Canada were appropriate, there would be absolutely no basis to depart from the modest Tariff amounts and annual unit values for counsel's time as provided for in the *Rule*s for individual judicial review proceedings. [115]

100. The steps taken by Applicant's counsel for which costs are claimed demonstrate no consideration by him or the Representative Applicant of the summary nature of judicial review, and full indemnity could not have been expected even outside the no costs provision, had the proceedings gone forward as initially constituted in an individual capacity. Furthermore, certain steps taken by the Applicant and Class Counsel in the litigation were unnecessary or improper. The disbursements claimed are less controversial, but Canada notes that it agreed to and did pay

[112] *Condon v Canada*, 2018 FC 522, para 17, **JBA, tab 14.**
[113] *Ds-Max Canada Inc. v. Nu Life Inc*., 2005 FC 25, para 12, **RBA-Costs, tab 15.**
[114] *Randall, supra,* para 21, **RBA-Costs, tab 13**.
[115] *Federal Courts Rules*, Tariff B, sections 3-4 - Unit amount effective April 1, 2019: $150.

all of the costs associated with the certification and settlement approval notices issued to date, which included hourly fees for Class Counsel's staff to prepare and mail the notices.

101. How costs are ordinarily determined in individual matters is set out in *rules* 400-422. The courts' broad discretion on costs is exercised by reference to a non-exhaustive list of considerations in Rule 400(3).[116] To arrive at a lump sum award or costs assessed under Tariff B,[117] an assessment is directed to be performed under Tariff B.[118] or costs may be refused, increased, or even awarded against a successful party.[119]

102. Tariff B presents modest rates, which includes counsel fees among litigation costs, and seeking to balance compensation and burden between the parties. The Federal Court of Appeal has explained further:

> The purpose of the costs rules is not to reimburse all the expenses and disbursements incurred by a party in the pursuit of litigation, but to provide partial compensation. The costs awarded, as a matter of principle, are party-and-party costs. Unless the Court orders otherwise, Rule 407 requires that they be assessed in accordance with column III of the table to Tariff As the Federal Court properly said in Apotex …Tariff B represents a compromise between compensating the successful party and burdening the unsuccessful party. The Tariff includes counsel fees among the judicial costs. Since it applies uniformly across Canada, it obviously does not reflect a counsel's actual fees as lawyers' hourly rates vary considerably from province to province, from city to city and between urban and rural areas.[120]

103. The Applicant has not provided a bill of costs based on Tariff B, using the approved hourly rates. By way of example, attached as **Schedule "A",** is a draft bill of costs prepared on that measure showing what the AGC would claim in this application as Tariff B rates using Column III and the highest number of units provided.

[116] *Federal Courts Rules*, SOR/98-106, rule 400.
[117] *Ibid*, rule 400(4).
[118] *Ibid*, rule 400(5).
[119] *Ibid*, rule 400(6).
[120] *Sherman v. Canada (Minister of National Revenue)*, 2004 FCA 29, paras 8-9, **RBA-Costs, tab 16.**

2) No basis for solicitor-client costs

104. Solicitor-client costs are "very rarely granted, for example if a party displays 'reprehensible, scandalous or outrageous'".[121] Far from warranting solicitor client costs, the conduct of Canada in this case was exemplary.

105. The Applicant seeks solicitor client costs of $850,000.00 for over 1,800 hours plus disbursements to pursue and resolve this application.[122] The Applicant bases his request on erroneous assertion that it was improper for Canada to address concerns about the TSCP in the political realm once litigation was initiated. As explained above, that assertion is based on a fundamental misunderstanding of our democratic system and the interplay between litigation and the proper functioning of the policy-making process. The mere fact that litigation was commenced in the midst of the parliamentary processes reviewing the TSCP does not entitle any litigant to a special role in that process, nor does it limit or restrict how the executive exercises its powers.

106. This is particularly the case when the program at issue is an *ex gratia* program, in which 25 persons were newly successfully identified as thalidomide survivors, and where no *Charter* or other legal rights were implicated. Further, the first judicial pronouncement on the TSCP in the *Fontaine* case made no declaration of the TSCP's unfairness, nor re-wrote any of the *ex gratia* program's parameters.

107. As set out above suggestion that the government's adoption of the CTSSP circumvented the class proceeding (which related to the TSCP), or that Canada was "evading a merits decision" has no foundation and should be wholly rejected.

108. In *Microsoft Corp.*, Justice Harrington considered the language of rule 400(1), and explained that:

> "Reprehensible" behaviour is that deserving of censure or rebuke; blameworthy. "Scandalous" comes from scandal which may describe a person, thing, event or circumstance causing general public outrage or indignation. Among other things,

[121] *Quebec v Lacombe*, 2010 SCC 38, para 67, **RBA-Costs, tab 17.**
[122] Applicant's Written Representations on Costs, paragraph 77.

"outrageous" behaviour is deeply shocking, unacceptable, immoral and offensive (see: *Oxford Canadian Dictionary*).[123]

109. Canada has done nothing in the course of these proceedings which could be so characterized. The implementation of a policy decision is a complex process, which may require legislation, regulations, or orders in council and many officials' participation, to obtain necessary approvals for policy and program design, and funding approvals.[124] This may occur over months or even years.[125] All government departments, including Health Canada, are accountable for directing and spending finite resources and public monies to achieve value for the targeted beneficiaries and Canadians.[126]

110. Finally, there are no further reasons of public interest to support a solicitor-client costs award in this case.[127]

PART IV – ORDER SOUGHT

111. The Attorney General of Canada asks that the Applicant's motion for costs against Canada be dismissed in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 14th day of February 2020.

Christine Mohr

Christine Mohr

for Melanie Toolsie

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[123] *Microsoft Corp v 9038-3746 Quebec Inc.*, 2007 FC 659, para 16, **RBA-Costs, tab 18**; *Abdelrazik v Canada,* 2019 FC 769, paras 20-22, **RBA-Costs, tab 19**.
[124] Moriarty Affidavit (January), para 17, **RMR-Costs, tab 1, p 6.**
[125] *Ibid*, para 18, **RMR-Costs, tab 1, p 6.**
[126] *Ibid*, para 19, **RMR-Costs, tab 1, p 7.**
[127] Moriarty Affidavit (January), para 21, **RMR-Costs, tab 1, p 7.**

TO: The Administrator
Federal Court of Canada
180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

AND TO: David Rosenfeld/Charles Hatt
Koskie Minsky LLP
20 Queen Street West
Suite 900
Toronto, Ontario
M5H 3R3

PART V – LIST OF AUTHORITIES

Cases

1. *Fontaine v Canada (Attorney General)*, 2017 FC 431
2. *Briand v Attorney General of Canada*, 2018 FC 279
3. *Rodrigue v Canada*, 2018 FC 280
4. *Campbell v Canada (Attorney General)*, 2012 FCA 45
5. *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184
6. *Voltage Pictures, LLC v Salna*, 2017 FCA 221
7. *R v John Doe*, 2016 FCA 191
8. *Hryniak v. Mauldin*, 2014 SCC 7
9. *Manitoba v. Canada*, 2015 FCA 57
10. *Samson First Nation v. Canada*, 2015 FC 836
11. *Strickland v Canada (Attorney General)*, 2015 SCC 37
12. *Union Carbide Canada Inc v Bombardier Inc.*, 2014 SCC 35
13. *Randall v Caldwell First Nation of Point Pelee & Pelee Island Band Council*, 2006 FC 1054
14. *Tetzlaff v. Canada (Minister of the Environment)* [1991] FCJ No 113
15. *Condon v Canada*, 2018 FC 522
16. *Ds-Max Canada Inc. v. Nu Life Inc*, 2005 FC 25
17. *Sherman v Canada (Minister of National Revenue)*, 2004 FCA 29
18. *Quebec v Lacombe*, 2010 SCC 38
19. *Microsoft Corp v 9038-3746 Quebec Inc.*, 2007 FC 659
20. *Abdelrazik v Canada*, 2019 FC 769

Secondary Sources

21. Federal Court of Canada Rules Committee's *Class Proceedings in the Federal Court of Canada: A Discussion Paper* (Ottawa: 9 June 2000)
22. Lutfy, Hon. A and Emily McCarthy, "Rule Making in a Mixed Jurisdiction: The Federal Court (Canada)", 2010 49 SCLR (2d)

SCHEDULE "A"

Amount Claimed For Assessable Service under Tariff B

*This draft is provided for general illustration only.

Item	Assessable Service	Units (Column III)	Units Claimed	Fees
	A. Originating Documents and Other Pleadings			
	Individual Judicial Review Application			
2.	Preparation and filing respondents' records and materials.	4-7	7 x $150	$1, 050.00
3.	Amendment of documents, where the amendment is necessitated by amended originating documents	2-6	6 x 150	$900.00
	B. Motions			
4.	**Preparation and filing of an uncontested motion, including all materials.**			
	Motion to Amend Notice of Application (Sept.2016) Applicant's Motion to amend the Notice of Application on consent	2-4	4 x 150	$600.00
	Motion to Approve Notice of Settlement Approval (February 2019)	2-4	4 x 150	$600.00
5.	**Preparation and filing of a contested motion, including materials and responses**			
	Certification Motion Respondent's response to Applicant's Motion for certification as class JR application	4-7	7 x $150	$1, 050.00

	Respondent's Motion to Compel Applicant to answer Respondent's written examination questions	4-7	7 x $150	$1, 050.00
	Response to Applicant's Motion re: Public announcement of January 9, 2019	4-7	7 x $150	$1, 050.00
	Response to Applicant's Motion compelling Respondent Affiant to answer questions in the Applicant's Written Examination (Jan.2019)	4-7	7 x $150	$1, 050.00
	Responding to Applicant's Motion re: Notice Dissemination (February 2019)	4-7	7 x $150	$1, 050.00
	Responding to Applicant' Motions re: Costs & Fees	4-7	2 x (7 x $150)	$2, 100.00
	Respondent's Motion to Dismiss for Adequate Alternative Remedy and Mootness (May 2019)	4-7	2 x (7 x $150)	$2, 100.00
6.	**Appearance on a motion, per hour**			
	Motion for Certification on May 9, 2017 Melanie Toolsie, (3.5 hours) Negar Hashemi (3.5 hours)	7 hours x 150.00		$1, 050.00
	Special Case hearing to determine Respondent's participation on Fee Approval motion on November 21, 2019 Christine Mohr (1 hour) Melanie Toolsie, (1 hour)	2 hours x 150.00		$300.00
C. EXAMINATIONS				
7.	Preparation for cross examination on affidavits	2-5	5 x $150	$750
	Discovery of documents, affidavit of C. Moriarty	2-5	5 x $150	$750

9.	Attending on examinations, per hour –Moriarty on March 9, 2017 Melanie Toolsie (3 hours) Negar Hashemi (3 hours)	3 hours x $150		$900
	Cross examination of Applicant's Affiant, Bruce Wenham (in writing)	2-5	5 x $150	$750
D. PRE- HEARING PROCEDURES				
10.	<u>Preparation for Case Management Conferences</u> Five Case Management Conference (CMC) February 13, 2017 March 21, 2017 February 6, 2019 February 28, 2019 May 30, 2019	3-6	6 (x 5 CMC) x $150	$4, 500
	<u>Preparation for Dispute Resolution Conference</u>, including brief	3-6	6 x $150	$900.00
11.	<u>Attendance Case Management Conference, per hour</u>. CMC – February 13, 2017 (1/4 hour) CMC – March 21, 2017 (2&3/4 hours) CMC - February 6, 2019 (1/2 hour) CMC - February 28, 2019 (3/4 hour) CMC - May 30, 2019 (1/2 hour)	4.75 hours x $150		$712.50

	<u>Attendance at Dispute Resolution Conference</u> Christine Mohr (6 hours) Melanie Toolsie (6 hours) Negar Hashemi (6 hours)	18 hours X $150		2700.00
12.	Notice to admit facts or admission of facts, notice for production at hearing or trial or reply thereto.	3-6	6 x $150	$900.00
	COUNSEL FEE <u>Certification Motion – May 9, 2017</u> preparation and attendance at hearing	2 - 5	5 X $150	$700.00
F. APPEALS TO THE FEDERAL COURT OF APPEAL **<u>Applicant's Appeal of Certification Motion Decision</u>**				
19.	Preparation of memorandum of fact and law	4-7	2 x (7 x $150)	$2, 100.00
22.	Counsel Fee on hearing of Appeal First Council (3 hours) Second Council (3 hours @ 50%)	2-3	3 x 150 @50%	$450.00 $225.00
G. MISCELLANEOUS				
25.	Preparation of Bill of Costs	**1**	1 x $150	$150.00
			Total Fees (not including HST):	**29,887.50**

APPENDIX A - STATUTES AND REGULATIONS

Orders in Council

1. Order which provides for the making of ex gratia payments to individuals who received the Human Immunodeficiency Virus (HIV) infected blood or blood products and to individuals whose mothers were administered “Kevadon” or “Talimol” (thalidomide) and consequently suffered physical deformities. Canadian Thalidomide Victims, May 10, 1990, PC 1990-4/872

2. Amendment to the HIV-Infected Persons and Thalidomide Victims Assistance Order, December 16, 1991, PC 1991-7/2543

3. Order Establishing the Canadian Thalidomide Survivors Support Program in order to set out the parameters for a federal financial support program for victims of thalidomide, called the Canadian Thalidomide Survivors Support Program, which would replace the current Thalidomide Survivors Contribution Program, PC 2019-0271

Crown Liability and Proceedings Act, RSC, 1985, c C-50

Costs

Costs

28 (1) In any proceedings to which the Crown is a party, costs may be awarded to or against the Crown.

Costs awarded to Crown

(2) Costs awarded to the Crown shall not be disallowed or reduced on taxation by reason only that the solicitor or counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of the Crown performing those services in the discharge of the officer's duty and was remunerated therefor by a salary, or for that or any other reason was not entitled to recover any costs from the Crown in respect of the services so rendered.

(3) [Repealed, 2012, c. 31, s. 305]

R.S., 1985, c. C-50, s. 28; 1990, c. 8, s. 31; 1996, c. 17, s. 15; 2012, c. 31, s. 305.

Loi sur la responsabilité civile de l'État et le contentieux administratif (LRC (1985), ch C-50)

Dépens

Adjudication

28 (1) Dans toute poursuite à laquelle l'État est partie, les dépens peuvent aussi bien lui être adjugés que mis à sa charge.

Dépens adjugés à l'État

(2) Les dépens adjugés à l'État ne peuvent être refusés ni réduits lors de la taxation au seul motif que l'avocat pour les services duquel ils sont justifiés ou réclamés était un fonctionnaire salarié de l'État, et à ce titre rémunéré pour les services qu'il fournissait dans le cadre de ses fonctions, ou bien n'était pas, de par son statut ou pour toute autre raison, admis à prélever les dépens sur l'État pour les services ainsi rendus.

(3) [Abrogé, 2012, ch. 31, art. 305]

L.R. (1985), ch. C-50, art. 28; 1990, ch. 8, art. 31; 1996, ch. 17, art. 15; 2012, ch. 31, art. 305.

Interpretation Act, **RSC, 1985, c I-21)**

Application of definitions and interpretation rules

15 (1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

Interpretation sections subject to exceptions

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(a) as being applicable only if a contrary intention does not appear; and

(b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

R.S., c. I-23, s. 14

Loi d'interprétation **(L.R.C. (1985), ch. I-21)**

Application

15 (1) Les définitions ou les règles d'interprétation d'un texte s'appliquent tant aux dispositions où elles figurent qu'au reste du texte.

Restriction

(2) Les dispositions définitoires ou interprétatives d'un texte :

a) n'ont d'application qu'à défaut d'indication contraire;

b) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

S.R., ch. I-23, art. 14.

General principle

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

Costs

No costs

334.39 (1) Subject to subsection (2), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless

(a) the conduct of the party unnecessarily lengthened the duration of the proceeding;

(b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or

(c) exceptional circumstances make it unjust to deprive the successful party of costs.

SOR/2007-301, s. 7

Principe général

3 Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

Dépens

Sans dépens

334.39 (1) Sous réserve du paragraphe (2), les dépens ne sont adjugés contre une partie à une requête en vue de faire autoriser l'instance comme recours collectif, à un recours collectif ou à un appel découlant d'un recours collectif, que dans les cas suivants :

a) sa conduite a eu pour effet de prolonger inutilement la durée de l'instance;

b) une mesure prise par elle au cours de l'instance était inappropriée, vexatoire ou inutile ou a été effectuée de manière négligente, par erreur ou avec trop de circonspection;

c) des circonstances exceptionnelles font en sorte qu'il serait injuste d'en priver la partie qui a eu gain de cause.

DORS/2007-301, art. 7

Costs

Awarding of Costs Between Parties

Discretionary powers of Court

400 (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

Crown

(2) Costs may be awarded to or against the Crown.

Factors in awarding costs

(3) In exercising its discretion under subsection (1), the Court may consider

(a) the result of the proceeding;
(b) the amounts claimed and the amounts recovered;
(c) the importance and complexity of the issues;
(d) the apportionment of liability;
(e) any written offer to settle;
(f) any offer to contribute made under rule 421;
(g) the amount of work;
(h) whether the public interest in having the proceeding litigated justifies a particular award of costs;
(i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
(j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;
(k) whether any step in the proceeding was
(i) improper, vexatious or unnecessary, or
(ii) taken through negligence, mistake or excessive caution;
(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were

Dépens

Adjudication des dépens entre parties

Pouvoir discrétionnaire de la Cour

400 (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

La Couronne

(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.

Facteurs à prendre en compte

(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

a) le résultat de l'instance;
b) les sommes réclamées et les sommes recouvrées;
c) l'importance et la complexité des questions en litige;
d) le partage de la responsabilité;
e) toute offre écrite de règlement;
f) toute offre de contribution faite en vertu de la règle 421;
g) la charge de travail;
h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
i) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;
j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;
k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :
(i) était inappropriée, vexatoire ou inutile,
(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

represented by the same solicitor but separated their defence unnecessarily;
(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;
(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;
(n.1) whether the expense required to have an expert witness give evidence was justified given
(i) the nature of the litigation, its public significance and any need to clarify the law,
(ii) the number, complexity or technical nature of the issues in dispute, or
(iii) the amount in dispute in the proceeding; and
(o) any other matter that it considers relevant.

Tariff B

(4) The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

Directions re assessment

(5) Where the Court orders that costs be assessed in accordance with Tariff B, the Court may direct that the assessment be performed under a specific column or combination of columns of the table to that Tariff.

Further discretion of Court

(6) Notwithstanding any other provision of these Rules, the Court may

(a) award or refuse costs in respect of a particular issue or step in a proceeding;
(b) award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;
m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;
n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;
n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :
(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,
(ii) le nombre, la complexité ou la nature technique des questions en litige,
(iii) la somme en litige;
o) toute autre question qu'elle juge pertinente.

Tarif B

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

Directives de la Cour

(5) Dans le cas où la Cour ordonne que les dépens soient taxés conformément au tarif B, elle peut donner des directives prescrivant que la taxation soit faite selon une colonne déterminée ou une combinaison de colonnes du tableau de ce tarif.

Autres pouvoirs discrétionnaires de la Cour

(c) award all or part of costs on a solicitor-and-client basis; or
(d) award costs against a successful party.

Award and payment of costs

(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust.

SOR/2002-417, s. 25(F); SOR/2010-176, s. 11.

(6) Malgré toute autre disposition des présentes règles, la Cour peut :
a) adjuger ou refuser d'adjuger les dépens à l'égard d'une question litigieuse ou d'une procédure particulières;
b) adjuger l'ensemble ou un pourcentage des dépens taxés, jusqu'à une étape précise de l'instance;
c) adjuger tout ou partie des dépens sur une base avocat-client;
d) condamner aux dépens la partie qui obtient gain de cause.

Adjudication et paiement des dépens

(7) Les dépens sont adjugés à la partie qui y a droit et non à son avocat, mais ils peuvent être payés en fiducie à celui-ci.

DORS/2002-417, art. 25(F); DORS/2010-176, art. 11.

***Federal Courts Citizenship, Immigration and Refugee Protection Rules,* SOR/93-22**

Costs

22 No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

SOR/2002-232, s. 11.

Règles des cours fédérales en matière de citoyenneté, d'immigration et de protection des réfugiés* (DORS/93-22*)

Dépens

22 Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

DORS/2002-232, art. 11

TARIFF B (Rules 400 and 407)

Counsel Fees and Disbursements Allowable on Assessment

Bill of costs

1 (1) A party seeking an assessment of costs in accordance with this Tariff shall prepare and file a bill of costs.

Content of bill of costs

(2) A bill of costs shall indicate the assessable service, the column and the number of units sought in accordance with the table to this Tariff and, where the service is based on a number of hours, shall indicate the number of hours claimed and be supported by evidence thereof.

Disbursements

(3) A bill of costs shall include disbursements, including

(a) payments to witnesses under Tariff A; and

(b) any service, sales, use or consumption taxes paid or payable on counsel fees or disbursements allowed under this Tariff.

Evidence of disbursements

(4) No disbursement, other than fees paid to the Registry, shall be assessed or allowed under this Tariff unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party.

Calculation

2 (1) On an assessment, the assessment officer shall determine assessable costs by applying the formula

$$\mathbf{A \times B + C}$$

where

A

is

- **(a)** the number of units allocated to each assessable service, or
- **(b)** where the service is based on a number of hours, the number of units allocated to that service multiplied by the number of hours;

B

is the unit value as established in section 3 and adjusted in accordance with section 4; and

C

is the amount of assessable disbursements.

Fractional amounts

(2) On an assessment, an assessment officer shall not allocate to a service a number of units that includes a fraction.

Unit value

3 The unit value as at January 1, 1998 is $100.

Adjustment of unit value

4 (1) On April 1 in each year, the Chief Justices of the Court of Appeal and the Federal Court, in consultation with one another, shall adjust the unit value by multiplying it by the amount determined by the formula

A/B × 100

where

A

is the Consumer Price Index for all items for Canada, as published by Statistics Canada under the authority of the *Statistics Act*, in respect of December of the preceding year; and

B

is the Consumer Price Index for all items for Canada, as published by Statistics Canada under the authority of the *Statistics Act*, in respect of December 1994.

Rounding of result

(2) Where a calculation under subsection (1) results in an amount that is not evenly divisible by 10, the resulting amount shall be

(a) where it is less than 100, rounded to the next higher amount that is evenly divisible by 10; and

(b) where it is greater than 100, rounded to the next lower amount that is evenly divisible by 10.

Communication of adjusted unit value

(3) The Chief Justices shall without delay communicate adjustments to the unit value made under subsection (1) to their respective courts and to their assessment officers.

TABLE

Item	Assessable Service	Number of Units				
		Column I	Column II	Column III	Column IV	Column V
	A *Originating documents and Other Pleadings*					
1	Preparation and filing of originating documents, other than a notice of appeal to the Federal Court of Appeal, and application records.	1 - 3	2 - 5	4 - 7	5 - 9	7 - 13
2	Preparation and filing of all defences, replies, counterclaims or respondents' records and materials.	1 - 3	2 - 5	4 - 7	5 - 9	7 - 13
3	Amendment of documents, where the amendment is necessitated by a new or amended originating document, pleading, notice or affidavit of another party.	1 - 2	1 - 4	2 - 6	3 - 7	4 - 8
	B *Motions*					
4	Preparation and filing of an uncontested motion, including all materials.	1 - 2	1 - 3	2 - 4	2 - 5	2 - 6
5	Preparation and filing of a contested motion, including materials and responses thereto.	1 - 3	2 - 5	3 - 7	4 - 9	5 - 11
6	Appearance on a motion, per hour.	1	1 - 2	1 - 3	1 - 4	1 - 5
	C *Discovery and Examinations*					
7	Discovery of documents, including listing, affidavit and inspection.	1 - 2	1 - 3	2 - 5	3 - 9	5 - 11
8	Preparation for an examination, including examinations for discovery, on affidavits, and in aid of execution.	1 - 2	1 - 3	2 - 5	4 - 8	7 - 11
9	Attending on examinations, per hour.	0 - 1	0 - 2	0 - 3	0 - 4	0 - 5
	D *Pre-Trial and Pre-Hearing Procedures*					
10	Preparation for conference, including memorandum.	1 - 2	2 - 5	3 - 6	4 - 8	7 - 11
11	Attendance at conference, per hour.	1	1 - 2	1 - 3	1 - 4	1 - 5
12	Notice to admit facts or admission of facts; notice for production at hearing or trial or reply thereto.	1	1 - 2	1 - 3	1 - 4	1 - 5

Item	Assessable Service	Number of Units				
		Column I	Column II	Column III	Column IV	Column V
13	Counsel fee:					
	(a) preparation for trial or hearing, whether or not the trial or hearing proceeds, including correspondence, preparation of witnesses, issuance of subpoenas and other services not otherwise particularized in this Tariff; and	1	1 - 2	2 - 5	3 - 9	4 - 11
	(b) preparation for trial or hearing, per day in Court after the first day.	1	1	2 - 3	2 - 6	3 - 8
	E *Trial or Hearing*					
14	Counsel fee:					
	(a) to first counsel, per hour in Court; and	1	1 - 2	2 - 3	2 - 4	3 - 5
	(b) to second counsel, where Court directs, 50% of the amount calculated under paragraph (a).					
15	Preparation and filing of written argument, where requested or permitted by the Court.	1 - 3	2 - 5	3 - 7	4 - 9	5 - 11
	F *Appeals to the Federal Court of Appeal*					
16	Counsel fee:					
	(a) motion for leave to appeal and all services prior to the hearing thereof; and	1- 3	2 - 5	4 - 7	5 - 9	7 - 13
	(b) on an oral hearing of the motion for leave to appeal, per hour.	1	1	1	1	1 - 2
17	Preparation, filing and service of notice of appeal.	1	1	1	1	1
18	Preparation of appeal book.	1	1	1	1 - 2	1 - 3
19	Memorandum of fact and law.	1 - 3	2 - 5	4 - 7	5 - 9	7 - 13
20	Requisition for hearing.	1	1	1	1	1
21	Counsel fee:					

Item	Assessable Service	Number of Units				
		Column I	Column II	Column III	Column IV	Column V
	(a) on a motion, including preparation, service and written representations or memorandum of fact and law; and	1	1 - 2	2 - 3	2 - 4	3 - 5
	(b) on the oral hearing of a motion, per hour.	1 - 2	1 - 3	2 - 4	2 - 5	2 - 6
22	Counsel fee on hearing of appeal:					
	(a) to first counsel, per hour; and	1	1 - 2	2 - 3	2 - 4	3 - 5
	(b) to second counsel, where Court directs, 50% of the amount calculated under paragraph (a).					
	G *Miscellaneous*					
23	Attendance on a reference, an accounting or other like procedure not otherwise provided for in this Tariff, per hour.	1	1 - 2	1 - 3	2 - 4	2 - 5
24	Travel by counsel to attend a trial, hearing, motion, examination or analogous procedure, at the discretion of the Court.	1	1 - 3	1 - 5	1 - 7	1 - 9
25	Services after judgment not otherwise specified.	1	1	1	1	1
26	Assessment of costs.	1 - 2	1 - 4	2 - 6	3 - 7	5 - 10
27	Such other services as may be allowed by the assessment officer or ordered by the Court.	1	1 - 2	1 - 3	1 - 4	1 - 5
28	Services in a province by students-at-law, law clerks or paralegals that are of a nature that the law society of that province authorizes them to render, 50% of the amount that would be calculated for a solicitor.					

SOR2004-283, ss. 30, 31(E), 32