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 Approval of Legal Fees returnable February 26-27, 2020)

February 14, 2020

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
National Litigation Sector
120 Adelaide Street West, Suite 400
Toronto, Ontario M5H 1T1
Fax : 416-952-4518

Per: Christine Mohr / Melanie Toolsie
Tel: 647-256-0773 / 647-256-0567

Counsel for the Respondent, the Attorney General of Canada

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The Attorney General of Canada (Canada) was granted leave to make submissions with respect to this motion for the approval of Class counsel's legal fees in the amount of $2,131,297.05 (inclusive of disbursements and taxes). The Court has recognized that Canada's perspective on the government financial support programs to thalidomide survivors and on how the programs came about goes to the issue of the "results of the litigation". This perspective is helpful in determining if the legal fees sought by class counsel are fair and reasonable.[1]

2. Legal fees should reflect the results achieved by Class counsel. To determine whether the level and structure of fees sought by Class counsel are fair and reasonable, the court must balance a desire to promote the use of class proceedings with the factual and legal context and public law considerations, including the nature of judicial review. Courts should also consider the extent to which the fee order will impact class members and/or undermine the government's policy objectives.

3. The level and structure of fees requested by Class counsel in this case are not proportionate to the results achieved in this litigation, will undermine the objectives of the Canadian Thalidomide Survivors Support Program ("CTSSP") and will impose an undue burden on already vulnerable class members who might ultimately be found eligible. This class judicial review proceeding, unlike a class action, did not and could not result in a direct monetary outcome for the class members, nor did it guarantee the number of class members who may be recognized as thalidomide survivors. The potential remedies were always the extraordinary ones set out in section 18(1) of the *Federal Courts Act*. Class counsel must take these factors into account in determining whether and how to litigate class judicial review proceedings, particularly where, as

[1] *Wenham v AGC*, 2019 FC 1653, paras 30-32, see also paras 27-28 where the Court considered and declined to appoint an *amicus* in this case, **Respondent's Book of Authorities (Fee Approval), (RBA-Fees), tab 1.**

occurred here, the government was responding to the issue through the political process. The institution of a class proceeding does not guarantee recovery of legal fees.

4. The narrative advanced by Class counsel in this motion and in the motion for costs is premised on the theory that Canada acted improperly when it developed the CTSSP in response to, and through, the political process, and that without this litigation, no action would have been taken. That narrative is false and should be wholly rejected. It ignores the factual record, reflects a fundamental misunderstanding of the context within which government programs like the TSCP and CTSSP are developed, and its acceptance would be contrary to the public interest. An objective review of the history of the programs and the litigation chronology indicates that the CTSSP was not the "direct result" of this litigation but was a product of the proper functioning of our democratic process.

5. Canada does not assert that Class counsel are not entitled to any fees for their work. Indeed, to that end Canada is prepared to make a contribution towards Class counsel's fees and disbursements in the amount of $90,000.00. Canada maintains however, that an order that would deprive class members found eligible of $187,500 is not proportionate and should not be approved. If fees are approved, they should reflect the results achieved and be drawn from the proceeds recovered in the settlement.

6. Canada also takes the position that no order can issue which would require the Crown or the Third Party Administrator (Administrator) to hold back any portion of CTSSP payments so that they may be redirected to Class counsel on account of legal fees. CTSSP payments are public funds and the Crown's immunity from execution and attachment applies to these funds. The *Federal Courts Rules* cannot override the operation of common law principles of Crown immunity.

7. Finally, Class counsel's request for an order seeking advance approval of fees or permitting him to enter into individual retainer agreements with class members who are not found eligible is not within the scope of this class proceeding.

B. STATEMENT OF FACTS

8. Canada repeats and relies on the summary of facts set out in its written representations filed in response to the Applicant's motion for costs.

PART II – POINTS IN ISSUE

9. Canada's submissions will address the following points in issue:

(a) whether the fee requested is fair and reasonable compensation in light of the way in which the programs came about that goes to the issue of success or results of the litigation;

(b) whether common law principles of crown immunity preclude an order requiring the Crown or the CTSSP Administrator to hold back a portion of any CTSSP payments which class members may be eligible on account of legal fees; and

(c) whether the request for permission to fix contingency fees for future litigation unrelated to this proceeding is appropriate.

PART III – SUBMISSIONS

A. LEGAL FEES SHOULD REFLECT THE NATURE OF THE PROCEEDING AND THE RESULTS ACHIEVED BY CLASS COUNSEL

10. The Federal Court has authority to approve the payment of legal fees and disbursements to Class counsel pursuant to rule 334.4, which provides:[2]

333.4 Approval of Payments – No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge.	**334.4 Approbation des paiements** - Tout paiement direct ou indirect à un avocat, prélevé sur les sommes recouvrées à l'issue d'un recours collectif, doit être approuvé par un juge.

[2] The rules also require a representative applicant to provide a summary of any agreement respecting fees and disbursements with their counsel at the certification stage (rule 334.16(1)(e)(iv)), and the proposed fees must also be disclosed in notices of certification and notice of a settlement approval hearing (rule 334.32(5)(d)).

11. In class proceedings, fees are generally considered a private matter that is between Class counsel and class members. Fees are negotiated and set out in retainer agreements entered into between representative plaintiffs and Class counsel, but are always subject to the approval of the Court which ensures that the interests of the class as a whole are protected.[3] Courts will assess whether the settlement resulted from *productive* counsel time that should be rewarded, where other process were in play and benefitting the settlement.[4]

12. In the Class Action Contingency Fee Retainer Agreement between Mr. Wenham and Koskie Minsky,[5] "Recovery" and "Success" were defined as follows:

> **"Recovery"** means the amount actually recovered by award, judgment, settlement or otherwise, including any amounts awarded or paid in any individual assessment of damages or process for the reconsideration of applications to the TSCP as ordered by the Court (including any lump sum payments and the present value of ongoing support payments payable pursuant to the TSCP), excluding any amount separately identified or specified as costs and/or disbursements.
>
> **"Success"** means judgment or award in favour of some or all Class members or a settlement that benefits some or all Class Members.

13. In addition to rule 334.39, which protected the applicant against an award of costs, the Contingency Fee Agreement also contained several provisions limiting the risk to Class counsel of pursuing certification of this judicial review application.[6]

14. The terms of the Settlement do not provide for "recovery" or "success" as defined in the retainer agreement. There is no judgment or award, no provision in the Settlement providing for a payment to class members by virtue of their membership in the class, nor is there a process for reconsideration of applications to the TSCP.

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[3] *Manuge v Canada*, 2013 FC 341, para 28, **Joint Book of Authorities (JBA), tab 6**; *Endean v CRCS*, 2000 BCSC 971, paras 40-41, **RBA-Fees, tab 2**.
[4] *Killough v The Canadian Red Cross Society*, 2007 BCSC 941, paras 35-45, **RBA-Fees, tab 3.**
[5] Affidavit of Bruce Wenham, dated Dec 13, 2019, Exhibit 5, para 1(j), (k), **Applicant's Motion Record (Fee Approval), (AMR-Fees) Vol 4 of 5, tab C, p 970.**
[6] *Ibid*, paras 7-9, 17, 20-23 and 26, **AMR-Fees, Vol 4 of 5, tab C, p 970.**

15. Instead of establishing entitlement to fees under this agreement, Class counsel argues that the litigation was a success because the CTSSP is the "direct result" of the litigation. As set out below, Canada disputes this proposition and states that the CTSSP was developed in response to and through legitimate political processes. That is not to say that the Settlement provides no benefit to the class; however, as set out below the results achieved by Class counsel in the settlement are modest. The fees ordered ought to reflect the causal link between the results achieved and the litigation.

1) Assessing the reasonableness of fees in judicial review proceedings relating to government programs

16. In assessing the level and structure of class counsel fees, courts should be mindful of the nature of the proceedings, and the particular factual and legal context of the legislative scheme or government program involved.

17. Canada has an interest in assisting the Court with the legal principles that should guide the Court's approach to rules 334.39 and 334.4 and with respect to this Court's assessment of what may constitute fair and reasonable payments to solicitors in the context of class judicial review applications, in contrast to class actions.

18. There are three primary distinctions. First, in terms of remedy, a successful result in an application will typically not result in an award of damages or other monetary recovery, and instead remedies will be limited to the prerogative remedies listed in section 18 of the *Federal Courts Act*. Second, judicial review applications are expressly designed to inexpensively facilitate access to justice through their summary nature and streamlined procedures (section 18.4(1)).[7] Third, the public law orientation of judicial review which reflects the court's supervisory role over administrative decision-making means that even where an applicant could establish the grounds for a remedy, the Court may dismiss the application on account of other compelling public

[7] See also: *Bisaillon v Concordia University*, 2006 SCC 19, paras 16-22, **RBA-Fees, tab 4;** and *Canada v Berhad*, 2005 FCA 267, para 60, **RBA-Fees, tab 5,** where the Courts have distinguished judicial review applications from actions.

law imperatives, such as ripeness, mootness, adequate alternative remedy, or because a matter is otherwise to be dealt with under section 18.5 of the *Federal Courts Act*. [8]

19. These distinctions are important and may require a more nuanced approach in applying jurisprudence concerning legal fees that has been developed in the context of private law matters.

20. With respect to the factual and legal context, in this case, the context includes the history and background to the government's three *ex gratia* thalidomide support programs dating back to 1990, the parliamentary processes in 2014, 2016 and 2017, and the internal policy and funding processes which resulted in the introduction of the CTSSP.

21. The legislative history and factual record demonstrate that successive governments responded to citizens' concerns through political, not legal processes, to recognize a moral obligation to support thalidomide survivors. That obligation was met by providing financial assistance through the vehicle of *ex gratia* programs. The 1990 and 2019 programs were established through formal orders in council, whereas the 2015 program was established as an exercise of the prerogative. When Members of Parliament and others again raised concerns about the terms of the 2015 program, government officials and the executive responded by following the established processes for designing government programs and obtaining the necessary funding and policy approvals required, while respecting the various privileges that restrict their ability to disclose certain information to the public.

[8] The Supreme Court of Canada has distinguished the public law nature of judicial review from other procedures: *Canada (AG) v TeleZone Inc.*, 2010 SCC 62, paras 24, 48, 78, 80, **RBA-Fees, tab 6.**

2) The CTSSP was developed in response to, and through, the legitimate political processes

22. Contrary to the assertions of Class counsel that but for this litigation the changes to the TSCP and the introduction of the CTSSP would not have occurred,[9] the evidence demonstrates that this litigation, together with the related litigation in *Fontaine, Rodrigue and Briand*, were but one factor considered in the broader policy process that led to the development of the CTSSP. The CTSSP was not introduced as a "direct result" of this litigation.

23. The government introduced the CTSSP as a response to concerns raised by multiple sources regarding the effectiveness of the TSCP in recognizing and supporting thalidomide victims, beginning in the spring 2016. These sources include Parliamentarians and the Standing Committee on Health ("HESA"), British Columbia's Chief Medical Officer, an E-petition called "Canada's Forgotten Thalidomide Survivors" containing nearly 1000 signatures, the TSCP's Administrator (Crawford), TVAC, individuals whose TSCP applications were denied.[10]

24. Concerns about the TSCP were first raised in March of 2016, not long after the TSCP Administrator began to process applications and make decisions. These concerns led HESA to undertake a review of the TSCP and ultimately in June 2017 recommend to Health Canada that the eligibility criteria be revisited, that it include clinical evaluation to determine on a balance of probabilities the likelihood of thalidomide exposure in accordance with international best practices and with a focus upon the U.K. model.[11]

25. From the time that concerns about the TSCP were first raised, Health Canada actively engaged in examination of the issues and considered the government's options. After reviewing the multiple concerns and recommendations, Health Canada's

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[9] Affidavit of Cindy Moriarty, dated January 24, 2020, (Moriarty Affidavit (January)) para 82, **RMR-Costs, tab 1, p 26.**
[10] *Ibid*, paras 52-67, **RMR-Costs, tab 1, p 16-21.**
[11] *Ibid*, para 59, **RMR-Costs, tab 1, p 18.**

work in this area led to the February 2018 budget announcement illustrating the government's financial commitment to create a new and improved financial assistance program for thalidomide victims.[12] The federal budget, which is the result of months of preparation, rather than a knee jerk reaction, sets out the government's plan for the sustainable spending of money each year through direct spending initiatives planned, as well as major transfer payments to the provinces and territories. All of this took place some nine months before this proceeding was certified.[13]

26. At the time the government made its commitment through the budget announcement in February 2018, the *Fontaine* application had been dismissed as non-justiciable, and the certification motion in this proceeding had been denied. The formal commitment to expand eligibility was also made prior to the adverse decisions in the related individual applications in *Briand* and *Rodrigue*. The evidence demonstrates that despite the outcome of *Fontaine*, and the later denial of certification, Health Canada's activities continued to focus on following through on the commitment made in February 2018.[14]

27. 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 amongst 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, which made it clear that the government was responding to the HESA recommendations to improve the support provided to thalidomide survivors.[15]

28. In addition to considering the information provided by stakeholders, throughout this period, Health Canada continued to consult, and also received the written submissions provided to it by the applicant through his counsel, in April 2018.

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[12] Moriarty Affidavit (January), paras 17-24, 63, **RMR-Costs, tab 1, pp 6-8, 20.**
[13] *Ibid*, para 83, **RMR-Costs, tab 1, p 26.**
[14] *Ibid*, para 85 **RMR-Costs, tab 1, p 27.**
[15] *Ibid*, para 66 **RMR-Costs, tab 1, p 20.**

As with the input of the other stakeholders and experts, the submissions provided were considered in the development of the new program.[16]

29. On April 5, 2019, the Governor in Council established the CTSSP by an Order in Council ("OIC").[17]

30. Class counsel's submissions in this motion on the one hand suggest that the program development moved too slowly and on the other hand suggest that on January 9, 2019, the Minister rushed to announce the anticipated roll out of the program, all of which ignore the months of planning and design and approval processes required to roll out this program.[18] The suggestion that the November 1, 2018 certification decision affected the timing of the announcement is pure speculation and has no evidentiary foundation.

31. Class counsel's submissions in paragraphs 64-68 ignore the work undertaken by the parliamentary and executive branches, and suggest that the HESA review and recommendations, the Budget 2018 commitment, and Health Canada's policy planning throughout 2018, all of which took place before the certification, were an attempt to circumvent the litigation process. That implication is also without foundation. Significant policy work had been completed by the time the government publicly committed to expanding eligibility for financial support in February 2018. Extensive work on the development of the program details and to meet all of the internal processes required before the OIC could be issued then continued throughout the remainder of 2018 leading up to the Minister's announcement in January 2019, and through to the promulgation of the Order in Council in April 2019.

32. Moreover, the continued references to the Crown's alleged failure to meet with Class counsel or the applicant to discuss proposed changes to the program, also reflects a misunderstanding of the public policy processes and the status of a litigant in

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[16] Moriarty Affidavit (January), para 67, **RMR-Costs, tab 1, p 21.**
[17] *Ibid*, para 65 **RMR-Costs, tab 1, p 20.**
[18] *Ibid*, paras 17-24, 60-65, 83, **RMR-Costs, tab 1, pp 6-8, 19-20, 26.**

those processes. Health Canada, through AGC Counsel, shared information about changes to the program with applicant's counsel, as and when it was able to by law.[19]

33. Lastly, contrary to the allegation that Canada took no action in response to the class as a whole, it is clear that Canada has acted in the public interest in designing the new program, which is open to Class members but also to those who chose not to litigate, those on the 1960s registry who have not come forward, and for unknown others who may have not applied to the TSCP as they felt they could not meet the evidentiary requirements, or who were unaware of the TSCP. That Canada's response was not one provided through the litigation process as Class counsel or the applicant would have preferred, or on the timeline they desired, does not render it deficient.

3) The CTSSP includes terms which extend well beyond the issues raised in the application

34. The CTSSP's eligibility criteria, the grant of discretion and ability to consider all relevant information, the access to a medical-legal committee, the use of the UK algorithm and the increased financial support, illustrate that the CTSSP not only addresses the deficiencies associated with the TSCP raised in this proceeding, but included a number of changes that go well beyond those issues as a consequence of the broader review.

35. The hallmark features of the CTSSP are:

(a) the CTSSP Administrator's broad discretion;

(b) the use of a diagnostic algorithm based on the latest available international expertise on Thalidomide embryopathy which allow for an objective and consistent review of applicants' symptoms; and

(c) use of the most generous date of birth parameters.

36. Applicants found eligible under the CTSSP will receive an *ex gratia* lump sum payment of $250,000 ($125,000 more than the TSCP), increased ongoing annual

[19] Moriarty Affidavit (January), paras 83-84, **RMR-Costs, tab 1, pp 26-27.**

tax-free payments and access to the Extraordinary Medical Assistance Fund (EMAF), which increased from $500,000 to $1,000,000 per year. Survivors already supported under the TSCP will transfer to the CTSSP, and will receive a one-time *ex gratia* payment of $125,000 in addition to the *ex gratia* lump sum payment received under the TSCP, and their annual payments will continue. None of these improvements relate to this proceeding.

37. As promised in February 2018, the eligibility criteria were expanded. The third party Administrator is to determine whether a person is eligible under the CTSSP by considering all relevant information provided by applicants. Specifically, the OIC requires the Administrator to use the following three-step process:

(a) it must conduct a preliminary assessment of the person's eligibility based on the following criteria:

(i) the date of birth of the person in Canada falls within the period beginning on December 3, 1957 and ending on December 21, 1967;

(ii) the person's date of birth or any other information available is consistent with maternal ingestion of thalidomide in the first trimester of pregnancy; and

(iii) the nature of the person's congenital malformations is consistent with known characteristics of congenital malformations linked to thalidomide;

(b) if the third party administrator considers that it is likely based on the preliminary assessment that the person's congenital malformations are the result of maternal ingestion of thalidomide in the first trimester of pregnancy, it must assess the probability that the person's congenital malformations are consistent with known patterns of thalidomide 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 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.[20]

38. The CTSSP gives the Administrator broad discretion to assess eligibility on a balance of probabilities, supported by a diagnostic algorithm and the input of an expert committee. The former TSCP Administrator's binary assessment to ascertain the existence of objectively verifiable medical records evidence has been enhanced through the CTSSP Administrator's distinct mandate to consider all probative evidence linking first trimester maternal thalidomide ingestion with the individual's conditions. This enhancement, modeled after the UK program, was one of the HESA recommendations and was also one of the common grounds for judicial review in the related four proceedings.

39. The use of the diagnostic algorithm for thalidomide embryopathy is intended to assist in more accurately identifying probable thalidomide survivors. The algorithm integrates the most up to date and comprehensive international scientific and clinical data on thalidomide embryopthy, and takes into account each applicant's specific information to arrive at a numeric score indicating the likelihood of exposure to thalidomide. Several features may be expected to occur together and when seen in this grouping would attract an enhanced score.[21] The use of the algorithm is also modeled after the UK program and was not part of any of the grounds for the judicial review application.

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[20] *Canadian Thalidomide Survivors Support Program Order*, P.C. 2019-0271; Moriarty Affidavit (January), para 69, **RMR-Costs, tab 1, p 21.**

[21] Mansour et al, "A clinical review and introduction of the diagnostic algorithm for thalidomide embryopathy (DATE)" (1019), Affidavit of Jonathan Ptak, sworn February 11, 2020, (Ptak SA Affidavit), Exhibit 61, **Joint Motion Record (Settlement Approval), JMR-SA, tab F, p 1242.**

40. The CTSSP invites applications from those born between December 3, 1957 to December 21, 1967. These dates were chosen to provide the broadest window of time that a woman could have possibly ingested this drug. The initial parameter of December 3, 1957 is based on global availability (as opposed to authorized use in Canada), and was determined by calculating the earliest plausible premature birth at 22 weeks gestation, and allowing for maternal ingestion of thalidomide up to the last day of the first trimester of pregnancy. In other words, if October 1, 1957, is the last day of the first trimester, and a pre-term baby is considered viable at 22 weeks, the earliest possible DOB after October 1, 1957, is December 3, 1957.[22]

41. The latest parameter of December 21, 1967 is based on the withdrawal of thalidomide from the Canadian market (March 2, 1962) plus five years (i.e. to March 2, 1967). The additional five years is to allow for its contemporary shelf life. This date of birth parameter assumes full term gestation and allows for post-term delivery at 42 weeks gestation. The Program was unable to locate information about contemporaneous shelf-life of the drug. In other words, if March 2, 1967 is the last day of the first trimester, and a baby was carried post-term (42 weeks), the latest possible DOB after March 2, 1967 is December 21, 1967. [23]

42. In summary, the following highlights the benefits already put in place by the CTSSP, independent of the Settlement:

(a) the CTSSP provides increased funding to those found eligible through a doubling of the lump sum payment to $250,000.00, and increased funding for the Extraordinary Medical Assistance Fund;

(b) the CTSSP now includes the use of the diagnostic algorithm and the multi-disciplinary committee, and a more refined and comprehensive eligibility process, specifically tailored to identify persons whose anomalies are most likely to have resulted from thalidomide exposure;

(c) the CTSSP addresses the specific eligibility concerns arising from the TSCP, by allowing consideration of all relevant evidence provided by applicants in determining eligibility;

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[22] Moriarty Affidavit (January), paras 72-78, **RMR-Costs, tab 1, pp 23-25.**
[23] *Ibid.*

(d) the Administrator now has the authority to determine eligibility on a balance of probabilities standard in the preliminary assessment of the person's eligibility, which may consider broader evidence, results of a medical assessment and the input of medical-legal experts;

(e) while the CTSSP will be administered by a third party Administrator, the terms of the CTSSP allow access to expertise through a medical-legal committee, which will assess the medical and other evidence submitted and provide recommendations to the Administrator.

4) <u>The results achieved through the Settlement Agreement are modest</u>

43. With the above benefits already offered by the CTSSP, Class counsel's efforts achieved modest monetary and procedural benefits for the class members in the Settlement. Financially, the only benefits obtained are: (1) the potential entitlement to retroactive payments to June 3, 2019; and (2) payments to estates of those who are determined to be eligible for the CTSSP but pass away before receiving the initial lump sum payment.[24]

44. Procedurally, the Settlement spells out implicit procedural fairness requirements such as the opportunity to present more information if the diagnostic algorithm does not find a "probable" link between a class member's congenital malformations and thalidomide; the opportunity to seek reconsideration based on new evidence and receive an oral hearing upon denial of application and the advantage of having one's application determined in priority to non-class members' applications. In addition, Canada agreed to offer an opportunity for Mr. Wenham or another class member to provide input on the attributes, knowledge, experience and expertise of the members of the Multi-disciplinary Committee. [25]

45. Notably, Ms. Moriarty attested that sections 4.02(a) and 4.02(c) of the Settlement reflect decisions that Health Canada had made prior to entering into the Agreement. In particular, with respect to section 4.02(c), at that time of the DRC, there

[24] Settlement Agreement, Exhibit 56 to the Affidavit of Jonathan Ptak, dated December 13, 2019, ss. 4.04 & 4.06, **Applicant's Motion Record (Fee Approval), (AMR-Fees), Vol 3 of 5, tab 56, pp 793-794.**
[25] *Ibid*, s. 4.01, **AMR-Fees, vol 3 of 5, p 792.**

remained some uncertainty as to when Epiq would be given access to the UK Trust's DATE algorithm, a tool, which is indirectly referenced as a step in the eligibility assessment process in the OIC. That uncertainty was understood to be resolved by the time the settlement agreement was entered, and thus use of the algorithm is referenced in the agreement.[26]

46. Contrary to paragraph 146 of Mr. Ptak's affidavit,[27] where he asserts that this class proceeding was not solely about the monetary support to class members but also about them being recognized as thalidomide survivors, Canada reiterates that neither the Settlement nor the CTSSP guarantee that class members will be recognized as survivors. The CTSSP provides class members a further opportunity to be considered for support and recognition as survivors.

5) <u>The impact of the proposed fees on individual class members is not proportionate to the results achieved in the settlement</u>

47. In *McCrea,*[28] this Court recognized that in certain circumstances it is important to measure the fairness and reasonableness of legal fees from more perspectives and against all relevant factors: "What the case at bar requires is to measure fairness and reasonableness of the counsel fee against what is fair and reasonable to all of the class, Class Counsel, the defendant, and the public interest."

48. The same applies to the case at bar. The relevant factors include not just the risk of the litigation and the results achieved but also must be considered in view of the impact on class members and the fact that the legal fees will be paid out of public monies set aside to be distributed by way of *ex gratia* payments to thalidomide survivors who would likely have qualified for the CTSSP regardless of the settlement.

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[26] Moriarty Affidavit (January), para 89, **RMR-Costs, tab 1, p 28.**
[27] Affidavit of Jonathan Ptak, dated December 13, 2019, **AMR-Fees, Vol 1 of 5, tab B, p 36.**
[28] *McCrea v Canada*, 2019 FC 122, paras 108 and 111, **Joint Book of Authorities (Settlement Approval), tab 23.**

49. An impediment to the relief sought at paragraphs 1(a)(ii) and 2 of the Notice of Motion is the absence of a pool or fund of money which is properly characterized as being the "proceeds recovered in a class proceeding". This proceeding has not generated any monetary recovery. The lump sum and annual payments which are payable to individuals who fall within the class definition who apply and are found eligible have no connection to the settlement agreement.

50. Rather, it has generated the *potential* for retroactive payment of the annual amounts for those choosing to apply to the CTSSP after December 31, 2019, and who are ultimately found eligible. In addition, it has generated the *potential* for the payment to an estate, where a class member is found eligible, but passes away before they receive the lump sum payment.

51. As was indicated in *Brown*, there may well be cases where the application of the multiplier approach can result in an unseemly or unreasonable award even in the context of a lower-end settlement.[29] When taken together with the procedural safeguards, these limited gains, the relatively low legal risk taken by counsel, the relatively short duration of the litigation, and the low complexity of the issues do not justify a 15% legal fee approval.

52. Consequently, Canada suggests that the fees to which Class counsel may be eligible ought to be fixed at a level or in respect of only certain payments which would properly reflect the actual results achieved in the Settlement.

53. As illustrated in the following table, if this Court were to fix the fees at 15% of the lump sum and annual payments as sought by Class counsel – and if 10 or fewer class members are found eligible, those few individuals could be required to pay $187,500.00 in fees:

[29] See *Brown v. Canada (Attorney General)*, 2018 ONSC 3429, paras 48, 57, **RBA-Fees, tab 7;** Law Reform Commission of Ontario, *Final Report*, *Class Actions, Objectives, Experiences and Reforms*, July 2019, at 72, 99, **RBA-Fees, tab 20**.

Number of class members found eligible	*Lump Sum ($250,000.00) x 15%*	*Annual Payment (max $100,000.00) x 15% for 10 years*	*Total Fees payable to Class Counsel**	*Amount of fees per class member*
5	$187,500	$750,000	$937,500	$187,500
10	$375,000	$1,500,000	$1,875,000	$187,500
12	$450,000	$1,800,000	$2,131,297.05*	$177,608
15	$562,500	$2,250,000	$2,131,297.05*	$142,086
20	$750,000	$3,000,000	$2,131,297.05*	$106,564
25	$937,500	$3,750,000	$2,131,297.05*	$85,251
30	$1,125,000	$4,500,000	$2,131,297.05*	$71,043

*amount reduced to $2,131,297.05

54. Most of the case law relied on by Class counsel are "mega-fund cases", and are of little assistance here. The fees approved in *McCrea* may however be instructive, as the ultimate settlement in that case was expected to be between $9 and 11 million. In that case, this Court approved fees and disbursements of $2.1 million (plus HST) in respect of a certified class *action* that spanned more than twice the length of this litigation (seven+ years) and involved several motions, appeals and discovery.[30] It is not clear why a multiplier of 2X the fees reported by counsel is warranted here, where the results achieved through the litigation pale in comparison to those in *McCrea*.

B. NO ORDER CAN ISSUE TO REDIRECT A PORTION OF CTSSP PAYMENTS TO CLASS COUNSEL TO SATISFY A FEE AWARD

1) The Crown is immune from all forms of execution

55. Class counsel's request for an order requiring the Crown or CTSSP Administrator to hold back a portion of class members' CTSSP payments so that it may be redirected to class counsel is not available at law. Although this Court has held that it has inherent jurisdiction to grant a charging order or solicitor's lien in some

[30] *McCrea*, *supra*, paras 95, 123, **JBA, tab 23.**

circumstances,[31] common law principles of crown immunity preclude the court from making the order requested against the Crown in these circumstances.

56. At common law, the Crown is immune from all forms of charging orders, liens, attachment, garnishment, and execution. This immunity has also been codified through various statutes, including through sections 22 and 29 of the *Crown Liability and Proceedings Act.*

57. The basis of the Crown's common law immunity is the court's inability to make a coercive order against the Crown.[32] Courts have repeatedly held that sections 22 and 29 of the *CLPA* codify the common law position that the federal Crown is immune from attachment, charging orders, execution, seizure and mandatory injunctions.[33]

58. When asked to make orders similar to the request made in this case, courts have concluded that neither the inherent jurisdiction of the Court nor the rule-making capacity of the provincial superior court can derogate from the Crown's immunity from execution.[34]

59. In *Peepeetch v Canada (Attorney General)*, the trial judge accepted that he could not grant a charging order in favour of a law firm against monies payable by the federal Crown to the firm's former clients. Instead, the trial judge ordered the Crown to pay the monies into court on the basis of the inherent jurisdiction of the superior

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[31] *Schnurr v Canada*, 2016 FC 1231, para 25, **RBA-Fees, tab 8;** *Weight Watchers International Inc v Burns*, [1976] 1 FC 237 (FCTD), **RBA-Fees, tab 9**. In *Schnurr*, the order was available as the rental refunds that were subject to the solicitors' lien had voluntarily been paid into court by Canada, and the funds were no longer public monies.

[32] Peter Hogg, Patrick J. Monahan & Wade K Wright, Liability of the Crown, 4th ed (Toronto: Thomson Reuters Canada Ltd., 2011), at 46, **RBA-Fees, tab 21.**

[33] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 88, **RBA-Fees, tab 10;** *Canada v Kahnapace*, 2008 SKCA 15, paras 14-15, **RBA-Fees, tab 11;** *Fontaine v Canada (Attorney General)* 2007 BCSC 1841, para 14, **RBA-Fees, tab 12;** *Cybulski v Bertrand*, 2000 BCSC 623, para 45, **RBA-Fees, tab 13**.

[34] See also *Hislop v. Canada (Attorney General)*, 2008 CanLII 8248 (ONSC), para 65, affirmed 2009 ONCA 354, **RBA-Fees, tab 14.**

court to make such orders.[35] The Saskatchewan Court of Appeal overturned this order, finding that it was akin to a garnishment order or a mandatory injunction, neither of which were available against the Crown under the *CLPA.* The appellate court held that a third party's interest cannot attach to a payment by the Crown to another person, and that neither the rules nor inherent jurisdiction of the court alters this proposition.[36]

60. The effect of section 29 of the *CLPA* is that no execution or attachment, or similar process can be issued against the Crown to enforce payment of monies of costs.[37]

2) Public monies held and distributed by third parties are immune from attachment or garnishment

61. TSCP and CTSSP payments are administered by Epiq Class Action Services Canada Inc. (formerly Crawford) pursuant to a Contribution Agreement.[38] The funds used to make CTSSP payments are public funds earmarked for the ex gratia payments which the government has seen fit to provide to thalidomide survivors.

62. The fact that the funds used to make CTSSP payments are held or distributed by a third party does not alter the Crown's immunity. A similar situation arose in *Choken v Lake St. Martin Indian Band*. In that case, the Federal Court of Appeal found that federal funds paid to a Third Party Manager and deposited for the purpose of providing programs to Indian Band members were Crown funds and could not be garnished.[39]

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[35] *Peepeetch v Canada (Attorney General)*, 2005 SKQB 445, para 4, 16-17, 24, **RBA-Fees, tab 15.**
[36] *Peepeetch v. Canada (Attorney General)*, 2006 SKCA 143, paras 1, 5-8, **RBA-Fees, tab 16**
[37] *PSAC, Local 660 v Canadian Broadcasting Corp*, [1976] 2 FC 145, **RBA-Fees, tab 17.**
[38] Moriarty Affidavit (January), para. 81, **RMR-Costs, tab 1, p 26.**
[39] *Choken v Lake St Martin Indian Band*, 2004 FCA 248, para 25, **RBA-Fees tab 18.**

63. The Lake St Martin Indian Band entered into a Comprehensive Funding Arrangement (CFA) with the Minister, where the Minister transferred funds to the Band Council to provide Departmental programs and services to Band members.[40] Due to allegations of corruption, the Department appointed a Third Party Manager responsible for receiving and transferring monies under the CFA.[41]

64. Choken was a former employee of the Band who was successful in an unjust dismissal claim, and, amongst others, was owed approximately $90,000 by the Band. The Federal Court found that the funds paid to the Third Party Manager were not Crown funds and could therefore be garnished to pay the judgment debt to the former employees of the Band.[42]

65. On appeal, Justice Décary found that Crown immunity prevented the CFA funds from being garnished because the funds held by the Third Party Manager retained their status as public funds.[43] Justice Décary considered the provisions of the Third Party Management Agreement (TPMA) and found that they were premised on the monies remaining public funds at least until they were effectively used for the delivery of the programs and services under the CFA.[44] In particular, the Band was not a party to the TPMA, the Third Party Manager was simply administering the fund otherwise payable to the Band Council, the monies were held "in trust" by the Third Party Manager, and the monies could only be used for the purposes expressly outlined in the TPMA.[45]

66. The same analysis applies here. The funds transferred to Epiq under the Contributions Agreements remain public monies and can only be used for the purposes expressly outlined in the Contribution Agreements.

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[40] *Choken*, *supra*, para 3, **RBA-Fees, tab 18.**
[41] *Ibid*, para 6, **RBA-Fees, tab 18.**
[42] *Ibid*, para 9, **RBA-Fees, tab 18.**
[43] *Ibid*, para 24, **RBA-Fees, tab 18.**
[44] *Ibid*, para 25, **RBA-Fees, tab 18.**
[45] *Ibid*, para 26, **RBA-Fees, tab 18.**

67. The CTSSP funds remain public funds until payment is made to an individual who has been found to be a "thalidomide survivor" within the meaning of that term of the 2019 Order in Council. .

3) In any event, there is no judgment or award against which a charging order or solicitors' lien could issue

68. Separate and apart from the issue of the Crown's immunity from execution, attachment or garnishment, there is no judgment or award against which a charging order or solicitors' lien could issue. The lien is a pre-existing right confirmed by an order or declaration of right by the court. A charging lien creates the interests of a secured creditor in the property recovered or preserved.[46] In Ontario, section 34 of the *Solicitor's Act* codifies the right to a solicitor's lien. In order for a court to grant a charging order or solicitor's lien, courts have required that (1) the fund or property be in existence at the time the order is granted; (2) the property was 'recovered or preserved' through the instrumentality of the solicitor; and (3) there is evidence the client cannot or will not pay the lawyers' fees.[47]

69. None of these criteria can be satisfied here. The CTSSP is a program established by an Order in Council independently of the litigation; there is no court order, judgment or settlement fund created or in existence at the time the order is sought. Moreover, if class members are ultimately found eligible under the CTSSP, it is not due to the instrumentality of the solicitor; it is on the basis that they have met the prescribed criteria. Finally, no evidence has been presented to suggest that individual class members will refuse to pay legal fees to Class counsel directly upon request.

C. PROSPECTIVE FEE ORDERS SHOULD BE AVOIDED

70. The order sought in respect of prospective fees is beyond the scope of this litigation. Class members who wish to retain Class counsel may do so separately.

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[46] *Choken*, *supra*, para 101, **RBA-Fees, tab 18.**
[47] *Weenan v Biadi*, 2018 ONCA 288, para 15, **RBA-Fees, tab 19.**

It remains for another day, what future fees will be agreed upon by individual litigants who may wish to begin litigation arising out of the CTSSP. Such litigation will be independent of this proceeding, as is also confirmed in the Settlement.[48] As such this Court ought not to approve future unrelated litigation fees.

PART IV – ORDER SOUGHT

71. The Attorney General of Canada asks that:

(a) legal fees be approved at a level and in a manner that reflects the results achieved by Class counsel in this proceeding;

(b) no order issue which would require the Crown or the CTSSP Administrator to direct any portion of the amounts payable to class members who are found eligible, to Class Counsel; and that

(c) no order issue as to the fixing of contingency fees in relation to future proceedings that are unrelated to the existing class proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 14th day of February, 2020.

Christine Mohr

Melanie Toolsie

Of Counsel for the Respondent

[48] Settlement Agreement, Exhibit 56 to the Affidavit of Jonathan Ptak, dated December 13, 2019, ss. 5.01 & 5.02, **AMR-Fees, Vol 3 of 5, tab 56, pp 794-795.**

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

Authorities

1. *Wenham v AGC*, 2019 FC 1653
2. *Manuge v Canada*, 2013 FC 341
3. *Endean v CRCS*, 2000 BCSC 971
4. *Killough v The Canadian Red Cross Society*, 2007 BCSC 941
5. *Bisaillon v Concordia University*, 2006 SCC 19
6. *Canada v Berhad*, 2005 FCA 267
7. *Canada (AG) v TeleZone Inc.*, 2010 SCC 62
8. *McCrea v Canada*, 2019 FC 122
9. *Brown v. Canada (Attorney General)*, 2018 ONSC 3429
10. *Schnurr v Canada*, 2016 FC 1231
11. *Weight Watchers International Inc v Burns*, [1976] 1 FC 237 (FCTD)
12. *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85
13. *Canada v Kahnapace*, 2008 SKCA 15
14. *Fontaine v Canada (Attorney General)* 2007 BCSC 1841,
15. *Cybulski v Bertrand*, 2000 BCSC 623
16. *Hislop v. Canada (Attorney General)*, 2008 CanLII 8248 (ONSC), affirmed 2009 ONCA 354
17. *Peepeetch v Canada (Attorney General)*, 2005 SKQB 445
18. *Peepeetch v. Canada (Attorney General)*, 2006 SKCA 143
19. *PSAC, Local 660 v Canadian Broadcasting Corp*, [1976] 2 FC 145
20. *Choken v Lake St Martin Indian Band*, 2004 FCA 248 2004 FCA 248
21. *Weenan v Biadi*, 2018 ONCA 288

Secondary Sources

22. Peter Hogg, Patrick J. Monahan & Wade K Wright, Liability of the Crown, 4th ed (Toronto: Thomson Reuters Canada Ltd., 2011), at 4
23. Law Reform Commission of Ontario, *Final Report*, *Class Actions, Objectives, Experiences and Reforms*, July 2019

APPENDIX A - STATUTES AND REGULATIONS

Federal Courts Rules, **SOR/98-106**	**Règles des Cours fédérales (DORS/98-106)**
333.4 Approval of Payments – No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge.	**334.4 Approbation des paiements -** Tout paiement direct ou indirect à un avocat, prélevé sur les sommes recouvrées à l'issue d'un recours collectif, doit être approuvé par un juge.