

FEDERAL COURT

B E T W E E N :

BRUCE WENHAM

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

Class Proceeding

**WRITTEN REPRESENTATIONS OF THE APPLICANT
(MOTION FOR FEE APPROVAL
RETURNABLE FEBRUARY 26 & 27, 2020)**

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TABLE OF CONTENTS

	PAGE
PART I - OVERVIEW	1
PART II - FACTS	3
A. Background to this Class Proceeding.....	3
i. TSCP background; Bruce Wenham's TSCP application unfairly rejected.....	3
B. History of the Class Proceeding.....	5
i. Application for judicial review initiated (September 2016 – December 2016).....	5
ii. Certification motion initiated and scheduled (December 2016 – April 2017).....	5
iii. Applicant's first request for consultation	6
iv. Certification denied and appeal initiated and heard.....	7
v. Briand and Rodrigue decisions	7
vi. Budget 2018 and second request for consultation	8
vii. Certification by the Federal Court of Appeal and third request for consultation (November 2018)	9
viii. Attempts at notice to the class (November to December 2018)	10
ix. Initial announcement of anticipated roll out of CTSSP (January 2019)	10
x. CTSSP announcement led to additional motions, evidence and processes prior to the common issues hearing	11
xi. Settlement and related motions.....	13
PART III - ISSUES AND THE LAW	14
A. Legal test: fair and reasonable.....	14
i. Factors to be applied	14
ii. The legal fees sought promote access to justice	16
B. Fees sought are fair and reasonable in the circumstances	17

i.	Risks undertaken by Class Counsel were significant	17
ii.	Results would not have been achieved without Class Counsel	20
iii.	Time and resources devoted by Class Counsel were significant	24
iv.	This litigation was most important to the Class.....	26
v.	Legal fees did not interfere with Settlement.....	27
vi.	Class has no ability to pay fees and disbursements	27
vii.	Fees are lower than that expected by the class	28
viii.	Fees are in the lower range approved in similar cases.....	28
ix.	Legal services provided should be compensated	30
PART IV - ORDER REQUESTED		30
SCHEDULE "A" - LIST OF AUTHORITIES		32
SCHEDULE "B" - RELEVANT STATUTES		33
SCHEDULE "C" - TIME DEVOTED		34
SCHEDULE "D" - DISBURSEMENTS INCURRED		36
SCHEDULE "E" - PREVIOUSLY APPROVED FEES.....		37

PART I - OVERVIEW

1. The Class achieved success in this class proceeding and received advice and representation by legal counsel who agreed to do so without being paid on an hourly basis. Class Members benefited from the result achieved in this proceeding and the advice and representation provided by Class Counsel. Class Counsel now seeks compensation for the time, effort and risk incurred by them on behalf of the Class.
2. This motion seeks approval of Class Counsel fees and disbursements. This motion is supported by the Representative Plaintiff, Class Members, and all relevant jurisprudence. Class Counsel's request of a 15% contingency fee sought is: justified by the risks involved and results achieved, less than the retainer agreement and the Class' expectations, and in the low range of reasonable fees previously approved in similar cases.
3. The class proceeding challenged egregiously unreasonable barriers to the Thalidomide Survivors Contribution Program ("TSCP") that deprived the Applicant and Class Members – vulnerable Thalidomide survivors – of a fair chance at official recognition and much-needed financial support. Class Counsel agreed to represent the Class on a contingent basis. At the outset of the retainer the risks were high and they remained so throughout. The case was only certified in a precedent-setting decision by the Federal Court of Appeal.
4. Immediately after certification this proceeding directly resulted in Canada complying with the relief sought by the Class in the proceeding. Specifically, Canada provided another opportunity for Class Members to apply, be recognized and receive the financial support available for Thalidomide survivors without unfair evidentiary requirements through changes to the TSCP in the form of the Canadian Thalidomide Survivors Support Program ("CTSSP"). The Settlement now before the Court recognizes the success achieved by the Class and provides additional protections and benefits for Class Members under the CTSSP.

5. This class proceeding directly resulted in the CTSSP being implemented, which is confirmed by:

- (a) the fact that this class proceeding was the only legal proceeding advancing the rights of all Thalidomide survivors unfairly excluded from the TSCP. Canada was therefore forced to eventually face scrutiny by this Court on the systematic application of the TSCP to all Class Members, as opposed to the individual judicial reviews of individual applicants that resulted only in individual remedies not shared by the rest of those impacted;
- (b) Canada's full and vigorous defence of this class proceeding and the three other individual judicial review proceedings regarding the TSCP;
- (c) the vague and uncertain nature of Canada's statements about potential TSCP amendments in Budget 2018 that remained undefined until after this class proceeding was certified by the Federal Court of Appeal;
- (d) Canada's unexplained and repeated failure to announce "further details" about the Budget 2018 statements in accordance with several self-imposed deadlines until after this class proceeding was certified;
- (e) the lack of a policy decision, or program design and implementation approvals, for changes to the TSCP prior to this class proceeding getting certified;
- (f) the Minister of Health's rushed announcement of changes to the TSCP in the form of the CTSSP without any meaningful eligibility or due process details directly in the face of this class proceeding being certified only weeks earlier; and
- (g) the Applicant's repeated requests for consultation and his detailed submissions on changes to the TSCP, which were ultimately reflected in the design of the CTSSP.

6. In addition to Class Members being provided with another opportunity to apply, be recognized and receive the financial support available without the unfair evidentiary requirements of the TSCP, the Settlement Agreement improved the CTSSP and provided significant benefits for Class Members, including via:

- (a) confirmation of a balance of probabilities evidentiary standard for stage 1 of the CTSSP;
- (b) confirmation of the identification of the scientific algorithm to be used at stage 2 of the CTSSP;
- (c) input into the selection criteria for the multi-disciplinary committee of medical and legal experts for stage 3 of the CTSSP;
- (d) a reconsideration or appeal process for rejected applicants;
- (e) retroactive annual support payments to June 3, 2019; and

(f) payments to estates of deceased Class Members who are approved by the CTSSP.

7. Class Counsel worked diligently and devoted a significant amount of resources on behalf of the Class to ensure that all Class Members had representation in this proceeding. Class Counsel worked tirelessly to certify this proceeding as a class proceeding on behalf of the Class, disseminate notice of certification, prepare this proceeding for the adjudication of the merits, seek consultation with Canada on the issues in this proceeding, assess the CTSSP when it was announced, participate in settlement discussions, reach a Settlement benefiting the Class and provide advice and representation to the Class throughout. Class Counsel devoted over 1,800 hours of lawyer, student and clerk time to this proceeding, with a value of approximately \$850,000.¹

8. The ultimate result for the Class and the legal services provided to the Class in this high risk class proceeding justify Class Counsel's fee request as fair and reasonable. In the alternative, regardless of the influence of this proceeding on the CTSSP, Class Counsel's fees are fair and reasonable given the extensive advice and representation provided to the Class throughout and the additional protections and benefits provided by the Settlement Agreement.

PART II - FACTS

A. Background to this Class Proceeding

i. *TSCP background; Bruce Wenham's TSCP application unfairly rejected*

9. The Government of Canada's first program to compensate Thalidomide survivors established in the early 1990s (the Extraordinary Assistance Plan for Thalidomide Victims, "EAP") was criticized for providing inadequate compensation. In response, Canada set up the

¹ As of December 6, 2019 Class Counsel devoted approximately 1,820 hours of lawyer, student and clerk time with a value of approximately \$818,146.50. Further hours were necessary between December 7, 2019 and the Settlement approval motion on February 26 and 27, 2020: Affidavit of Jonathan Ptak (Fee Approval), sworn December 13, 2019 ["Ptak Affidavit"], paras. 133-134, Applicant's Motion Record (Fees Motion) ["AMR-Fees"], vol. 1, Tab B, pp. 33-34. Class Counsel anticipates providing an update of the time and value devoted to this proceeding in advance of the motion date.

TSCP in 2015, providing eligible persons a lump-sum payment of \$125,000 and annual support between \$25,000 and \$100,000 depending on one's level of disability.

10. Bruce and other Class Members who applied to the TSCP were required to satisfy the program's restrictive Evidentiary Criteria through the Documentary Proof Requirements, which could only be met via copies of a doctor's prescription; hospital birth records or medical/pharmacy records; or an affidavit of a person with direct knowledge (e.g. prescribing physician).² Canada "intentionally limited" the TSCP Administrator's discretion to preclude consideration of any other evidence as part of imposing a standard of "near certainty" on TSCP applicants to prove their deformities were caused by Thalidomide.³

11. Bruce Wenham's mother experienced morning sickness during her pregnancy and was provided with Thalidomide by her doctor. Bruce was born on July 14, 1958 with bilateral deformities to his arms, consistent with the effects of Thalidomide.⁴

12. Bruce applied to the TSCP. Since Bruce's mother's consulting physician was no longer available and the records from her visits with that doctor at Mount Sinai Hospital had been destroyed, he put together an application that included: (i) fact affidavits from himself, his brother and his wife testifying to his deformities, his siblings' lack of deformities, and his mother's ingestion of Thalidomide; (ii) an opinion from an expert geneticist on the causal link between his deformities and Thalidomide exposure; and (iii) a clinical opinion corroborating his

² Ptak Affidavit, paras. 17-25, AMR-Fees, vol. 1, Tab B, pp. 13-15.

³ Affidavit of Cindy Moriarty, affirmed January 24, 2020 ["Moriarty Affidavit"], para. 45.

⁴ Affidavit of Bruce Wenham, sworn December 13, 2019 ["Wenham Affidavit"], paras. 3-4, AMR-Fees, vol. 4, Tab C, pp. 921-922.

deformities as consistent with *in utero* Thalidomide exposure.⁵

13. The TSCP Administrator rejected his application through blind application of the unfair and unreasonable Evidentiary Criteria and Documentary Proof Requirements,⁶ despite the fact that these were effectively impossible for Bruce, and other Class Members, to meet.

B. History of the Class Proceeding

i. *Application for judicial review initiated (September 2016 – December 2016)*

14. Bruce filed an application for judicial review of the TSCP Administrator's rejection decision on September 12, 2016.⁷ The case proceeded in the normal course over the next couple months: the Certified Decision Record was served; affidavits were exchanged, and application records were served.⁸ The Respondent defended all aspects of the application, including this Court's jurisdiction to hear the application itself as being not justiciable.

ii. *Certification motion initiated and scheduled (December 2016 – April 2017)*

15. Upon reviewing Canada's responding materials for his application, Bruce and his counsel became aware that potentially 200 individuals were denied eligibility to the TSCP for the same reasons as he was – blind application of the unfair Evidentiary Criteria and Documentary Proof Requirements. Concerned for the broader interests of Thalidomide survivors unfairly denied eligibility to the TSCP, many of whom lacked resources to litigate and might be time-barred from doing so, Bruce retained Koskie Minsky LLP as Class Counsel and sought to certify his

⁵ Wenham affidavit, paras. 5-7, AMR-Fees, vol. 4, Tab C, pp. 922-923.

⁶ Ptak Affidavit, para. 31, AMR-Fees, vol. 1, Tab B, p. 16; Wenham Affidavit, para. 7, AMR-Fees, vol. 4, Tab C, pp. 923.

⁷ Ptak Affidavit, para. 32, AMR-Fees, vol. 1, Tab B, p. 16; Wenham Affidavit, para. 9, AMR-Fees, vol. 4, Tab C, pp. 923.

⁸ Ptak Affidavit, paras. 134-38, AMR-Fees, vol. 1, Tab B, pp. 16.

application as a class proceeding.⁹ He didn't have to do so and his individual judicial review would have been heard and determined within a year had he not. Instead, he selflessly made an individual sacrifice on behalf of the class.

16. The Notice of Motion for certification and Bruce's accompanying affidavit were served in December 2016.¹⁰

17. Knowing that all Class Members were advancing in age and requiring support, Bruce sought to have the case resolved quickly through a combined hearing on certification and the merits.¹¹ The Respondent refused to consent and opposed the relief sought. Ultimately, that request was refused by Justice McDonald.

iii. *Applicant's first request for consultation*

18. In May 2017, the House of Commons Standing Committee on Health ("**Standing Committee**") held two meetings focussed on the TSCP, following which the Standing Committee Chair wrote to the Minister of Health ("**Minister**") on June 8, 2017, recommending that the TSCP's Evidentiary Criteria be reviewed and reconsidered. Class Counsel wrote to the Respondent days later making the Class' **first request for consultation** if the Ministry of Health was in fact considering implementing the Standing Committee's recommendations, which was similar to the relief sought in the proposed class proceeding. The Respondent refused consultation, stating that Health Canada could not be committed to "a hypothetical course of

⁹ Wenham Affidavit, paras. 10-12, AMR-Fees, vol. 4, Tab C, pp. 923-924.

¹⁰ Ptak Affidavit, paras. 42-43, AMR-Fees, vol. 1, Tab B, p. 17.

¹¹ Wenham Affidavit, para. 13, AMR-Fees, vol. 4, Tab C, p. 924.

action" and generally downplaying the Standing Committee's "discussion".¹²

iv. *Certification denied and appeal initiated and heard*

19. The motion for certification was heard on May 9, 2017. Justice McDonald dismissed the motion on July 6, 2017, relying in part on Justice Strickland's May 2, 2017 decision in *Fontaine v. Canada*¹³ that had dismissed a Thalidomide survivor's individual judicial review application largely on the basis of justiciability.

20. A Notice of Appeal was issued on July 14, 2017 and the appeal was heard by the Federal Court of Appeal on January 9, 2018.¹⁴

v. *Briand and Rodrigue decisions*

21. While the appeal was under reserve, Justice Annis issued orders setting aside the TSCP Administrator's decisions in the two other individual judicial review applications brought by Thalidomide survivors excluded from the TSCP – *Briand v. Canada* and *Rodrigue v. Canada*.¹⁵ Like Bruce, these applicants were unable to satisfy the Documentary Proof Requirements due to the passage of time. Justice Annis held in detailed reasons that the TSCP's restrictions were justiciable and were "egregiously unreasonable" in substance.¹⁶ The Court awarded costs to the applicants and Canada did not appeal either case. Canada did not apply the results of these decisions to a single other Class Member.

¹² Ptak Affidavit, paras . 48, AMR-Fees, vol. 1, Tab B, p. 18; Wenham Affidavit, paras. 15-18, AMR-Fees, vol. 4, Tab C, p. 924.

¹³ *Fontaine v. Canada (Attorney General)*, 2017 FC 431, Applicant's Book of Authorities (Fees Motion) ("ABOA-Fees"), Tab 5 [*Fontaine*].

¹⁴ Ptak Affidavit, paras. 50-52, AMR-Fees, vol. 1, Tab B, p. 19.

¹⁵ *Briand v. Canada*, 2018 FC 279, ABOA-Fees, Tab 2 [*Briand*]; *Rodrigue v. Canada*, 2018 FC 280, ABOA-Fees, Tab 13.

¹⁶ *Briand* at para. 78, ABOA-Fees, Tab 2.

vi. *Budget 2018 and second request for consultation*

22. On or about January 9, 2018, the Minister finally responded to the Standing Committee Chair's letter but did not suggest any changes would be made to the TSCP.¹⁷

23. On February 27, 2018, the Government of Canada tabled Budget 2018 (the "**Budget**"). The Budget contained a brief statement acknowledging Thalidomide survivors' difficulties in obtaining the documentary proof required under the TSCP and announcing an intention to expand the program so "that all eligible thalidomide survivors receive the financial support they need." All other detail was promised to be provided later in the spring of 2018.¹⁸

24. While the Budget announcement came without notice, it was a welcome surprise to Bruce. It appeared that Canada was conceding that the issues raised in the proposed class proceeding were meritorious and that changes had to be made to the TSCP. After the Budget announcement, Class Counsel and Bruce made their **second request for consultation**, via letter to the Respondent dated March 9, 2018, regarding any potential TSCP amendments that would overlap with relief sought in the case.¹⁹

25. Bruce and Class Counsel continued to press for meaningful consultation with the Class through that spring, even writing an open letter to the Minister and the Prime Minister in April 2018, seeking a meeting with the bureaucrats charged with developing any amendments to the TSCP. However, nobody would meet with Class Counsel and Bruce, despite the fact that the

¹⁷ Minister's Letter to Standing Committee Chair (undated), Exhibit 18 to Ptak Affidavit, para. 39, AMR-Fees, vol. 1-2, Tabs B and B(18), pp. 17 and 363.

¹⁸ Ptak Affidavit, para. 63, AMR-Fees, vol. 1, Tab B, p. 21; Wenham Affidavit, para. 19, AMR-Fees, vol. 4, Tab C, p. 925.

¹⁹ Wenham Affidavit, paras. 20-21, AMR-Fees, vol. 4, Tab C, p. 925; Ptak Affidavit, para. 55, AMR-Fees, vol. 1, Tab B, p. 19.

Budget announcement seemed directly aimed towards what the Class was seeking in this case.²⁰

26. In the absence of any meaningful consultation, the Applicant provided detailed submissions on his view of fair and appropriate changes to the TSCP's adjudicative processes dated April 18, 2018.²¹ Health Canada considered these submissions in developing changes to the TSCP.²² The eventual design of the CTSSP closely resembles the Applicant's submissions.

27. The Minister's response to the April open letter, via letter dated May 31, 2018, indicated that "further details" about TSCP reforms would be "announced shortly".²³ However, the Government never announced any "further details" about TSCP reforms in 2018.²⁴ Bruce was concerned the Government would not actually make amendments to the TSCP if not compelled to do so, and so he continued on with the class proceeding.²⁵ At no time did the Respondent advise that changes to the TSCP were coming or that the litigation should be stayed to permit them to do so.

vii. *Certification by the Federal Court of Appeal and third request for consultation (November 2018)*

28. On November 1, 2018, the Federal Court of Appeal granted the appeal of the certification decision, finding that Bruce's challenge to the TSCP was justiciable and that the application met the criteria for certification as a class proceeding. The Court approved Bruce as Representative

²⁰ Ptak Affidavit, paras. 56-62, AMR-Fees, vol. 1, Tab B, p. 20; Wenham Affidavit, paras. 21-24, AMR-Fees, vol. 4, Tab C, p. 925.

²¹ Exhibit 25 to Ptak Affidavit, AMR-Fees, vol. 2, Tab B(25), p. 387.

²² Moriarty Affidavit, para. 67.

²³ Ptak Affidavit, para. 63, AMR-Fees, Tab B, vol. 1, p. 21; Wenham Affidavit, para. 25, AMR-Fees, vol. 4, Tab C, p. 926.

²⁴ Ptak Affidavit, para. 64, AMR-Fees, vol. 1, Tab B, p. 21; Wenham Affidavit, para. 26, AMR-Fees, vol. 4, Tab C, p. 926.

²⁵ Wenham Affidavit, para. 26, AMR-Fees, vol. 4, Tab C, p. 926.

Applicant and his proposed litigation plan.²⁶ Bruce was reassured that he and other Thalidomide survivors would get their "day in court" to have their voices heard.²⁷

29. The next day Class Counsel made the **third request for consultation on potential TSCP amendments**, via letter to Health Canada. The letter stated that in the absence of any further details about potential amendments to the TSCP, as had been promised, the Class would pursue "any and all remedies" available through the now-certified class proceeding. The letter sought consultation on any potential amendments that would address concerns raised in the class proceeding.²⁸ Nobody from Health Canada responded to Class Counsel's letter.²⁹

viii. *Attempts at notice to the class (November to December 2018)*

30. Immediately after certification Class Counsel sought the Respondent's consent for a proposed notice of certification to the Class and for an expeditious merits hearing based on the records exchanged by the parties in 2016. However, the Respondent either failed to respond or was largely indifferent to these efforts. The Respondent eventually agreed to respond about notice in the first week of January 2019. The Respondent did not respond as advised.³⁰

ix. *Initial announcement of anticipated roll out of CTSSP (January 2019)*

31. Instead, on January 9, 2019, with no prior notice to the representative of the Class as appointed by the Federal Court of Appeal, Canada announced the "anticipated roll out" of

²⁶ Judgment and Reasons for Judgment of Justice Stratas for the Federal Court of Appeal, Exhibit 29 to Ptak Affidavit, AMR-Fees, vol. 2, Tab B(29), p. 437.

²⁷ Wenham Affidavit, para. 27, AMR-Fees, vol. 4, Tab C, p. 926.

²⁸ Letter of Class Counsel to Health Canada, dated November 2, 2018, Exhibit 28 to Ptak Affidavit, para. 53, AMR-Fees, Tabs B and B(28), vol. 1-3, pp. 19, 434.

²⁹ Ptak Affidavit, para. 67, AMR-Fees, vol. 1, Tab B, p. 21; Wenham Affidavit, para. 28, AMR-Fees, vol. 4, Tab C, p. 926.

³⁰ Ptak Affidavit, paras. 72-73, AMR-Fees, vol. 1, Tab B, p. 22.

changes to the TSCP in the form of the CTSSP.³¹ The announcement indicated the CTSSP would provide "a fair and comprehensive approach to identifying thalidomide survivors that is based on international best practices."³² No details of the administrative or adjudicative processes of the CTSSP were provided however. Lacking any detail, the announcement amounted to a statement of intent rather than a detailed program outline – a rushed announcement of undefined changes in the face of the recently certified class proceeding.

32. The timing of the announcement of the "anticipated roll out" of changes to the TSCP was a direct result of this class proceeding.

x. *CTSSP announcement led to additional motions, evidence and processes prior to the common issues hearing*

33. The announcement of the anticipated roll out of the CTSSP sought to derail the prospect of an expeditious resolution of the certified common issues, and instead led to new motions, new evidence, and additional court processes.

34. Immediately after the announcement absent any notice to the representative of the Class, the Applicant was compelled to bring a motion seeking controls on the Respondent's inappropriate communications with Class Members; the convening of a dispute resolution conference ("**DRC**"); and an order to disseminate notice of certification because the Respondent continued to withhold consent ("**motion for notice**").³³

³¹ Moriarty Affidavit, para. 64.

³² Ptak Affidavit, paras. 74-76, AMR-Fees, vol. 1, Tab B, p. 23; Wenham Affidavit, paras. 29-30, AMR-Fees, vol. 4, Tab C, pp. 926-927.

³³ Ptak Affidavit, para. 77, AMR-Fees, vol. 1, Tab B, p. 23.

35. In response to the motion, the Respondent agreed to set a date for a DRC and Justice McDonald subsequently directed February 28, 2019.³⁴ However, the DRC was eventually adjourned at the Respondent's request, because Canada had not yet issued further details of the CTSSP.³⁵ Ultimately Justice McDonald scheduled the DRC for June 17, 2019.³⁶

36. The Respondent continued to contest the motion for notice, necessitating a hearing on March 26, 2019. Justice McDonald ordered that notice of certification be disseminated to Class Members over the Respondent's objection.³⁷

37. The Respondent also sought to add evidence to the record following the CTSSP announcement. Justice McDonald ordered that Canada serve "supplementary evidence, if any" by March 15, 2019.³⁸ The Respondent served the supplementary affidavit of Cindy Moriarty, dated March 12, 2019, providing evidence on the CTSSP announcement and certain Parliamentary events such as the Standing Committee meetings.³⁹ (Shortly thereafter this evidence was used as the basis for a motion to dismiss the proceeding on preliminary grounds.)

38. With details on the CTSSP still not announced as of March 2019, many questions put to Ms. Moriarty in written examination were refused or could not be answered.⁴⁰ On April 10, 2019, Health Canada finally announced further details about the CTSSP, and the next day the Respondent served further answers from Ms. Moriarty based on these details as well as the

³⁴ Ptak Affidavit, paras. 78-79, AMR-Fees, vol. 1, Tab B, p. 24.

³⁵ Ptak Affidavit, paras. 82, AMR-Fees, vol. 1, Tab B, p. 24.

³⁶ Ptak Affidavit, para. 95, AMR-Fees, vol. 1, Tab B, p. 26.

³⁷ Order and Reasons of Justice McDonald, dated March 28, 2019, Exhibit 43 to Ptak Affidavit, AMR-Fees, vol. 2, Tabs B(43), pp. 576-582.

³⁸ Ptak Affidavit, para. 80, AMR-Fees, vol. 1, Tab B, p. 24.

³⁹ Ptak Affidavit, para. 83, AMR-Fees, vol. 1, Tab B, p. 25.

⁴⁰ Moriarty's answers to written examination, dated April 5, 2019, Exhibit 45 to Ptak Affidavit, AMR-Fees, vol. 3, Tabs B(45), pp. 617-620.

related Order-in-Council, dated April 5, 2019.⁴¹ Class Counsel promptly reviewed these answers and sent further questions also on April 11, 2019.⁴² Still lacking answers to certain questions, Bruce was compelled to serve a **refusals motion** on April 15, 2019, that included a request for costs.⁴³ The refusals motion was scheduled for hearing June 5, 2019 but adjourned based on the Respondent's undertakings to provide certain information when it became available.⁴⁴

39. On May 22, 2019, the Respondent served a **motion to dismiss** prior to a hearing on the common issues, arguing that the CTSSP constituted an adequate alternative remedy and rendered the class proceeding moot. Bruce was forced to respond with written submissions. The parties exchanged application records in April and May 2019. Eventually, October 23, 2019 was set for the common issues hearing.⁴⁵

xi. Settlement and related motions

40. The DRC was held on June 17, 2019, with the parties exchanging briefs shortly beforehand. After the DRC the parties continued arm's length negotiations over several months. On October 22, 2019, the parties executed a settlement agreement ("**Settlement Agreement**").⁴⁶

41. The Settlement Agreement delivers additional protections and benefits for Class Members that were not previously available under the CTSSP alone (fully summarized at paragraph 73 below).

⁴¹ Ptak Affidavit, para. 89, AMR-Fees, vol. 1, Tab B, p. 26.

⁴² Ptak Affidavit, para. 90, AMR-Fees, vol. 1, Tab B, p. 26.

⁴³ Ptak Affidavit, para. 91, AMR-Fees, vol. 1, Tab B, p. 26.

⁴⁴ Ptak Affidavit, para. 94, 98, AMR-Fees, vol. 1, Tab B, p. 26.

⁴⁵ Ptak Affidavit, paras. 99-103, AMR-Fees, vol. 1, Tab B, p. 27.

⁴⁶ Settlement Agreement, Exhibit 56 to Ptak Affidavit, AMR-Fees, vol. 1, Tab B(56), p. 785.

42. Class Counsel has prepared motion materials to seek approval of the settlement and has spoken to and advised Class Members on the Settlement Agreement and the release it would provide to the Respondent.

43. This motion for Class Counsel's fees and disbursements is being heard together with motions to approve the Settlement Agreement and the Applicant's costs motion, which seeks to defray the Class' legal costs by having the Respondent contribute.⁴⁷

PART III - ISSUES AND THE LAW

44. The sole issue for determination is whether Class Counsel's request for payment of legal fees and reimbursement for disbursements incurred is fair and reasonable in all of the circumstances. The Applicant and Class Counsel respectfully submit the answer is "Yes".

A. Legal test: fair and reasonable

45. Rule 334.4 of the *Federal Court Rules*, SOR/98-106 ("**Rules**") allows the Court to approve payments from the proceeds recovered in a class proceeding. In doing so the Court must determine whether the fee is "fair and reasonable" in the circumstances of the case.

i. *Factors to be applied*

46. The Court has adopted the following non-exhaustive list of factors to assist in the determination of whether the fees sought are fair and reasonable.⁴⁸

- (a) results achieved;
- (b) risk undertaken;
- (c) time expended;
- (d) complexity of the issue;
- (e) importance of the litigation to the plaintiffs;

⁴⁷ The Respondent has limited standing on this motion to make submissions on the TSCP and CTSSP and how they came about in relation to this class proceeding: *Wenham v. Canada (Attorney General)*, 2019 FC 1653 at paras. 20, 31, 32, ABOA-Fees, Tab 21.

⁴⁸ *McLean v. Canada*, 2019 FC 1077 at para. 25, ABOA-Fees, Tab 9 [*McLean*], citing *Condon v. Canada*, 2018 FC 522 at para. 82, ABOA-Fees, Tab 4 [*Condon*]; *Merlo v. Canada*, 2017 FC 533 at paras. 78-98, ABOA-Fees, Tab 11 [*Merlo*]; *Manuge v. R.*, 2013 FC 341 at para. 28, ABOA-Fees, Tab 8 [*Manuge*].

- (f) the degree of responsibility assumed by counsel;
- (g) the quality and skill of counsel;
- (h) the ability of the class to pay;
- (i) the expectation of the class;
- (j) fees in similar cases.

47. Risk and result remain the critical factors.⁴⁹ Of the two, risk incurred is the more important.⁵⁰ The nature of the risk is primarily the risk of non-payment:

As noted by the Ontario Law Reform Commission in its seminal *Report on Class Actions*, "the class lawyer will be assuming a risk that after the expenditure of time and effort no remuneration may be received ... [that is] the risk of non-payment."⁵¹

48. The results achieved include both monetary as well as non-monetary results that improve the situation of Class Members.⁵²

49. Courts have also acknowledged that class counsel should be compensated for the risk inherent in litigating against a "recalcitrant" defendant.⁵³ Here, the Respondent was more than recalcitrant. It circumvented this class proceeding and the class representative in order to neutralize the proceeding *outside* of the Court's process and oversight as provided in Part 5.1 of the *Rules*. The Respondent repeatedly ignored Class Counsel's requests for consultation about potential changes to the TSCP that mirrored the relief sought in the case. Shortly after certification, but before progress could be made toward the merits, Canada rushed out a unilateral announcement of the "anticipated roll out" of the CTSSP. The Respondent then leveraged the CTSSP once it had a basic legal structure to avoid a hearing on the merits, relying on its existence as providing an adequate alternative remedy and/or rendering the proceeding moot.

⁴⁹ *Heyder v. Canada*, 2019 FC 1477 at para. 108, ABOA-Fees, Tab 6 [*Heyder*], citing *Condon* at para. 83, ABOA-Fees, Tab 4.

⁵⁰ *Toth v. Canada*, 2019 FC 125 at para. 116, ABOA-Fees, Tab 17 [*Toth*]; *Welsh v. R.*, 2019 ONSC 4204 at para. 11, ABOA-Fees, Tab 19 [*Welsh*].

⁵¹ *Welsh* at para. 11, ABOA-Fees, Tab 19.

⁵² *Merlo* at para. 10, 33, ABOA-Fees, Tab 11.

⁵³ *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.) at para. 21, ABOA-Fees, Tab 22 [*Windisman*].

ii. *The legal fees sought promote access to justice*

50. The issue of compensation for Class Counsel is a vitally important subject, and the final analysis of whether class proceedings legislation will achieve its objectives (access to justice, behaviour modification and judicial economy) will largely depend on whether or not there are sophisticated and hard-working Class Counsel who are prepared to act for the class and hence bring these actions and do them well.⁵⁴

51. As a result, it is paramount that the Court carefully consider not only all of the risks incurred by Class Counsel in prosecuting class proceedings, but also the ultimate risk concerning the fulfillment of the objectives of the legislation. Although the risks incurred in undertaking and continuing a class proceeding are varied and complex, the purpose of assessing the risks incurred by Class Counsel is clear: the issue of compensation will ultimately determine whether or not the class proceedings regime in Canada generally will be successful in fulfilling its legislative objectives.

52. Class proceedings legislation was designed to prevent the injustice of the non-pursuit of meritorious claims as a result of the economic disadvantage of Class Members. Such claims cannot be prosecuted diligently, or at all, without counsel being willing and able through a contingent fee arrangement to assume all of the attendant financial risks.

53. If Class Counsel were not compensated in a manner that reflected the risk, in addition to being reimbursed for their investment of time and resources, lawyers would always prefer to undertake other kinds of less risky work for which payment is certain. Compensation in the context of contingency work in class proceedings must therefore be sufficiently appealing to justify "capable and effective" counsel's lost opportunity to take on paying clients and the carrying costs of a case without pay for years, or at all.

54. This Court has endorsed the proposition that fair and reasonable fees in a class proceeding must be sufficient to provide "a real economic incentive to lawyers to take on a class

⁵⁴ Garry D. Watson, Q.C., "Class Actions: Uncharted Procedural Issues" (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996), pp. 3-4 cited by Cumming J. in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.) at para. 59, ABOA-Fees, Tab 17; see also *Windisman* at para. 21, ABOA-Fees, Tab 22.

proceeding and to do it well."⁵⁵ Class Counsel will not undertake class actions unless they are assured of receiving fair and generous compensation in appropriate cases.⁵⁶

55. Should fees not be approved in this case, a dangerous precedent impeding access to justice would follow: Class Counsel would have no economic incentive to take on class proceedings where the defendant/respondent can circumvent the proceeding without recourse and thereby imperil the prospect of compensation for the time devoted and risk undertaken by Class Counsel. Defendants/respondents could then use this strategy to undermine the economic viability of class proceedings. Without recourse and without compensating Class Counsel for the work performed for the Class, defendants/respondents will circumvent the legislature's intention to provide for class judicial review proceedings.

B. Fees sought are fair and reasonable in the circumstances

56. Class Counsel respectfully submit that the legal fees sought and the reimbursement of disbursements requested here are fair and reasonable given the unique circumstances. The risks undertaken, the results achieved, as well as the time expended, the importance of the litigation to Thalidomide survivors, the expectations of Class Members and the extent of services rendered to the Class support this Court's approval of a 15% contingency fee and reimbursement of the disbursements incurred by Class Counsel on behalf of the Class in prosecuting this proceeding.

i. *Risks undertaken by Class Counsel were significant*

57. Class Counsel undertook significant risk in agreeing to pursue this matter without any guarantee that they would be compensated for their work – particularly in a case such as this.

58. Risk is measured from the commencement of the proceeding and includes recovery risk, liability risk, and the risk that the action will not be certified.⁵⁷ Risks must be assessed as they existed when the litigation commenced and as it continued. They should not be assessed with the

⁵⁵ *Toth* at para. 119, ABOA-Fees, Tab 16, citing *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4206 at para. 4, ABOA-Fees, Tab 6.

⁵⁶ *Riddle v. Canada*, 2018 FC 641 at para. 50, ABOA-Fees, Tab 11 [*Riddle*].

⁵⁷ *Condon* at para 83, ABOA-Fees, Tab 3.

benefit of hindsight.⁵⁸

59. At the outset of this case the Applicant faced significant legal challenges concerning the administrative law 'causes of action', the 30-day limitation period, justiciability, and the remedies sought and available, all in relation to an *ex-gratia* program implemented by the Respondent. Some of the significant litigation risks faced by Class Counsel in this case include:

- (a) **Certification risk:** This proceeding is one of the few judicial review applications to have ever been certified as a class proceeding. At the time the Applicant sought to pursue this matter as a class proceeding, there was considerable risk the proceeding would not be certified including on the bases defended by Canada such as the lack of an identifiable class where individuals did not commence their own judicial review applications and that the class proceeding was not preferable to a test case or other rationales. The Respondent raised a significant defence to certification that was successful at first instance;
- (b) **Justiciability risk:** The Respondent alleged that the TSCP, the subject matter of the proceeding, was an *ex-gratia* program and, as such, issues raised by the proceeding about the program were not justiciable. It relied on this position to defeat the related judicial review of *Fontaine v. Canada*⁵⁹ and to defeat certification of this proceeding at first instance.⁶⁰ The Respondent maintained that defence through the appeal of certification and raised it in Responding Application Record on the merits. The nature of the TSCP and whether the issues raised with its operation were justiciable was to be a live issue on the merits. There was considerable risk when this proceeding was commenced that the court might find that issues raised about an *ex-gratia* program were not something that the court could adjudge;
- (c) **Limitation period risk:** Subsection 18.1(2) of the *Federal Courts Act* provides a 30 day limitation period to commence a judicial review. The vast majority of Class Members did not commence individual judicial reviews (only 4 did so). The Respondent raised this limitation in defence of the certification of this class proceeding. A common issue was certified by the Federal Court of Appeal asking "Is the proceeding barred by the limitation period in subsection 18.1(2) of the *Federal Courts Act*? To the extent that an extension of time is required, should one be granted?" There was a serious risk that this novel issue would not be determined in favour of the Class at the common issues hearing;
- (d) **General class proceeding litigation risks:** As with many class proceedings, there was the risk that a court would not find there to be sufficient evidence or inferences necessary to find liability across the entire class;

⁵⁸ *Condon* at para. 97, ABOA-Fees, Tab 3.

⁵⁹ *Fontaine*, ABOA-Fees, Tab 4.

⁶⁰ *Wenham v. Canada (Attorney General)*, 2017 FC 658 at paras. 3, 25, 25, ABOA-Fees, Tab 19.

- (e) **General litigation risks:** As with all legal proceedings, the risk of witnesses' evidence not being sufficient, the documentation not being sufficient, vagaries of summary applications, and the uncertainty associated with the court making findings of fact and law existed in this case;
- (f) **Mootness risk:** Once the CTSSP was announced by Canada, the Respondent argued that the class proceeding should be dismissed as the issues were moot or that the CTSSP provided an adequate alternative remedy. The Respondent initiated a motion to dismiss on these preliminary grounds. Given the process provided by the CTSSP and the *ex-gratia* nature of both the TSCP and CTSSP, there was considerable risk that the application would be dismissed in favour of the CTSSP;
- (g) **Risk of uncertain remedies:** Once the CTSSP was announced, and given the mootness risk identified above, one of the remaining remedies might have been to seek retroactive payments available under the TSCP from the date of Class Members' denials to the date of acceptances in the CTSSP. There was considerable risk that such a remedy would not be imposed by the court in the face of the CTSSP given judicial review principles, the nature of judicial review remedies which exclude damages, the *ex-gratia* nature of the programs and the argument that the CTSSP is an adequate alternate remedy.
- (h) **Risk of prolonged litigation:** If a decision on the merits on the common issues was rendered, there was a high likelihood of an appeal given the novelty of the issue as play in the proceeding. An appeal to the Federal Court of Appeal would have added another year to a year and a half to the litigation, thereby delaying any chance of recovery for the class and Class Counsel on a contingent basis; and
- (i) **Risk of delay and uncertainty of individual assessments:** Even if successful on the common issues after appeals, individual assessments of eligibility to the TSCP would have been required. Conducting an assessment of each individual's application to the TSCP, with argument, could have taken a significant amount of time and delayed recovery for Class Members. It is estimated that such a process could take another year to complete. In addition, that process could have resulted in appeals or further judicial reviews. Further, there was uncertainty as to whether Class Members might ultimately be successful at the individual assessment phase, if any. The risk of these delays and uncertainties existed at the commencement of this class proceeding and remained throughout.

60. Class Counsel undertook these challenges at the initiation of the class proceeding knowing that the proceeding would be expensive and would consume a tremendous amount of resources, all with the risk of no recovery.

ii. *Results would not have been achieved without Class Counsel*

61. The results achieved include both monetary as well as non-monetary results that improve the situation of Class Members.⁶¹

62. There are several benefits now available to Class Members under both the CTSSP *and* under the Settlement Agreement (should it be approved). Neither set of benefits would have been achieved without Class Counsel's efforts on behalf of the Class over the course of three years.

63. First, this class proceeding directly resulted in changes to the TSCP in the form of the CTSSP. This is confirmed by:

- (a) the fact that this class proceeding was the only legal proceeding advancing the rights of all Thalidomide survivors unfairly excluded from the TSCP. Canada was therefore forced to eventually face scrutiny by this Court on the systematic application of the TSCP to all Class Members, as opposed to the individual judicial reviews of individual applicants that resulted only in individual remedies not shared by the rest of those impacted;
- (b) Canada's full and vigorous defence of this class proceeding and the three other individual judicial review proceedings regarding the TSCP (*Briand, Rodrigue, and Fontaine*);
- (c) the vague and uncertain nature of Canada's statements about potential TSCP amendments in Budget 2018 that remained undefined until after this class proceeding was certified by the Federal Court of Appeal;
- (d) Canada's unexplained and repeated failure to announce "further details" about the Budget 2018 statements in accordance with several self-imposed deadlines until after this class proceeding was certified;
- (e) the lack of a policy decision, or program design and implementation approvals, for changes to the TSCP prior to this class proceeding getting certified;
- (f) the Minister of Health's rushed announcement of changes to the TSCP in the form of the CTSSP without any meaningful eligibility or due process details directly in the face of this class proceeding being certified only weeks earlier; and
- (g) the Applicant's repeated requests for consultation and his detailed submissions on changes to the TSCP, which were ultimately reflected in the design of the CTSSP.⁶²

⁶¹ *Merlo* at para. 10, 33, ABOA-Fees, Tab 10; *McCrea v. Canada*, 2019 FC 122 at paras. 50-52, ABOA-Fees, Tab 9 [*McCrea*].

64. While this class proceeding was not the only effort to address the TSCP's deficiencies, it was the only process that advanced the legal interests of all 167 Class Members in a coordinated way and was backed by the potential of court-ordered remedies. No other avenue required the Respondent to either defend the unfair requirements of the TSCP in court or comply with the remedies sought. Eventually, in this class proceeding, the Federal Court was going to assess and determine whether the TSCP was unfair and what remedy might be imposed – no other avenue could have provided that eventuality. In the end, the Respondent chose to comply with the remedies sought in this class proceeding instead of seeking a determination of the merits of the TSCP, however, it did so outside of the Court's process. Even after the CTSSP was announced, the Respondent sought to dismiss and defend this proceeding on the basis that the class proceeding was moot – thereby seeking to avoid a court determination of the fairness of the TSCP and court-imposed remedies.

65. At the very least, there is no evidence suggesting the TSCP's deficiencies would have been addressed in the timeframe that they were absent certification of this class proceeding. The opposite is true.

66. There was no policy decision, nor were there program design and implementation approvals, prior to certification on November 1, 2018.⁶³ Following certification, Canada refused consultation with the appointed Class representative and stalled on providing consent to notice of certification to Class Members. Instead, on January 9, 2019, the Minister rushed out the "announcement of the anticipated roll out" of changes to the TSCP in the form the CTSSP,⁶⁴ which lacked any meaningful detail. When details were finally announced in April 2019, these did not address the administrative and adjudicative processes under the CTSSP. The CTSSP was commenced in June 2019 despite there being no agreement with the Third Party Administrator, no algorithm and no multi-disciplinary committee in place.⁶⁵ Many important adjudicative

⁶² Ptak Affidavit, paras. 48, 53-54, 61-62, 63-64, 66-67, 74-75, AMR-Fees, vol. 1, Tab B, pp. 18-23; Wenham Affidavit, paras. 31-32, AMR-Fees, vol. 4, Tab C, p. 927.

⁶³ Moriarty Affidavit, para. 64. While a "funding decision" was presumably made as part of the Budget 2018 process, Ms. Moriarty notes that "funding decisions do not authorize spending", rather this would typically follow a policy decision and program design and implementation approvals: see Moriarty Affidavit, paras. 20-22.

⁶⁴ Moriarty Affidavit, para. 64.

⁶⁵ Moriarty Affidavit, paras. 81, 88-89. There remains no agreement with an administrator to run the CTSSP, the identification of the algorithm was only confirmed in October 2019 as part of the Settlement, and the multi-disciplinary committee has still not been established

processes of the CTSSP were negotiated as part of the Settlement reached in October 2019, despite the fact that that program commenced in June 2019.

67. Without the class proceeding, there was nothing to ensure that Canada would actually make changes to the TSCP or follow through in a timely way. The *Briand* and *Rodrigue* decisions were rendered in March 2018, holding that the TSCP's restrictions were justiciable and "egregiously unreasonable".⁶⁶ Despite that finding, which should equally apply to all Class Members, Canada did not apply the decisions to anyone else. They did not contact the Applicant to seek a resolution of his application, let alone a resolution for all Class Members. By contrast, the applicants in *Briand* and *Rodrigue* were entitled to begin receiving annual payments in 2018.

68. Without the class proceeding there was nothing requiring Canada to do anything, let alone in a timely fashion. There was no urgent need for Canada to implement changes and begin making annual payments to those who should have been successfully approved under the TSCP. Canada's process of listening to complaints and considering potential reforms could have gone on indefinitely without the class proceeding, resulting in the Class Members being negatively impacted even further by delaying annual payments to meritorious applicants. It was over a year after Budget 2018 – and only after certification of this class proceeding – that any details of the changes to the TSCP were announced. Even then, the changes were still uncertain and ill-defined as there was no agreement with the TPA to administer the CTSSP, no confirmation of the algorithm to be used, and there still is no multi-disciplinary committee formed. Without the CTSSP and the Settlement, this class proceeding would have resulted in a decision of the Court on the fairness of the TSCP and associated remedies in 2019, thereby requiring Canada to initiate changes in a timely fashion, forcing the immediate implementation of those changes, and limiting the continued prejudice to the Class by requiring that annual payments be retroactive to June 2019 in the Settlement.

69. Canada's evidence conspicuously avoids making the claim that this class proceeding did not influence the announcement, design and implementation of the CTSSP at all.⁶⁷ The evidence shows that the Respondent distanced itself from, and downplayed the importance of

⁶⁶ *Briand* at para. 78, ABOA-Fees, Tab 1.

⁶⁷ See Moriarty Affidavit, paras. 82-85.

Parliamentary events from March 2016 onward that it now implies resulted in the CTSSP. For example, when Bruce and Class Counsel first sought consultation with Health Canada on potential TSCP amendments after the Standing Committee Chair's letter to the Minister in June 2017, the Respondent replied that: (i) Health Canada could not be committed to "a hypothetical course of action" and (ii) the matter was "only the subject of Parliamentary committee discussion."⁶⁸

70. Even after the CTSSP was announced the Respondent attempted to ensure this class proceeding would not get to a common issues hearing.⁶⁹

71. The temporal links between steps in this class proceeding and the steps taken by the government in revising the TSCP are not mere coincidences. At all times that the government acted to review and revise the TSCP's inadequacies, it was motivated and informed by this class proceeding, and acting to thwart its adjudication. The continuous efforts of Class Counsel seeking the adjudication of this proceeding on the merits and a just remedy for Class Members, whether they were achieved through the proceeding or otherwise through consultation with the Class, should be acknowledged and compensated.

72. In any event, regardless of whether this class proceeding influenced the creation and timing of the CTSSP, the Settlement Agreement improves upon it with additional protections and benefits for Class Members that did not exist when the CTSSP was announced:⁷⁰

- (a) confirmation of a "balance of probabilities" standard in the Third Party Administrator's ("TPA") preliminary assessment of the person's criteria referred to in paragraph 5(a) of the OIC;⁷¹
- (b) identification and confirmation of the Algorithm to be used in paragraph 5(c) of the OIC;
- (c) input from the Representative Applicant (or his designate) regarding the members of the Multi-disciplinary Committee referenced at paragraph 5(c) of the OIC;⁷²

⁶⁸ Ptak Affidavit, paras. 46-48, AMR-Fees, vol. 1, Tab B, p. 18.

⁶⁹ Ptak Affidavit, para. 99 and Exhibit 52, AMR-Fees, vol. 1, Tab B, pp. 27, 748.

⁷⁰ Wenham Affidavit, paras. 35-38, AMR-Fees, vol. 4, Tab C, pp. 928-929.

⁷¹ Settlement Agreement, dated October 22, 2019, s. 4.02(b), Exhibit 56 to the Ptak Affidavit, AMR-Fees, vol. 3, Tab B(56), p. 792 ["Settlement Agreement"].

⁷² Settlement Agreement, s. 4.01, Exhibit 56 to the Ptak Affidavit, AMR-Fees, Tab vol. 3, Tab B(56), p. 792.

- (d) a requirement to provide reasons for any denial of an application under the CTSSP;
- (e) opportunities for an applicant to present more information before the TPA denies their application on the basis that the information does not produce a finding of 'probable' as required under paragraph 5(c) of the OIC;⁷³
- (f) an opportunity to provide additional information or submissions in writing for reconsideration if the TPA makes a final decision to deny an application at any step of the three-step process;⁷⁴
- (g) the right to seek reconsideration upon presentation of new evidence for the Class Members' whose applications to the CTSSP are denied by the TPA at the first or second step of the three-step process;⁷⁵
- (h) an entitlement to provide written submissions and/or an oral hearing with TPA and at least one representative of the Multi-disciplinary Committee for Class Members' whose applications are denied at the third stage of the three-step process, after recommendation by the Multi-disciplinary Committee;⁷⁶
- (i) priority in processing Class Members' applications;⁷⁷
- (j) ensuring that payment of the \$250,000 lump sum payment is made to the estate of Class Member who dies after their application is approved; and
- (k) retroactive payments to June 3, 2019 for Class Members who are found to be eligible under paragraph 3(1)(c) of the OIC.⁷⁸

73. The results achieved here by Class Counsel – both in the creation of the CTSSP, the timing of the implementation of the CTSSP, and in the procedural benefits to the Class provided by the Settlement Agreement – are evidence that the fees ought are fair and reasonable.

iii. Time and resources devoted by Class Counsel were significant

74. This class proceeding was novel, complex and aggressively defended. Class Counsel devoted a significant amount of lawyer, student and clerk time to prosecuting this proceeding efficiently and effectively. In total, Koskie Minsky LLP devoted approximately **1,800** hours to the prosecution of this proceeding with a value of approximately **\$815,000**.⁷⁹ Attached as

⁷³ Settlement Agreement, s. 4.01(d), Exhibit 56 to the Ptak Affidavit, AMR-Fees, vol. 3, Tab B(56), p. 793.

⁷⁴ Settlement Agreement, s. 4.01(e), Exhibit 56 to the Ptak Affidavit, AMR-Fees, vol. 3, Tab B(56), p. 793.

⁷⁵ Settlement Agreement, s. 4.05, Exhibit 56 to the Ptak Affidavit, AMR-Fees, vol. 3, Tab B(56), p. 793.

⁷⁶ Settlement Agreement, s. 4.05, Exhibit 56 to the Ptak Affidavit, AMR-Fees, vol. 3, Tab B(56), p. 793.

⁷⁷ Settlement Agreement, s. 4.03, Exhibit 56 to the Ptak Affidavit, AMR-Fees, vol. 3, Tab B(56), p. 793.

⁷⁸ Settlement Agreement, s. 4.04, Exhibit 56 to the Ptak Affidavit, AMR-Fees, vol. 3, Tab B(56), p. 793.

⁷⁹ Ptak Affidavit, paras. 112-113 and Exhibit 60, AMR-Fees, Tabs B and B(60), pp. 29, 866.

Schedule "C" is a chart of the time devoted by Class Counsel to this proceeding and in each step in this proceeding.⁸⁰ The work performed by Class Counsel on behalf of the Class included:

- (a) investigating and researching the issues and drafting, issuing and amending the Notice of Application;
- (b) preparing certification materials, participating in cross-examinations, responding to and preparing for a refusals motion, preparing written submissions, preparing for and arguing the certification motion;
- (c) preparing appeal materials, preparing written submission and preparing for and arguing the appeal of certification;
- (d) following HESA Committee meetings and recommendations, making multiple requests for consultation, preparing submission on changes to the TSCP;
- (e) preparing and negotiating notice materials, disseminating notice to the class, responding to questions from the class members and collecting and reporting on opt-outs;
- (f) preparing affidavits for the judicial review application, reviewing responding affidavits, preparing written examination questions, reviewing responses from the AGC, preparing written submissions, reviewing written submissions from the AGC and began preparations for the hearing of the application;
- (g) working on interlocutory motions including:
 - (i) *Motion to be heard together* – preparing materials for and arguing a motion to have the certification motion and judicial review hearing heard concurrently;
 - (ii) *Motion for an order to disseminate notice of certification* – preparing materials for and arguing a motion to disseminate notice of certification;
 - (iii) *Refusals motion* – preparing materials for a motion relating to questions refused by the AGC for the common issues hearing and negotiating a resolution to such motion; and
 - (iv) *Motion to dismiss* – preparing materials for and preparing for hearing of AGC's motion to dismiss based on mootness;
- (h) preparing Dispute Resolution Conference ("DRC") materials, preparing for the DRC, participating in DRC and settlement discussions and drafting, reviewing and approving the Settlement Agreement;
- (i) communicating with Class Members, family members or their representatives throughout the course of this proceeding;
- (j) preparing materials for the motion to approve notice of the settlement approval motion, preparing settlement approval materials, and preparing written submissions, for the settlement approval hearing; and

⁸⁰ See also Ptak Affidavit, paras. 112-137 and Exhibit 60, AMR-Fees, vol. 1, B and B(60), pp. 29, 866.

- (k) preparing materials, reviewing responding materials and preparing written submissions for the costs motion.

75. Additionally, as of December 11, 2019, Class Counsel has incurred **more than \$49,999.40** in disbursements (including taxes) since the commencement of this proceeding to prosecute this matter effectively.⁸¹ Attached as **Schedule "D"** is a detailed chart setting out the disbursements incurred by Class Counsel for each relevant category. During the application, the Respondent contributed only \$12,358.44 for the cost of notice of certification (of which \$9,202.35 were disbursements and taxes and \$3,156.09 were fees and taxes) in accordance with the order of Justice McDonald of March 28, 2019. Therefore, Class Counsel incurred **\$40,797.05** in disbursements on behalf of the class that have not been reimbursed.⁸²

iv. *This litigation was most important to the Class*

76. Where the injury that is the subject of class litigation has been "deeply personal," courts have awarded fees based on this factor.⁸³ Winkler J., as he then was, once stated that the class action is of utmost importance when it seeks all three of: someone taking responsibility for what happened, a sense of closure, and financial compensation.⁸⁴ That is exactly what this class proceeding sought and achieved.

77. The Class Members are some of the most disadvantaged and vulnerable people in society. They have limited financial means. They are also an aging population. The amount of monetary support denied pursuant to the TSCP was significant to them.⁸⁵ The CTSSP and Settlement Agreement have finally granted them fair access to this support.

⁸¹ Ptak Affidavit, para. 138, AMR-Fees, vol. 1, Tab B, p. 35.

⁸² Ptak Affidavit, paras. 139-140, AMR-Fees, vol. 1, Tab B, pp. 35-36.

⁸³ *Merlo* at para. 91, ABOA-Fees, Tab 10.

⁸⁴ *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Gen. Div.) (Winkler J., as he then was) at para. 30, ABOA-Fees, Tab 13.

⁸⁵ Wenham Affidavit, para. 44, AMR-Fees, vol. 4, Tab C, p. 931; Affidavit of Michael Porto, sworn December 12, 2019 ("**Porto Affidavit**"), para. 7, AMR-Fees, vol. 4, Tab E, p. 1013; Affidavit of Ermano DeClavasio, sworn December 18, 2019 ("**DeClavasio Affidavit**"), para. 7, AMR-Fees, vol. 4, Tab F, pp. 1037; Affidavit of Michel O'Neil, sworn December 17, 2019 ("**O'Neil Affidavit**"), para. 9, AMR-Fees, vol. 4, Tab D, p. 986; Ptak Affidavit, para. 145, AMR-Fees, vol. 1, Tab B, p. 36. .

78. In addition, the proceeding was also about the Government refusing to recognize Class Members as Thalidomide survivors, which they believed themselves to be for years.⁸⁶ This Court recognized in *Briand* that the TSCP's "egregiously unreasonable" Evidentiary Criteria were an affront to the dignity of Thalidomide survivors like Bruce: "The policies are also unfair toward the applicant due to the perception that she is submitting a false application to receive compensation to which she is not entitled."⁸⁷ The CTSSP and Settlement Agreement provide a second – and fairer – chance for Bruce and Class Members to be officially recognized.

v. *Legal fees did not interfere with Settlement*

79. The Settlement terms were negotiated first. The absence of an agreement on legal fees to Class Counsel with the Respondent did not interfere with the Settlement being finalized. Instead, Class Counsel agreed to seek fees and costs separately from the Settlement.

vi. *Class has no ability to pay fees and disbursements*

80. The Class is composed of individuals who have suffered from malformations throughout their entire lives. Many of the Class Members are of limited financial means. Many are over 60 years old, some have retired and some do not work. There are few (if any) amongst the proposed Class Members whom could afford a lawyer to mount the type of legal proceedings necessary and which was done by Class Counsel.⁸⁸ In addition, the prospect of an adverse cost award in an individual judicial review impacted Class Members' willingness to commence a proceeding.

81. It would not have been possible for the Class to achieve justice without Class Counsel's representation on a contingency fee basis.⁸⁹

⁸⁶ Wenham Affidavit, para. 56, AMR-Fees, vol. 4, Tab C, p. 933; Porto Affidavit, para. 8, AMR-Fees, vol. 4, Tab E, p. 1013; DeClavasio Affidavit, para. 8, AMR-Fees, vol. 4, Tab F, pp. 1037; O'Neil Affidavit, para. 10, AMR-Fees, vol. 4, Tab D, p. 986; Ptak Affidavit, para. 146, AMR-Fees, vol. 1, Tab B, p. 36.

⁸⁷ *Briand* at para. 46, ABOA-Fees, Tab 1.

⁸⁸ Ptak Affidavit, para. 147, AMR-Fees, vol. 1, Tab B, pp. 37; Wenham Affidavit, para. 44, AMR-Fees, vol. 4, Tab C, p. 931.

⁸⁹ Wenham Affidavit, para. 47, AMR-Fees, vol. 4, Tab C, p. 931.

vii. *Fees are lower than that expected by the class*

82. Class Counsel agreed to pursue this class proceeding on a contingency fee basis, thereby accepting responsibility for seeking court approval of a fee if successful. In November 2016, the Applicant executed a retainer agreement with Class Counsel to pursue this application as a class proceeding.⁹⁰ That retainer agreement provided for a 25% contingency fee.

83. In March 2019, the Court ordered notice of certification to be disseminated to the Class. The notice provided that Class Counsel would be seeking "25% of any recovery received by class members...".⁹¹ Notice was distributed at the same time as the Order-in-Council establishing the CTSSP was put in place. The Class had an opportunity to opt-out of this class proceeding at that time knowing the legal fee percentage sought and the existence of the CTSSP. However, only twelve (12) Class Members opted out.⁹²

84. Class Counsel now seeks a much lower rate of fees compared to that stipulated in the retainer agreement and the notice of certification.

viii. *Fees are in the lower range approved in similar cases*

85. Fees in the range of 15-30% of recovery are standard in class action litigation.⁹³

86. While Class Counsel seeks approval of a percentage based fee, this court is nevertheless entitled to also examine the reasonableness of that percentage's quantum as against the actual time incurred, on the basis of a multiplier calculation, as a crosscheck: percentage-based fees and

⁹⁰ Ptak Affidavit, paras. 148-149 and Exhibit 63, AMR-Fees, vol. 1-3, Tabs B and B(63) p. 37, 906.

⁹¹ Schedule "A" to the Order of Justice McDonald, dated March 28, 2019, Ptak Affidavit, Exhibit 43, AMR-Fees, vol. 3, Tab B(43), p. 575. The approved notice stated at the time that "[t]he lawyers are seeking 25% of any recovery received by Class Members that is a result of this case."

⁹² There was an initial class of 167. Twelve individuals opted out, three of which later rescinded their opt-outs. The status of those class members who rescinded opt outs has yet to be determined.

⁹³ For example, in *Toth*, the retainer provided for legal fees calculated on a regressive scale of 15-30% based on the amount of recovery, and an alternative model based on a multiplier of 3. The Court approved the regressive scale model and fees amounting to around 17% of the total settlement, which was a mega-fund much greater than the totality of compensation to be granted to Class Members in this case. The Court accepted that Class Members were made aware of the percentage of fees to be requested through the Notice of the Proposed Settlement sent to them: *Toth* at paras. 108-109, 141, 148, 150, ABOA-Fees, Tab 16.

multiplier based fees may be assessed as against one another, depending on which approach is being used in any particular case.⁹⁴

87. In this case, Class Counsel has agreed to seek 15% of Class Member's recovery up to a maximum of 2.01 times Class Counsel's current time value, plus anticipated future time value. Depending on the number of Class Members ultimately found eligible under the CTSSP, that multiplier could be significantly less.

88. Fees assessed as 15% of recovery or a maximum multiplier of 2.01 are entirely reasonable and fall at the very low end of fees previously approved in the jurisprudence.⁹⁵

Case	Percentage	Multiplier	Stage of Action
<u>Federal Class Actions</u>			
<i>Toth v. Canada</i> , 2019 FC 125	17%	~5.6	Post-certification
<i>McLean v. Canada</i> , 2019 FC 1077	3% (mega-fund >\$2 bil.)	5	Post-certification
<i>McCrea v. Canada</i> , 2019 FC 122	19-24%	2.2	Post-certification
<i>Riddle v. Canada</i> , 2018 FC 900	8.5% (mega-fund)	N/A (\$75 mil.)	Post-certification
<i>Condon v. Canada</i> , 2018 FC 522	30%	N/A	Post-certification
<i>Merlo v. Canada</i> , 2017 FC 533	Estimated 27% on \$100 million settlement (\$12 million + 15% of individual compensation)	N/A	Post-certification
<i>Manuge v. R.</i> , 2013 FC 341	8% (mega-fund \$887 mil.)	N/A	Post-certification
<i>Heyder v. Canada</i> , 2019 FC 1477	2.95% (mega-fund \$900 mil.)	~4	Pre-certification

⁹⁴ *McLean* at paras. 36-37, ABOA-Fees, Tab 8; *Heyder* at para. 122, ABOA-Fees, Tab 5. In these cases the Court was satisfied that fees amounting to five and four times the estimated value of time expended respectively were fair and reasonable.

⁹⁵ See Schedule E for a list of cases including approved fees outside of the Federal Court context.

ix. *Legal services provided should be compensated*

89. While retainer agreements are informative, Federal Courts have accepted that fees sought can be different than those initially stipulated in a retainer agreement.⁹⁶ Despite the existence of a retainer agreement and its terms, it is the Court's task to assess the reasonableness of the fee separately.⁹⁷ Courts can determine what legal fees are fair and reasonable without approval of a retainer agreement.⁹⁸ In two recent Federal Court cases, *Riddle v. Canada* and *Heyder v. Canada*, the fee sought and approved was much different than that stipulated in the retainer agreement.⁹⁹

90. In the event that the Court finds that this class proceeding did not result in success and recovery for the Class, Class Counsel should, in any event, be compensated for the legal services provided to Class Members. Class Counsel initiated this class proceeding on their behalves, prosecuted it diligently and aggressively to reach a timely result, fielded numerous inquiries and questions about the class proceeding and its impacts on Class Members, reviewed and assessed the CTSSP announcements, pushed this litigation to the point of a common issues hearing to pressure the Respondent to implement its stated intentions in a timely fashion, provided advice to Class Members about the CTSSP and its impacts on the class proceeding, negotiated improvements to the CTSSP on their behalves and sought approval of those negotiated improvements by the Court. Class Counsel provided significant legal representation and advice to Class Members. The fees sought herein are fair and reasonable compensation for the work performed for the Class and the risk taken on by Class Counsel.

PART IV - ORDER REQUESTED

91. The Applicant respectfully requests an order for:

- (a) an order approving Class Counsel fees, disbursements and taxes payable by Class Members in Federal Court file T-1499-16 as follows:

⁹⁶ *McCrea* at paras. 91-92, ABOA-Fees, Tab 9.


⁹⁷ *Charles Trust (Trustee of) v. Atlas Cold Storage Holdings Inc.*, [2009] O.J. No. 4271 (S.C.) at para. 50, ABOA-Fees, Tab 2.

⁹⁸ *Smith Estate v. National Money Mart Company*, 2011 ONCA 233 at paras. 51-55, ABOA-Fees, Tab 14; *Sutts, Strosberg LLP v. Atlas Cold Storage Holdings Inc.*, 2009 ONCA 690 at paras. 21-22, ABOA-Fees, Tab 15.

⁹⁹ *Riddle* at para. 44, ABOA-Fees, Tab 11; *Heyder* at para. 102, ABOA-Fees, Tab 5.

- (b) Class Counsel fees and disbursements to be paid on the basis of maximum of 15% of the amounts payable by the CTSSP to Class Members who are determined eligible pursuant to the CTSSP up to a maximum of \$2,131,297.05 (being \$1,850,000 in fees, plus HST of \$240,500, plus disbursements of \$40,797.05) (referred to as the "**Maximum Fee and Disbursements**") to be paid as follows:
 - (i) all costs awarded by the Court to be paid to Class Counsel to be deducted from the Maximum Fee and Disbursements;
 - (ii) any remaining Maximum Fee and Disbursements shall first be satisfied by a deduction of 15% of each lump sum payment awarded to Class Members pursuant to the CTSSP;
 - (iii) then, any amounts remaining of the Maximum Fee and Disbursements, shall be satisfied by a deduction of 15% of annual payments payable pursuant to the CTSSP for a maximum 10 annual payments, or until the amount remaining of the Maximum Fee and Disbursements is satisfied; and
 - (iv) then any amounts still remaining of the Maximum Fee and Disbursements shall not be recoverable.
- (c) an order directing the Respondent or the administrator of the CTSSP to hold back 15% of the lump sum payments and each of the first 10 annual payments payable to the Class Members pursuant to the CTSSP and pay such funds to Class Counsel on account of the Maximum Fee and Disbursements until such time as the Maximum Fee and Disbursements are paid in accordance with paragraph 1 above.
- (d) an order directing that Class Members and Class Counsel may enter into individual retainer agreements for the representation and assistance by Class Counsel during any reconsiderations, appeals or judicial reviews of a rejection of the Class Member's applications to the CTSSP and the fee for such services is approved to be a maximum of 10% of any recovery to Class Member resulting therefrom plus disbursements.
- (e) Such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of February 2020.


per _____
David Rosenfeld
Koskie Minsky LLP

Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Briand v. Canada*, 2018 FC 279
2. *Charles Trust (Trustee of) v. Atlas Cold Storage Holdings Inc.*, [2009] O.J. No. 4271 (S.C.)
3. *Condon v. Canada*, 2018 FC 522
4. *Fontaine v. Canada*, 2017 FC 431
5. *Heyder v. Canada*, 2019 FC 1477
6. *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4206
7. *Manuge v. R.*, 2013 FC 341
8. *McLean v. Canada*, 2019 FC 1077
9. *McCrea v. Canada*, 2019 FC 122
10. *Merlo v. Canada*, 2017 FC 533
11. *Riddle v. Canada*, 2018 FC 641
12. *Rodrigue v. Canada*, 2018 FC 280
13. *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Gen. Div.)
14. *Smith Estate v. National Money Mart Company*, 2011 ONCA 233
15. *Sutts, Strosberg LLP v. Atlas Cold Storage Holdings Inc.*, 2009 ONCA 690
16. *Toth v. Canada*, 2019 FC 125
17. *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.)
18. *Welsh v. R.*, 2019 ONSC 4204
19. *Wenham v. Canada (Attorney General)*, 2017 FC 658
20. *Wenham v. Canada (Attorney General)*, 2019 FC 1653
21. *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.)

SCHEDULE "B"
RELEVANT STATUTES

Federal Court Rules, SOR/98-106

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.
- [...]

334.4 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.

SCHEDULE "C"
TIME DEVOTED

Time and value of time by step in the proceeding (as of December 6, 2019)

<u>Step in Proceeding</u>	<u>Hours</u>	<u>Value of Time</u>	<u>Average Hourly Rate</u>
Pleadings and Claim Investigation	143.2	\$57,071.50	\$398.54
Certification Motion	401.5	\$163,300.00	\$406.72
Appeal of Certification	192.7	\$88,608.50	\$459.83
Notice to the Class	56.6	\$40,544.00	\$716.33
Judicial Review Application	291.0	\$119,434.50	\$410.43
Motion to be heard together	24.5	\$10,835.00	\$442.24
Motion for Notice	30.5	\$14,780.00	\$484.59
Refusals motion	18.7	\$9,983.00	\$533.85
Motion to dismiss	43.2	\$18,390.00	\$425.69
DRC and Settlement discussions	146.6	\$94,277.50	\$643.09
Submissions on Budget 2018	22.5	\$14,010.00	\$622.67
Communications with Class Members	242.0	\$88,802.50	\$366.95
Settlement approval	111.3	\$47,372.50	\$425.63
Fee approval motion	55.9	\$31,679.50	\$566.72
Costs Motion	40.3	\$19,058.00	\$472.90
Settlement implementation	0.0	\$-	\$-
<u>Totals</u>	1,820.5	\$818,146.50	\$449.41

Time and value of time by lawyer (as of December 6, 2019)

<u>Lawyer</u>	<u>Hours</u>	<u>Value of Time</u>	<u>Average Hourly Rate</u>
David Rosenfeld (2005)	658.3	\$462,163.50	\$702.06
Brittany Tovee (2016)	333.1	\$106,225.00	\$318.90
Janeta Zurakowski (2018)	123.8	\$38,102.00	\$307.77
Charles Hatt (2013)	75.4	\$33,930.00	\$450.00
Other Lawyers	71.7	\$27,824.50	\$388.07
Students	331.8	\$85,834.50	\$258.69
Clerks	226.4	\$64,067.00	\$282.98
<u>Totals</u>	1,820.5	\$818,146.50	\$449.41

SCHEDULE "D"
DISBURSEMENTS INCURRED

Disbursements incurred on behalf of the class (as of December 11, 2019)

<u>Category</u>	<u>Amount Incurred</u>
Photocopying and printing	\$22,768.15
Conference calls, telephone and long distance charges, and faxes	\$1338.48
Postage, mailing and couriers	\$553.44
Translator fees (notice of certification)	\$1,120.38
Court filing fees	\$50.00
Travel (airfare, accommodations and transportation)	\$129.20
Agency fees – commissioning of affidavit	\$69.40
News Releases	\$10,019.00
Research (Westlaw, Quicklaw)	\$4,346.04
Process Servers	\$1,205.00
Lpic Levy	\$50.00
Taxes on Disbursements	\$8,355.96
Total Disbursements (including taxes) incurred	\$49,999.40

SCHEDULE "E"
PREVIOUSLY APPROVED FEES

Case:	Percentage:	Multiplier:	Stage of Action at Resolution:
<u>Federal Class Actions</u>			
<i>Toth v. Canada</i> , 2019 FC 125	17%	~5.6	Post-certification
<i>McLean v. Canada</i> , 2019 FC 1077	3% (mega-fund >\$2 bil.)	5	Post-certification
<i>McCrea v. Canada</i> , 2019 FC 122	19-24%	2.2	Post-certification
<i>Riddle v. Canada</i> , 2018 FC 900	8.5% (mega-fund)	N/A (\$75 mil.)	Post-certification
<i>Condon v. Canada</i> , 2018 FC 522	30%	N/A	Post-certification
<i>Merlo v. Canada</i> , 2017 FC 533	\$12 million + 15% of compensation awarded to each class member (estimated 27% on \$100 million settlement)	N/A	Post-certification
<i>Manuge v. R.</i> , 2013 FC 341	8% (mega-fund \$887 mil.)	N/A	Post-certification
<i>Heyder v. Canada & Beattie v. Canada</i> , 2019 FC 1477	2.95% (mega-fund \$900 mil.)	~4	Pre-certification
<u>Other Settlements</u>			
<i>Cloud v. Canada</i> (approved as part of <i>Baxter v Canada</i> , 2006 CanLII 41673 (ONSC))		2.4	Post-certification
<i>Anderson v. Canada</i> (<i>Attorney General</i>), 2016 NLTD(G) 179	33.3%	1.81	After the close of the plaintiffs' case at trial
<i>Dolmage, McKillop and Bechard v. HMQ</i> , 2014 ONSC 1283	20.68%	2.38	First day of trial

<i>Robertson v. Thompson Canada Ltd.</i> , [2009] O.J. No. 2650 (S.C.J.)	36%	2.4	Post-certification, post-summary judgment
<i>Omrod v. Toronto Hydro-Electric Systems Ltd.</i> , [2002] O.J. No. 4925 (S.C.J.)	35%	2	Post-certification
<i>Walker v. Union Gas Ltd.</i> , [2009] O.J. No. 536 (S.C.J.)	29.8%	2.19	Pre-certification
<i>Martin v. Barrett</i> , [2008] O.J. No. 2105 (S.C.J.)	29%	2.5	Post-certification
<i>Pichette v. Toronto Hydro</i> , [2010] O.J. No. 3185 (S.C.J.)	28.5%	4.42	Pre-certification
<i>Garland v. Enbridge Gas Distribution Inc.</i> , [2006] O.J. No. 4907 (S.C.J.)	26.7%	2.78	Pre-certification, post-summary judgment
<i>799376 Ontario Inc. (c.o.b. Lonsdale Printing Services) (Trustee of) v. Cascades Fine Papers Group Inc.</i> , [2008] O.J. No. 5280 (S.C.J.)	25%	2.88	Pre-certification
<i>Pysznyj v. Orsu Metals Corp.</i> , [2010] O.J. No. 1994 (S.C.J.)	25%	2.11	Pre-certification
<i>Osmun v. Cadbury Adams Canada Inc.</i> , [2010] O.J. No. 2093 (S.C.J.)	25%	2	Post-certification
<i>405341 Ontario Ltd. v. Midas Canada Inc.</i> , [2013] O.J. No. 4107 (S.C.J.)	25%	1.3	Post-certification and discoveries
<i>Sheridan Chevrolet v Hitachi et al</i> , 2017 ONSC 2803	25%	0.8	Pre-certification
<i>Robertson v. ProQuest LLC</i> , [2011] O.J. No. 2013 (S.C.J.)	24%	1.7	Post-certification

<i>Zaniewicz v. Zungui Haixi</i> , [2013] O.J. No. 3894 (S.C.J.)	20.75%	3.3	Pre-certification
<i>Cassano v. Toronto-Dominion Bank</i> , [2009] O.J. No. 2922 (S.C.J.)	20%	5.5	Post-certification
<i>Jardine v. Certainteed Corporation</i> , 2017 BCSC 364	18%	3.6	Pre-certification
<i>Fantl v. Transamerica Life Canada</i> , [2009] O.J. No. 3366 (S.C.J.); <i>Fantl v. Transamerica Life Canada</i> , [2009] O.J. No. 4324 (S.C.J.)	16%	2.75	Pre-certification
<i>Lawrence v. Atlas Cold Storage Holdings Inc.</i> , [2009] O.J. No. 4067 (C.A.)	15.75%	~2	Pre-certification
<i>Mancinelli v Royal Bank of Canada</i> , 2017 ONSC 2324 (subject to further increase)	10.9%	2.2	Pre-certification
<i>Brazeau v. Canada</i> 2018 ONSC 4721	33.3%	3.3	Judgment

FEDERAL COURT

B E T W E E N :

BRUCE WENHAM

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

Class Proceeding

**WRITTEN REPRESENTATIONS
OF THE APPLICANT
(MOTION FOR FEE APPROVAL
RETURNABLE FEBRUARY 26 & 27, 2020)**

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