

**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 COSTS RETURNABLE FEBRUARY 26 & 27, 2020)**

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## **PART I - OVERVIEW AND FACTS**

### **A. Overview**

1. This class judicial review proceeding was successful. It 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. The proceeding, following the precedent-setting certification decision by the Federal Court of Appeal, directly led to 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 the egregiously unreasonable barriers of the TSCP. Canada gave its revisions to the TSCP a new name: 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 who apply under the CTSSP.

2. This motion for costs is being heard together with motions to approve the Settlement Agreement and Class Counsel's request for fees and disbursements. As no agreement was reached with the Respondent to pay Class Counsel's fees, Class Counsel will be seeking recovery of its legal fees directly from the Class in accordance with its retainer agreement with Bruce and class proceedings jurisprudence. Bruce supports Class Counsel's request and brings this motion seeking to defray the Class' legal costs by having the Respondent contribute.

3. As submitted by Class Counsel in its written submissions on fee approval, 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 (*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.

4. The Class was successful by the provision of another chance to apply, be recognized and receive the financial support offered under the TSCP through the CTSSP, and by the added benefits provided under the Settlement Agreement, all of which resulted in whole, or in part, by this class proceeding and the prospect that Canada would eventually have to face and address the unfairness of the TSCP in this Court.

5. The Respondent's evidence submitted on this motion implies that it was always going to implement changes to the TSCP regardless of this class proceeding. If true, then significant time, effort, party and court resources, and goodwill were unnecessarily spent and wasted.

6. Despite the general no-costs rule for Federal Court class proceedings, the exceptions under sub-rule 334.39(1) are engaged and an award of costs is warranted. Without such an award in the circumstances of this case, Respondents will act with impunity in the face of court oversight and waste court and party resources without any recourse. The underlying purposes of class proceedings (access to justice, judicial economy and behaviour modification) will be significantly undermined as needy class members will be unable to locate counsel willing to take matters such as these on a contingent basis if respondents/defendants are able to simply circumvent this Court with impunity and without recourse. If this were an individual proceeding, costs would be awarded in favour of the Applicant as a result of the Respondent's anticipatory compliance with the remedies sought in the litigation. The Respondent should not benefit because this matter was certified as a class proceeding to represent vulnerable class members seeking the access to justice that the Federal Court's general no-costs class proceeding rule is meant to provide.

7. The Court should use its full discretionary power over the amount of costs<sup>1</sup> to award costs on a solicitor-and-client basis,<sup>2</sup> totalling \$850,000 plus \$40,797.05 in disbursements. The Respondent's anticipatory compliance with the relief sought in this application, coupled with the public interest in indemnifying this class of vulnerable Thalidomide survivors and enhancing access to justice for similar groups, favours solicitor-client costs. In the alternative, significant costs on a party-and-party basis should be awarded.

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<sup>1</sup> *Federal Courts Rules*, r. 400(1) [**"Rules"**], Schedule B.

<sup>2</sup> *Rules*, r. 400(6), Schedule B.

**B. Background to this Class Proceeding**

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

8. 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.<sup>3</sup>

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 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).<sup>4</sup> 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.<sup>5</sup>

11. 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

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<sup>3</sup> Affidavit of Bruce Wenham, sworn December 13, 2019 ["**Wenham Affidavit**"], paras. 3-4, Applicant's Motion Record (Costs Motion) ["**AMR-Costs**"], Volume 3, Tab C, pp. 871-872.

<sup>4</sup> Affidavit of Jonathan Ptak, sworn December 13, 2019 ["**Ptak Affidavit**"], paras. 4-11, AMR-Costs, Volume 1, Tab B, pp. 9-10.

<sup>5</sup> Affidavit of Cindy Moriarty, affirmed January 24, 2020, ["**Moriarty Affidavit**"], para. 45.

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 deformities as consistent with *in utero* Thalidomide exposure.<sup>6</sup>

12. The TSCP Administrator rejected his application through blind application of the unfair and unreasonable Evidentiary Criteria and Documentary Proof Requirements,<sup>7</sup> despite the fact that these were effectively impossible for Bruce, and other class members, to meet.

### **C. History of the Class Proceeding**

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

13. Bruce filed an application for judicial review of the TSCP Administrator's rejection decision on September 12, 2016.<sup>8</sup> 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.<sup>9</sup> 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)***

14. 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

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<sup>6</sup> Wenham affidavit, paras. 5-7, AMR-Costs, Volume 3, Tab C, pp. 872-873.

<sup>7</sup> Ptak Affidavit, para. 17, AMR-Costs, Volume 1, Tab B, p. 11; Wenham Affidavit, para. 7, AMR-Costs, Volume 3, Tab C, p. 873.

<sup>8</sup> Ptak Affidavit, para. 18, AMR-Costs, Volume 1, Tab B, p. 11; Wenham Affidavit, para. 9, AMR-Costs, Volume 3, Tab C, p. 873.

<sup>9</sup> Ptak Affidavit, paras. 19-25, AMR-Costs, Volume 1, Tab B, p. 12.



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 application as a class proceeding.<sup>10</sup> 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.

15. The Notice of Motion for certification and Bruce's accompanying affidavit were served on December 23 and 28, 2016 respectively. Justice McDonald was appointed as Case Management Judge on February 22, 2017.<sup>11</sup>

16. 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.<sup>12</sup> The Respondent refused to consent and opposed the relief sought. Ultimately, on April 11, 2017, Justice McDonald ordered that the judicial review application would be held in abeyance pending determination of the certification motion.

**iii. *Applicant's first request for consultation***

17. 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

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<sup>10</sup> Wenham Affidavit, paras. 10-12, AMR-Costs, Volume 3, Tab C, pp. 873-874.

<sup>11</sup> Ptak Affidavit, paras. 28-29, AMR-Costs, Volume 1, Tab B, p. 13.

<sup>12</sup> Wenham Affidavit, para. 13, AMR-Costs, Volume 3, Tab C, p. 874.

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 action" and generally downplaying the Standing Committee's "discussion".<sup>13</sup>

**iv.      *Certification denied and appeal initiated and heard***

18.      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*<sup>14</sup> that had dismissed a Thalidomide survivor's individual judicial review application largely on the basis of justiciability.

19.      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.<sup>15</sup>

**v.        *Briand and Rodrigue decisions***

20.      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*.<sup>16</sup> 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.<sup>17</sup> The Court

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<sup>13</sup> Ptak Affidavit, paras. 32-34, AMR-Costs, Volume 1, Tab B, pp. 13-14; Wenham Affidavit, paras. 15-18, AMR-Costs, Volume 3, Tab C, pp. 874-875.

<sup>14</sup> *Fontaine v. Canada*, 2017 FC 431, Applicant's Book of Authorities (Costs Motion) ("ABOA-Costs"), Tab 1.

<sup>15</sup> Ptak Affidavit, paras. 36-38, AMR-Costs, Volume 1, Tab B, p. 14.

<sup>16</sup> *Briand v. Canada*, 2018 FC 279, ABOA-Costs, Tab 2; and *Rodrigue v. Canada*, 2018 FC 280, ABOA-Costs, Tab 3.

<sup>17</sup> *Briand v. Canada*, 2018 FC 279, at para. 78, ABOA-Costs, Tab 2.

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.

vi. *Budget 2018 and second request for consultation*

21. 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.<sup>18</sup>

22. 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.<sup>19</sup>

23. 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.<sup>20</sup>

24. 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

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<sup>18</sup> Minister's Letter to Standing Committee Chair (undated), Exhibit 18 to Ptak Affidavit, para. 39, AMR-Costs, Volume 1, Tab B and Volume 2, B18, pp. 14-15 and 352.

<sup>19</sup> Ptak Affidavit, para. 40, AMR-Costs, Volume 1, Tab B, p. 15; Wenham Affidavit, para. 19, AMR-Costs, Volume 3, Tab C, p. 875.

<sup>20</sup> Wenham Affidavit, paras. 20-21, AMR-Costs, Volume 3, Tab C, p. 875; Ptak Affidavit, paras. 41-42, AMR-Costs, Volume 1, Tab B, p. 15.

the TSCP. However, nobody from the Government would meet with Class Counsel and Bruce, despite the fact that the changes suggested in the Budget seemed directly aimed towards what the Class was seeking in its case.<sup>21</sup>

25. 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.<sup>22</sup> Health Canada considered these submissions in developing changes to the TSCP.<sup>23</sup> The eventual design of the CTSSP closely resembles the Applicant's submissions.

26. 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".<sup>24</sup>

27. In fact, the Government never announced any "further details" about TSCP reforms in 2018.<sup>25</sup> 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.<sup>26</sup> 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

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<sup>21</sup> Ptak Affidavit, paras. 42-46, 48, AMR-Costs, Volume 1, Tab B, pp. 15-16; Wenham Affidavit, paras. 21-24, AMR-Costs, Volume 3, Tab C, p. 875-876.

<sup>22</sup> Exhibit 25 to Ptak Affidavit, AMR-Costs, Volume 2, Tab B25.

<sup>23</sup> Moriarty Affidavit, para. 67.

<sup>24</sup> Ptak Affidavit, paras. 49-50, AMR-Costs, Tab B, p.16; Wenham Affidavit, para. 25, AMR-Costs, Volume 3, Tab C, p. 876.

<sup>25</sup> Ptak Affidavit, para. 51, AMR-Costs, Volume 1, Tab B, p. 16; Wenham Affidavit, para. 26, AMR-Costs, Volume 3, Tab C, p. 876.

<sup>26</sup> Wenham Affidavit, para. 26, AMR-Costs, Volume 3, Tab C, p. 876.

application met the criteria for certification as a class proceeding. The Court approved Bruce as Representative Applicant and his proposed litigation plan.<sup>27</sup> Bruce was reassured that he and other Thalidomide survivors would get their "day in court" to have their voices heard.<sup>28</sup>

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.<sup>29</sup> Nobody from Health Canada responded to Class Counsel's letter.<sup>30</sup>

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

30. Immediately after certification Class Counsel tried to get 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 to Class Counsel about notice to the Class in the first week of January 2019. The Respondent did not respond as advised.<sup>31</sup>

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<sup>27</sup> Judgment and Reasons for Judgment of Justice Stratas for the Federal Court of Appeal, Exhibit 29 to Ptak Affidavit, AMR-Costs, Volume 2, Tab B29, p. 388.

<sup>28</sup> Wenham Affidavit, para. 27, AMR-Costs, Volume 3, Tab C, p. 876.

<sup>29</sup> Letter of Class Counsel to Health Canada, dated November 2, 2018, Exhibit 30 to Ptak Affidavit, para. 53, AMR-Costs, Volume 1, Tab B and Volume 2, Tab B30, pp. 17 and 430.

<sup>30</sup> Ptak Affidavit, para. 54, AMR-Costs, Volume 1, Tab B, p. 17; Wenham Affidavit, para. 28, AMR-Costs, Volume 3, Tab C, p. 876.

<sup>31</sup> Ptak Affidavit, paras. 55-60, AMR-Costs, Volume 1, Tab B, p. 17-18.

**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, the Government of Canada announced the "anticipated roll out" of changes to the TSCP in the form of the CTSSP.<sup>32</sup> The announcement indicated the CTSSP would address the relief sought in the class proceeding by providing "a fair and comprehensive approach to identifying thalidomide survivors that is based on international best practices."<sup>33</sup> 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

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<sup>32</sup> Moriarty Affidavit, para. 64.

<sup>33</sup> Ptak Affidavit, paras. 61-62, AMR-Costs, Volume 1, Tab B, p. 18; Wenham Affidavit, paras. 29-30, AMR-Costs, Volume 3, Tab C, pp. 876-877.

conference ("**DRC**"); and an order to disseminate notice of certification because the Respondent continued to withhold consent ("**motion for notice**").<sup>34</sup>

35. In response to the motion, the Respondent agreed to set a date for a DRC and Justice McDonald subsequently directed February 28, 2019.<sup>35</sup> However, the DRC was eventually adjourned at the Respondent's request, because Health Canada had not yet issued further details of the CTSSP.<sup>36</sup> Only once Canada had provided further details on the CTSSP could Justice McDonald schedule the DRC,<sup>37</sup> which she set down for June 17, 2019.<sup>38</sup>

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.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup> (Shortly thereafter this evidence was used as the basis for a motion to dismiss the proceeding on preliminary grounds.)

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<sup>34</sup> Ptak Affidavit, para. 64, AMR-Costs, Volume 1, Tab B, p. 19.

<sup>35</sup> Ptak Affidavit, paras. 65, 66, AMR-Costs, Volume 1, Tab B, p. 19.

<sup>36</sup> Ptak Affidavit, paras. 66, 69, AMR-Costs, Volume 1, Tab B, p. 19, 20.

<sup>37</sup> Ptak Affidavit, para. 72, AMR-Costs, Volume 1, Tab B, p. 21.

<sup>38</sup> Ptak Affidavit, para. 82, AMR-Costs, Volume 1, Tab B, p. 22.

<sup>39</sup> Order and Reasons of Justice McDonald, dated March 28, 2019, Exhibit 45 to Ptak Affidavit, para. 72, AMR-Costs, Volume 1, Tab B and Volume 2, Tab B45, pp. 21 and 571.

<sup>40</sup> Ptak Affidavit, paras. 66-67, AMR-Costs, Volume 1, Tab B, pp. 19-20.

<sup>41</sup> Ptak Affidavit, para. 70, AMR-Costs, Volume 1, Tab B, p. 20.

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.<sup>42</sup> 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 related Order-in-Council, dated April 5, 2019.<sup>43</sup> Class Counsel promptly reviewed these answers and sent further questions also on April 11, 2019.<sup>44</sup> Still lacking answers to certain questions, Bruce was compelled to serve a **refusals motion** on April 15, 2019, that included a request for costs.<sup>45</sup> After being served the Respondent provided further answers from Ms. Moriarty on May 7, 2019. 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.<sup>46</sup>

39. On May 22, 2019, the Respondent served a **motion to dismiss** the application 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.<sup>47</sup>

40. The parties exchanged application records on April 22, 2019 (Applicant) and May 24, 2019 (Respondent). Eventually, October 23, 2019 was set for the common issues hearing.<sup>48</sup>

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<sup>42</sup> Moriarty's answers to written examination, dated April 5, 2019, Exhibit 47 to Ptak Affidavit, paras. 71, 75, AMR-Costs, Volume 1, Tab B and Volume 3, Tab B47, pp. 20, 21 and 609.

<sup>43</sup> Ptak Affidavit, para. 76, AMR-Costs, Volume 1, Tab B, p. 21.

<sup>44</sup> Ptak Affidavit, para. 77, AMR-Costs, Volume 1, Tab B, p. 21.

<sup>45</sup> Ptak Affidavit, para. 78, AMR-Costs, Volume 1, Tab B, pp. 21-22.

<sup>46</sup> Ptak Affidavit, para. 85, AMR-Costs, Volume 1, Tab B, p. 22.

<sup>47</sup> Ptak Affidavit, paras. 86-90, AMR-Costs, Volume 1, Tab B, pp. 22-23

<sup>48</sup> Ptak Affidavit, paras. 79, 83, 89, AMR-Costs, Volume 1, Tab B, pp. 22, 23.



**xi. *Settlement and related motions***

41. 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.

42. On October 22, 2019, the parties executed a settlement agreement ("**Settlement Agreement**") that, among other things, allows Bruce to seek costs of the proceeding.<sup>49</sup>

43. This motion for costs is being heard together with motions to approve the Settlement Agreement and Class Counsel's request for fees and disbursements. As no agreement was reached with the Respondent to pay Class Counsel's fees, Class Counsel will be seeking recovery of its legal fees directly from the Class in accordance with its retainer agreement with Bruce and class proceedings jurisprudence. Bruce supports Class Counsel's request and brings this motion seeking to defray the Class' legal costs by having the Respondent contribute.

44. As part of the Settlement, the Respondent will obtain a discontinuance of this class proceeding and a release from class members. Class Counsel has had to prepare motion materials to seek approval of the settlement and speak to and advise class members on the Settlement Agreement and the release sought. All of this work has benefitted the Respondent, who has not contributed at all to the cost of that work.

**D. Class Counsel devoted significant time on behalf of the Class in this proceeding**

45. Class Counsel devoted a significant amount of time to prosecute this novel, complex and aggressively defended class proceeding. The Applicant has filed a detailed bill of

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<sup>49</sup> Settlement Agreement, Exhibit 58 to Ptak Affidavit, para. 93, AMR-Costs, Volume 1, Tab B and Volume 3, Tab B58, pp. 23 and 781.

costs and further evidence explaining the time devoted at each major step.<sup>50</sup> In total, Class Counsel devoted over 1,800 hours of lawyer, student and clerk time to this proceeding, with a value of approximately \$850,000.<sup>51</sup>

46. The Respondent has provided no evidence of the hours its counsel devoted to this litigation for comparison purposes. As such, this Court should disregard or at least view skeptically any charge that Class Counsel's dockets are excessive.<sup>52</sup>

## **PART II - ISSUES AND THE LAW**

### **A. Issues**

- (a) Is an exception to the no-costs regime under rule 334.39(1) engaged, such that costs should be awarded against the Defendant?
- (b) If yes, what is the proper quantum?

### **B. Exceptions to the no-costs rule are met and this Court should award costs**

- i. *Exceptions to the "no-costs" rule for Federal Court class proceedings must be interpreted purposively*

47. Rule 334.39(1) of the *Federal Courts Rules*, SOR/98-106 ("**Rules**") provides the "no-costs" rule in Federal Court class proceedings, subject to three listed exceptions: (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

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<sup>50</sup> Chart of Class Counsel's hours and value of time devoted, Exhibit 62, Ptak Affidavit, paras. 99-121, AMR-Costs, Volume 1, Tab B and Volume 3, Tab B62, pp.24-29 and 862.

<sup>51</sup> 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: Ptak Affidavit, paras. 100-121, AMR-Costs, Volume 1, Tab B, pp. 24-29. Class Counsel anticipates providing an update of the time and value devoted to this proceeding in advance of the motion date.

<sup>52</sup> *Smith Estate v. Rotstein*, 2011 ONCA 491, ABOA-Costs, Tab 4; *Risorto v. State Farm Mutual Automobile Insurance Company* (2003), 64 O.R. (3d) 135, at para. 10, ABOA-Costs, Tab 5: where opposing counsel have not put their dockets before the court for comparison purposes, a critique of excessive docketing is "no more than an attack in the air".

negligence, mistake or excessive caution; or (c) exceptional circumstances make it unjust to deprive the successful party of costs.<sup>53</sup>

48. The Applicant submits that this Court must interpret and apply the exceptions to the no-costs rule in 334.39(1) generously in accordance with the fundamental principles underlying class proceedings and in accordance with the policy rationale that underlies the no-costs regime: the incentivizing of class proceedings.

49. The Supreme Court of Canada has repeatedly mandated that class proceeding legislation must be interpreted generously and purposively to give effect to the three underlying goals of class proceeding: access to justice, judicial economy and behavior modification.<sup>54</sup>

50. In keeping with these goals, decisions of the Federal Court of Appeal and this Court (summarized below) have consistently found that the purpose behind rule 334.39(1) is to protect class action plaintiffs (or applicants) from cost awards as a means to incentivize the use of class proceedings as a legal tool. By removing a practical barrier to class proceedings, the no-costs rule *incentivizes* the use of class proceedings by potential plaintiffs/applicants. Greater use of class proceedings in turn promotes the underlying goals of class proceedings.

51. In *Campbell v. Canada*, the Federal Court of Appeal traced the history of rule 334.39(1) to the Federal Courts Rules Committee's desire to remove "cost barriers to representative plaintiffs".<sup>55</sup> Canada had sought and been granted costs for steps in a proposed class proceeding other than the certification motion itself, which was not decided before the action was discontinued. The interpretive issue was whether to adopt an expansive interpretation

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<sup>53</sup> Rules, r. 334.39(1), Schedule B.

<sup>54</sup> *Hollick v. Toronto (City)*, 2001 SCC 68, at paras. 14-15, ABOA-Costs, Tab 6.

<sup>55</sup> *Campbell v. Canada (Attorney General)*, 2012 FCA 45, at para. 26 (emphasis added), ABOA-Costs, Tab 7.

of the temporal operation of the no-costs provision that would provide more protection to plaintiffs and therefore limit the role of costs as a disincentive. Working on the assumption "that the intention of the proponents of the 'no costs' rule was to limit the role of costs as a disincentive to class action plaintiffs," the Federal Court of Appeal purposively interpreted the rule so as to give "the fullest effect to the Rules Committee's intention" by adopting the expansive interpretation which minimized "the risk to representative plaintiffs".<sup>56</sup>

52. In *Manuge v. Canada*, this Court found that rule 334.39(1) "was adopted to eliminate a practical barrier to the commencement of a class proceeding by a representative plaintiff who might otherwise be exposed to a substantial costs award if the case was ultimately unsuccessful."<sup>57</sup> In *Dennis v. Canada*, this Court reiterated and endorsed the Federal Court of Appeal's finding of the purpose behind the no-costs rule in *Campbell*: "[t]he purpose of Rule 334.39(1) was said to be the limitation of 'the role of costs as a disincentive to class action plaintiffs'."<sup>58</sup>

53. While the default no-costs rule does facially apply to the Respondent (no costs against "any party"), it is more apt for a class of defendants/respondents who might face the prospect of an adverse cost award that would make such proceedings impractical.<sup>59</sup> Notably, no

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<sup>56</sup> *Campbell*, at paras. 44-45 (emphasis added), ABOA-Costs, Tab 7.

<sup>57</sup> *Manuge v. Canada*, 2013 FC 341, at para. 22, ABOA-Costs, Tab 8.

<sup>58</sup> *Dennis v. Canada*, 2017 FC 1011, at para. 11 (emphasis added), ABOA-Costs, Tab 9; See also *Buffalo v. Samson Cree Nation*, 2008 FC 1308, at para. 170, ABOA-Costs, Tab 10: where the Court noted the intention that class proceedings "act as a means of providing increased access to justice" in the context of evaluating whether the exceptions to the no-costs rule are met.

<sup>59</sup> See *Rules*, r. 334.14(2), whereby a party to an action or an application against two or more defendants/respondents can move to certify a defendant/respondent class with a representative defendant/respondent. It makes sense that the representative defendant/respondent would benefit from cost protection given the lack of incentive to perform that role. In fact, a recent decision of this Court awarded costs to a set of proposed representative respondents who had "no interest in participating in [a] reverse class proceeding" and successfully resisted the applicant's certification motion: *Voltage Pictures, LLC Canada v. Salna*, 2019 FC 1412, at paras. 16, 168, ABOA-Costs, Tab 11.

Federal Court or Federal Court of Appeal decisions suggest a policy rationale for protecting non-class defendants/respondents in class proceedings from cost awards where appropriate.

54. The Applicant submits that this Court must interpret and apply the exceptions to the no-costs rule purposively in this case, with an eye toward the underlying principles of class proceedings and underlying the no-costs rule – incentivizing applicants to bring class judicial review proceedings in Federal Court. The lack of useful case law on applying the exceptions makes purposive interpretation that much more important.<sup>60</sup>

**ii. *The Respondent's circumvention of the class proceeding and the class representative was unnecessary, improper and/or exceptional***

55. The Respondent circumvented the class proceeding and the class representative to make anticipatory compliance with the relief sought *outside* of the Court's supervisory role and process in class proceedings. This constitutes unnecessary, improper, and/or exceptional conduct. While the Class succeeded in remedying the TSCP's unfairness, the Respondent now denies this success in Class Counsel's fee approval motion, and resists contributing anything toward costs.

56. Failure to sanction the Respondent's circumvention of this class proceeding through costs would actually undermine the purpose of the no-costs rule by *disincentivizing* class proceedings in Federal Court. Needy class members will be unable to locate counsel willing to take on similar cases on a contingent basis in future since fees will be uncertain (even contested by respondents, as here) and costs will be unavailable.

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<sup>60</sup> *Always Travel Inc. v. Air Canada*, 2004 FC 675, at para. 9, ABOA-Costs, Tab 12: where the Court found the plaintiffs' motion to lift a stay of their proposed class proceeding, which had already been litigated four times in Federal Court and provincial superior court, was simply "frivolous and vexatious" and therefore met exception (b); *Buffalo v Samson Cree Nation*, 2008 FC 1308, at paras. 160-171, ABOA-Costs, Tab 10: where the Court noted the parties' arguments regarding exceptions (a) and (c) but did engage in any analysis in declining to order costs; *Dennis v. Canada*, 2017 FC 1011, at para. 12, ABOA-Costs, Tab 9: where the Court's analysis of whether any exceptions were met turned on unique facts, namely whether the plaintiffs' decision to discontinue their Federal Court class proceeding and pursue their claim in the Manitoba courts was improper, abusive or vexatious.

57. Anticipatory compliance that may moot an individual judicial review triggers cost consequences against the government respondent. The Respondent should not be permitted to do so here with impunity and without costs simply because it is a class proceeding. The Respondent does not have any issue with accessing the justice system.

58. This class proceeding was novel and successful. The Minister's announcement of changes to the TSCP in the form of the CTSSP directly resulted from this proceeding, as 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'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.

59. 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.

60. 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.

61. There was no policy decision, nor were there program design and implementation approvals, prior to certification on November 1, 2018.<sup>61</sup> 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,<sup>62</sup> 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 announced in April 2019 and commenced in June 2019 despite the fact that the bases for all of the three eligibility pillars of the CTSSP were not in place at the time: there was no agreement

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<sup>61</sup> 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.

<sup>62</sup> Moriarty Affidavit, para. 64.

with the Third Party Administrator that provides an assessment at stage 1 of the CTSSP, no algorithm had been arranged for stage 2 of the CTSSP and no multi-disciplinary committee had been created for stage 3 of the CTSSP.<sup>63</sup> It should be clear that the announcement of the CTSSP and its timing came as a direct result of this class proceeding.

62. Canada's evidence on this motion conspicuously avoids making the claim that this class proceeding did not influence the announcement, design and implementation of the CTSSP.<sup>64</sup> The evidence shows that the Respondent distanced itself from, and downplayed the importance of, 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."<sup>65</sup>

63. The Respondent circumvented this class proceeding and the class representative in order to make anticipatory compliance with the relief sought. In June 2017, the Respondent refused the Applicant's first consultation request about potential changes to the TSCP that mirrored the relief sought in the case. Following the statement of intent in Budget 2018, the Respondent and Health Canada officials stonewalled Bruce and Class Counsel in their second request for meaningful consultation, requiring written submissions only which were then considered and which closely resemble the CTSSP. Finally, the Applicant's third consultation request in November 2018 went unanswered, despite the case having been certified with Bruce

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<sup>63</sup> Moriarty Affidavit, paras. 81, 88-89.

<sup>64</sup> See Moriarty Affidavit, paras. 82-85.

<sup>65</sup> Ptak Affidavit, paras. 32-34, AMR-Costs, Volume 1, Tab B, pp. 13-14 (emphasis added).



as the court-ordered representative of the Class. Meanwhile, the Respondent slow-played Bruce's efforts to have notice of certification delivered to the class and to have the common issues heard expeditiously. Before any progress could be made toward the merits, the Minister hurriedly and unilaterally announced the "anticipated roll out" of the CTSSP in early 2019.

64. If a government respondent to a class judicial review proceeding in Federal Court can unilaterally take the remedial action sought in the proceeding, thereby rendering the proceeding successful but effectively moot, and then later deny that the class proceeding was successful in opposition to Class Counsel's fees and to avoid paying costs, Federal Court class judicial review proceedings will be *disincentivized* – if not effectively eliminated. It will be harder for classes of vulnerable persons like Thalidomide survivors to collectively advance their legal interests using the class proceedings tool.<sup>66</sup> No counsel will take on cases on a contingent basis as fees will be uncertain and cost awards will be unavailable. This disincentivizing effect runs counter to the purpose of the no-costs rule.

65. The Federal Court of Appeal, this Court and other appellate courts have awarded costs to judicial review applicants outside the class proceedings context where government respondents have similarly made anticipatory compliance to moot the underlying application.

66. In *Tetzlaff v. Canada (Minister of the Environment)*, the applicant challenged the Minister's failure to appoint a review panel to assess a project's environmental effects as required by a previous order. Days before the matter was decided on the merits, the government respondent made "anticipatory compliance" with the relief sought in the judicial review and

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<sup>66</sup> Wenham Affidavit, para. 58, AMR-Costs, Volume 3, Tab C, p. 883.

argued the court had nothing left to determine.<sup>67</sup> Justice Muldoon awarded costs to applicant, finding the respondent's compliance may have been linked to the litigation:

In circumstances such as this, where a respondent makes anticipatory compliance before the Court grants an applicant's request, it is not unusual to award costs to the applicant because he or she was right to make the application in the first place, and so far as can be known the respondent perhaps complied with alacrity just because the litigation was instituted.<sup>68</sup>

67. The *Tetzlaff* cost award was upheld by the Federal Court of Appeal.<sup>69</sup>

68. In *Dagg v. Canada (Minister of Industry)*, the applicant commenced a judicial review following a "deemed refusal" by the government respondent to provide documents sought under access to information legislation. Only after the judicial review was commenced did the government respond provide the documents, thereby rendering the proceeding moot. The Federal Court of Appeal held that Mr. Dagg was entitled to costs.<sup>70</sup>

69. In *Vukelich v. Mission Institution*, the applicant brought a *habeas corpus* proceeding for release from solitary confinement that was made moot by the government respondent after it released him prior to the merits hearing. The applicant sought costs, arguing that his release "flowed as a direct result of the petition" for judicial review.<sup>71</sup> The BC Court of Appeal upheld the lower court's decision to award costs, finding that the judicial review application was "instrumental in securing Mr. Vukelich's release".<sup>72</sup>

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<sup>67</sup> *Tetzlaff v. Canada (Minister of the Environment)* [1991] F.C.J. No. 113, at p. 6 (emphasis added) ["*Tetzlaff*"], ABOA-Costs, Tab 13.

<sup>68</sup> *Tetzlaff*, at p. 6 (emphasis added), ABOA-Costs, Tab 13.

<sup>69</sup> *Tetzlaff v. Canada (Minister of the Environment)*, [1991] F.C.J. No. 1277 (F.C.A.), at p. 7, ABOA-Costs, Tab 14.

<sup>70</sup> *Dagg v. Canada (Minister of Industry)*, 2010 FCA 316, at para. 15, ABOA-Costs, Tab 15; see also *Summer v. Canada (National Revenue)*, 2014 FC 880, at para. 75, ABOA-Costs, Tab 16.

<sup>71</sup> *Vukelich v. Mission Institution*, 2005 BCCA 75, at para. 41 ["*Vukelich*"], ABOA-Costs, Tab 17.

<sup>72</sup> *Vukelich*, at paras. 42-45, ABOA-Costs, Tab 17.

70. Respondents' circumvention of individual judicial review applications are sanctioned by costs awards and the Respondent's anticipatory compliance and circumvention of this class proceeding should similarly be sanctioned by an award of costs.

iii. *Alternatively, the Respondent unnecessarily lengthened the duration of the proceeding and took improper steps by failing to ensure the litigation halted once Canada had decided to remedy the TSCP*

71. If it is true that the announcement of the CTSSP was not influenced by this class proceeding, which Bruce denies, then the Respondent unnecessarily lengthened the duration of the proceeding.<sup>73</sup> Much of the work to litigate this proceeding would not have been necessary if the Respondent had acceded Bruce and Class Counsel's multiple requests for consultation and advised that Canada was going to implement the CTSSP.<sup>74</sup>

72. The Respondent's evidence is that Health Canada was "actively engaged" in work from March 2016 onward.<sup>75</sup> If changes to the TSCP were in development from 2016 – months prior to *any* step in this class proceeding – then certainly the Respondent's failure to consult with the Class and advise them of its development would mean it was not necessary for this class proceeding to go on, fully defended, for nearly three years. In contrast, Bruce and Class Counsel were diligent and made timely requests about potential TSCP amendments, on behalf of the Class, and for the Class to be consulted on them.

73. It is notable that the Respondent fails to advance any justification for why it failed to consult with the Class and advise about any details of potential changes to the TSCP prior to the January 2019 announcement. What rationale could there be for fully defending this class

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<sup>73</sup> Rules, r. 334.39(1)(a), Schedule B.

<sup>74</sup> Wenham Affidavit, para. 57, AMR-Costs, Volume 3, Tab C, p. 883.

<sup>75</sup> Moriarty Affidavit, para. 83.

proceeding, if, as the Respondent implies, it was going to resolve the concerns the entire time? It is further unclear what rationale would exist for continuing with this litigation after this Court held that the overly restrictive requirements under the TSCP were justiciable and were "egregiously unreasonable" in March 2018, which decisions the Respondent did not appeal.<sup>76</sup>

74. To the extent necessary, the Respondent's repeated failures to consult with and advise Bruce and the Class would also constitute steps that were improper, vexatious or unnecessary or that were taken through negligence, mistake or excessive caution.<sup>77</sup>

75. Finally, the rushed announcement of the "anticipated roll out" of the CTSSP lacked detail, which further complicated and lengthened the proceeding unnecessarily. The CTSSP was "announced" months before details about its scope and eligibility criteria were finalized (Health Canada's detailed announcement only came April 10, 2019). The Respondent served additional evidence for the merits in March 2019 but their affiant could not answer key questions about the CTSSP because of the informational void, resulting in multiple supplementary affidavits and a refusals motion.<sup>78</sup> The Respondent also resisted basic steps such as giving notice of certification to the Class, on the ground that this should be postponed until the details of the CTSSP were announced, which required a contested motion to resolve.<sup>79</sup>

76. The Respondent's actions by failing to consult with the representative Applicant and its continued defence of this proceeding when it has implied that it was always going to address the major remedies sought in this proceeding unnecessarily lengthened the duration of the proceeding and were improper.

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<sup>76</sup> *Briand v. Canada*, 2018 FC 279, at para. 78, ABOA-Costs, Tab 2.

<sup>77</sup> *Rules*, r. 334.39(1)(b), Schedule B.

<sup>78</sup> See above, paras. 37-38; Ptak Affidavit, paras. 70-71, 75-78 AMR-Costs, Volume 1, Tab B, p. 20, 21.

<sup>79</sup> Order and Reasons of Justice McDonald, dated March 28, 2019, at para. 5, attached as Exhibit 45 to Ptak Affidavit, AMR-Costs, Volume 2, Tab B45, p. 571.

### C. Quantum

#### i. *Solicitor-client costs are warranted*

77. If this Court finds that an exception to the no-costs rule is engaged, then it has "full discretionary power over the amount and allocation of costs"<sup>80</sup> and may "award all or part of costs on a solicitor-and-client basis".<sup>81</sup> The Applicant submits that the Court should award full indemnity, or solicitor-client costs of \$850,000, the value of the over 1,800 hours devoted by Class Counsel on behalf of the Class to pursue this litigation and participate in its resolution.<sup>82</sup>

78. Where a government respondent fully defends a judicial review proceeding but then takes steps amounting to "anticipatory compliance" to evade a merits decision, the Federal Court of Appeal has approved of solicitor-client costs.<sup>83</sup> This exact circumstance has occurred here: Canada circumvented the class proceeding and made changes to the TSCP in the form of the CTSSP, constituting anticipatory compliance with the relief sought, and then relied on this move to evade a merits decision (i.e. via the dismissal motion).

79. An award of solicitor-client costs may also be granted if justified by reasons of public interest,<sup>84</sup> which are present here. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, the Supreme Court of Canada awarded solicitor-client costs to the

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<sup>80</sup> *Rules*, r. 400(1), Schedule B. Note also that courts have awarded costs to a party represented by counsel working on contingency or *pro bono*, provided that the party pays any costs awarded over to counsel, as would be the case here under Bruce's retainer agreement: see *Abdelrazik v. Canada (Foreign Affairs and International Trade Canada)*, 2009 FC 816, at paras. 31-32, ABOA-Costs, Tab 18; see also *Fullerton v. Matsqui (District)* (1992), 1992 CarswellBC 368 (C.A.), at para. 31, ABOA-Costs, Tab 19; *Young v. Toronto Star Newspapers Ltd.* (2005), 77 O.R. (3d) 680, at paras. 143-144, ABOA-Costs, Tab 20.

<sup>81</sup> *Rules*, r. 400(6), Schedule B.

<sup>82</sup> 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: Ptak Affidavit, paras. 100-121, AMR-Costs, Tab B, pp. 24-29. Class Counsel anticipates providing an update of the time and value devoted to this proceeding in advance of the motion date.

<sup>83</sup> *Tetzlaff*, aff'd: [1991] F.C.J. No. 1277 (F.C.A.), ABOA-Costs, Tab 14.

<sup>84</sup> *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, at para. 67, ABOA-Costs, Tab 21.

successful NGO applicant given (i) "the Society's circumstances" and (ii) the litigation choices of several government parties.<sup>85</sup> Here, the Class Members' circumstances support full indemnity. Thalidomide survivors have limited means and are among the most vulnerable members of Canadian society. Failing to order costs against the Respondent will disincentivize members of vulnerable groups from bringing meritorious class judicial review proceedings in Federal Court for reasons explained above. Additionally, the government Respondent has either improperly circumvented the class proceeding to make anticipatory compliance outside the Court's process or has failed to consult with and advise the Class of pending changes to the TSCP that were in development since before the class proceeding even began. Either interpretation of the Respondent's conduct deserves sanction through solicitor-client costs.

80. This court has not hesitated to award full indemnity costs against government respondents in judicial review proceedings where the interests of justice require it, e.g.:

- (a) Where Health Canada's conduct was procedurally unfair to the extent that it "essentially disallowed a reasonable decision from ever occurring" in a way that "should have been obvious to Health Canada without the need for [...] judicial review proceedings."<sup>86</sup>
- (b) The Treasury Board of Canada Secretariat blindly adhered to a policy without considering its intent and its "devastating" effects when applied to the applicant's particular circumstances, resulting in lengthy litigation delaying the applicant's access to the remedial monetary benefit that Parliament intended for him.<sup>87</sup>

81. The Applicant submits that these cases are analogous. Canada required Bruce and Class Members to prove they are Thalidomide survivors to a standard of "near certainty", establishing impossible eligibility rules for the TSCP and "intentionally limiting" the TSCP

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<sup>85</sup> *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 80, ABOA-Costs, Tab 22.

<sup>86</sup> *Winning Combination Inc. v. Canada (Minister of Health)*, 2016 FC 381, at paras. 166-167, ABOA-Costs, Tab 23.

<sup>87</sup> *Brauer v. Canada (Attorney General)*, 2014 FC 488, at paras. 67-69, ABOA-Costs, Tab 24.

Administrator's discretion in a way that prevented a reasonable decision from ever occurring.<sup>88</sup>

This should have been obvious to Health Canada from 2016 onward. By the very latest, Canada understood this in March 2018 when this Court held that the TSCP's Evidentiary Criteria were "egregiously unreasonable" in their application to Thalidomide survivors like Bruce:

[I]t is certainly egregious to require that the applicant prove her claim based on a quasi-certain standard of proof that is not recognized and that is clearly stricter than any normal reasonable standard applied in any decision-making process in Canada.

Imposing limits on the type of evidence admitted to prove that thalidomide is the proof of malformations is more than simply unreasonable. The applicant's exceptionally unfortunate situation in life is considerably aggravated by a decision-making process that is egregiously unreasonable compared to the regular standards of proof applied in Canada ...<sup>89</sup>

82. The TSCP's fundamental unfairness led to devastating effects for Bruce and Class members, including the denial of official recognition<sup>90</sup> and the annual financial support payments from 2016-2019 that Parliament intended Thalidomide survivors to receive.<sup>91</sup> It is a terrible experience to live your life with debilitating malformations believed to be caused by Thalidomide exposure and have that belief rejected by the government unfairly/unreasonably.

**ii. *Alternatively, increased costs on a lump sum basis are warranted***

83. In the alternative to solicitor-and-client costs, Bruce submits that a lump sum award of costs in the amount of 75% of the time value incurred (\$637,500) is warranted.

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<sup>88</sup> Moriarty Affidavit, para. 45.

<sup>89</sup> *Briand*, at para. 78, ABOA-Costs, Tab 2.

<sup>90</sup> Wenham Affidavit, para. 56, AMR-Costs, Volume 3, Tab C, p.883. See also this court's comment on the point in *Briand*, at para. 46, ABOA-Costs, Tab 2: "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."

<sup>91</sup> Wenham Affidavit, para. 54, AMR-Costs, Volume 3, Tab C, pp. 882-883.

84. The Federal Court of Appeal has noted the judicial trend favoring lump sum cost awards.<sup>92</sup> In determining the appropriate percentage of actual fees for a lump sum award, the factors under rule 400(3), case law and the objectives that underlie cost awards are all relevant considerations.<sup>93</sup> The case law shows instances of increased lump sum costs up to 50% of actual fees incurred, however there may be cases where a higher or lower percentage is warranted.<sup>94</sup> The Federal Court has awarded significant amounts of costs using this approach – as high as \$2.9 million for legal fees alone – where, as here, the party paying costs is a sophisticated litigant that clearly has the means to pay for the legal choices they make.<sup>95</sup>

85. The following factors in rule 400(3) support an increased lump sum cost award:

- Bruce and the Class effectively achieved the core relief sought through the Respondent's anticipatory compliance; (r. 400(3)(a))
- the class members will now have a fair opportunity to access millions of dollars of funding to support their specific needs; (r. 400(3)(b))
- this case was an important, precedent setting,<sup>96</sup> example of how a judicial review application can be pursued as a class proceeding, thereby providing access to justice for vulnerable groups of Canadians not just in this case but in future cases; (r. 400(3)(c))
- the Respondents' anticipatory compliance effectively concedes the merits of the applicant's challenge to aspects of the TSCP that had already been found "egregiously unreasonable" by this Court; (r. 400(3)(d)) Class Counsel expended significant resources to efficiently and effectively prosecute this class proceeding; (r. 400(3)(g))
- the public interest in incentivizing class judicial review proceedings litigated for the benefit of a vulnerable group justifies increased costs; (r. 400(3)(h))
- if this Court finds the development of the CTSSP was not influenced by this class proceeding, then the Respondent's conduct in refusing

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<sup>92</sup> *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25, at para. 11 ["*Nova Chemicals*"], ABOA-Costs, Tab 25.

<sup>93</sup> *Nova Chemicals*, at para. 19, ABOA-Costs, Tab 25.

<sup>94</sup> *Nova Chemicals*, at para. 17, ABOA-Costs, Tab 25.

<sup>95</sup> *Nova Chemicals*, at paras. 1, 16, ABOA-Costs, Tab 25.

<sup>96</sup> *Wenham v. Canada (Attorney General)*, 2018 FCA 199, ABOA-Costs, Tab 26.



consultations and other litigation positions, as described above, unnecessarily lengthened the duration of the proceeding; and constitutes steps that were improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution; (r. 400(3)(i)&(k))

- the Court must exercise its discretion on costs in a way that advances the goals of class proceedings recognized by the Supreme Court of Canada, especially access to justice; awarding no costs or marginal costs will disincentivize representative applicants and potential class counsel from initiating class judicial review proceedings in the Federal Court. (r. 400(3)(o))


iii. *In the further alternative, costs according to Tariff B should be ordered at the high end of Column V*

86. In the further alternative, Bruce requests that this Court grant costs according to the high end of Column V of Tariff B, totaling \$49,465.60.

### **PART III - ORDER REQUESTED**

87. The Applicant respectfully requests an order for costs in the amount of \$850,000 plus \$40,797.05 in disbursements, payable within fifteen (15) days of the order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 4<sup>th</sup> day of FEBRUARY, 2020.

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**Koskie Minsky LLP**  
per: David Rosenfeld

Lawyers for the Applicant

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Fontaine v. Canada*, 2017 FC 431
2. *Briand v. Canada*, 2018 FC 279
3. *Rodrigue v. Canada*, 2018 FC 280
4. *Smith Estate v. Rotstein*, 2011 ONCA 491
5. *Risorto v. State Farm Mutual Automobile Insurance Company* (2003), 64 O.R. (3d) 135
6. *Hollick v. Toronto (City)*, 2001 SCC 68
7. *Campbell v. Canada (Attorney General)*, 2012 FCA 45
8. *Manuge v. Canada*, 2013 FC 341
9. *Dennis v. Canada*, 2017 FC 1011
10. *Buffalo v. Samson Cree Nation*, 2008 FC 1308
11. *Voltage Pictures, LLC Canada v. Salna*, 2019 FC 1412
12. *Always Travel Inc. v. Air Canada*, 2004 FC 675
13. *Tetzlaff v. Canada (Minister of the Environment)*, [1991] F.C.J. No. 113
14. *Tetzlaff v. Canada (Minister of the Environment)*, [1991] F.C.J. No. 1277 (F.C.A.)
15. *Dagg v. Canada (Minister of Industry)*, 2010 FCA 316
16. *Summer v. Canada (National Revenue)*, 2014 FC 880
17. *Vukelich v. Mission Institution*, 2005 BCCA 75
18. *Abdelrazik v. Canada (Foreign Affairs and International Trade Canada)*, 2009 FC 816
19. *Fullerton v. Matsqui (District)* (1992), 1992 CarswellBC 368 (C.A.)
20. *Young v. Toronto Star Newspapers Ltd.* (2005), 77 O.R. (3d) 680
21. *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38
22. *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3

23. *Winning Combination Inc. v. Canada (Minister of Health)*, 2016 FC 381
24. *Brauer v. Canada (Attorney General)*, 2014 FC 488
25. *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25
26. *Wenham v. Canada (Attorney General)*, 2018 FCA 199

## **SCHEDULE "B"** **RELEVANT STATUTES**

### *1. Federal Courts Rules, SOR/98-106*

#### **Defendant or respondent class proceeding**

**334.14** (2) A party to an action or an application against two or more defendants or respondents may, at any time, bring a motion for the certification of the proceeding as a class proceeding and for the appointment of a representative defendant or respondent.

...

#### **No costs**

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

- (a) the conduct of the party unnecessarily lengthened the duration of the proceeding;
- (b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or
- (c) exceptional circumstances make it unjust to deprive the successful party of costs.

...

#### **Discretionary powers of Court**

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

...

#### **Further discretion of Court**

**400(6)** Notwithstanding any other provision of these Rules, the Court may

- (a) award or refuse costs in respect of a particular issue or step in a proceeding;
- (b) award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;
- (c) award all or part of costs on a solicitor-and-client basis; or
- (d) award costs against a successful party.

FEDERAL COURT

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B E T W E E N :

BRUCE WENHAM

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

*Class Proceeding*

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

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