

# Completing the Mission

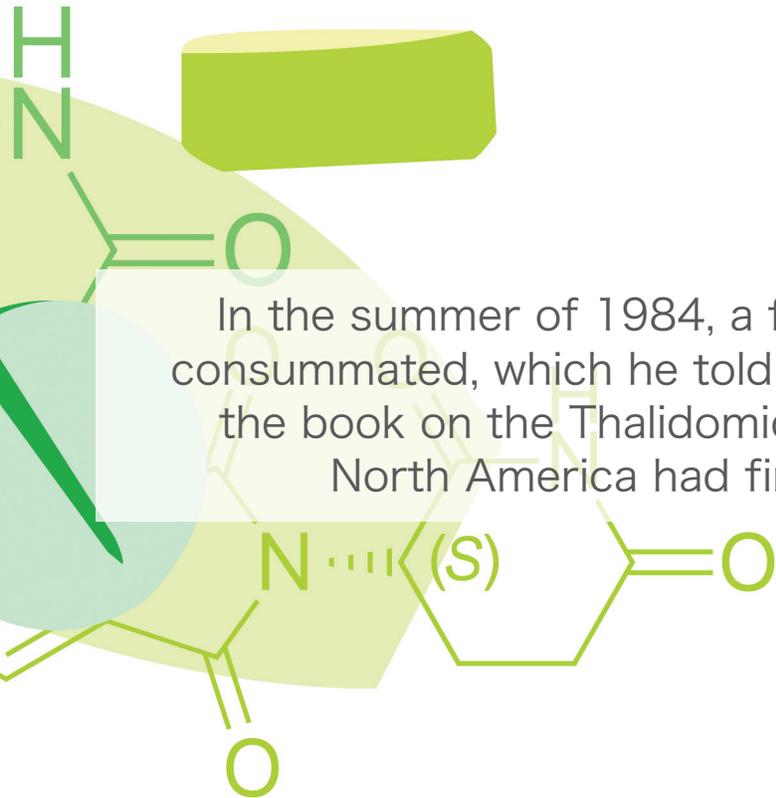
By Hon. Gerald Austin McHugh

**In early September 2017, Philadelphia lawyer Stephen Raynes** stood alongside other new inductees of the American College of Trial Lawyers in a Montréal hotel. It was one of those life moments when many related things come together in a profoundly meaningful way. It was not just that he was following in the footsteps of his late father – Arthur G. Raynes – in earning the distinction of fellowship. Beyond that, the location – one of Canada’s historic cities – was poignant because of a unique relationship between both father and son, and some of Canada’s most vulnerable citizens.

The story begins in the 1960s when the drug called Thalidomide began to be marketed as a treatment for the morning sickness experienced by pregnant women. Over time, horrific birth defects began to appear in the children of mothers who had ingested the drug. America was spared the brunt of the tragedy because of a heroic stance by a pharmacist at the Food and Drug Administration, Dr. Frances Kelsey, who was herself Canadian. But the same could not be said of Germany, England and Canada, where Thalidomide was widely prescribed.

Given that American distribution was limited to

physicians for research purposes, it is ironic that the first courtroom trial involving Thalidomide occurred here in Philadelphia. More specifically, it took place in the Eastern District of Pennsylvania before Judge E. Mac Troutmann in February 1969, with Art Raynes serving as plaintiffs’ counsel. Fittingly enough, for purposes of this story, one of the lawyers defending the manufacturer of the drug, Ned Madeira of Pepper Hamilton LLP, would also go on to become a Fellow of the American College. The case proceeded in an era before there was a highly developed law of product liability, at a time when litigation of cases against the



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pharmaceutical industry was a relative rarity. Art was still in his 30s, having left a leading plaintiffs’ firm to start his own, Raynes McCarty\*. He was just coming into his own as a force in the Philadelphia legal community. Both the costs and the complexity of the case were daunting that, as a member of the firm once confided to me, Art mortgaged his home to fund the litigation.

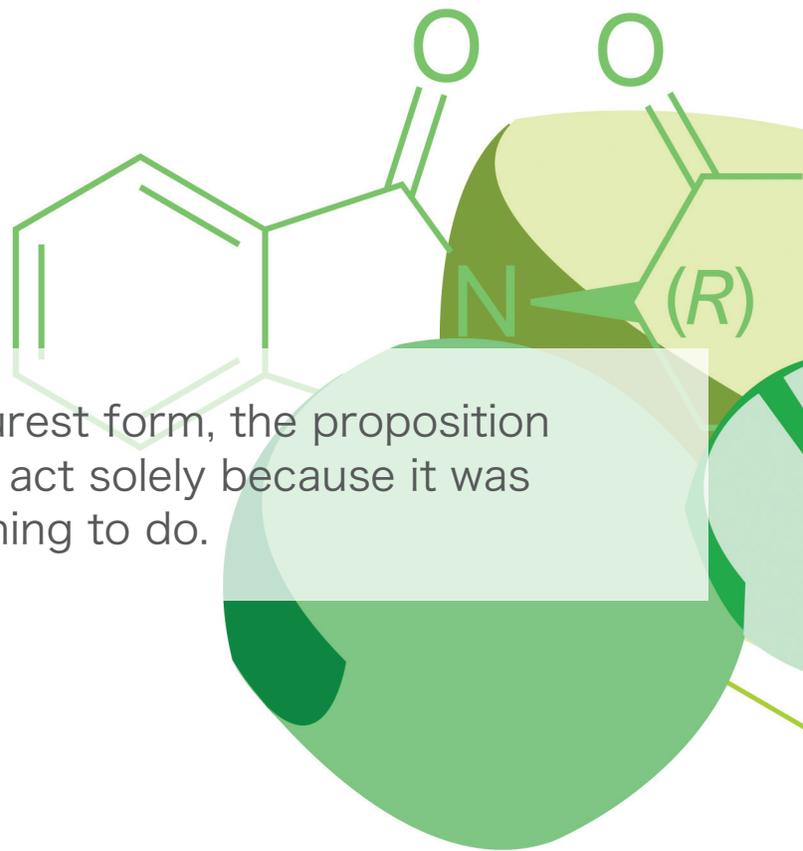
Through dogged legwork, Art found evidence strongly suggesting that his client had been prescribed the medication at the Cleveland Clinic while on a trip, where records demonstrated that a supply of the drug had likely been available for use in a clinical trial. That alone might not have carried the day, but any weakness in that proof was more than offset when Art persuaded Professor Widukind Lentz, the German scientist who first identified the risk of Thalidomide, to testify, and opine that the plaintiff’s condition was a result of exposure to the drug. As the trial proceeded, it became the focus of increasing publicity, and as the evidence continued to break in the plaintiff’s favor, the manufacturer offered a confidential settlement approximately three weeks into the trial.

Meanwhile, in Germany, the toll exacted by Thalidomide led to a criminal prosecution that resolved when the principal manufacturer established a fund for victims, supplemented by the government. In Britain, a combination of litigation and intense press coverage also led to the creation of a fund, later supplemented by the government and ultimately accompanied by a formal apology from the Minister of Health for regulatory failures surrounding approval of the drug. In Canada, however, Thalidomide victims fared far worse. Their

plight was not initially a focus of public concern because the number of victims was comparatively small. As early as 1963, Canada’s health minister vowed that the government would care for the affected children “in the best manner possible,” but that noble sentiment was not followed by meaningful action. When the first claims arose in Canadian courts, the manufacturer imposed strict confidentiality on the relatively modest settlements that were reached. Canadian law did not recognize strict liability for product defects, and had short statutes of limitations that were rigidly enforced, leaving multiple claims barred once families identified Thalidomide as the culprit.

One lawyer in Canada, Professor Allen Linden, saw a path around the obstacles. He would later become Canada’s leading authority on torts and a judge on the Federal Court of Appeal. Linden looked south to American courts, where he had observed and been impressed with the creativity and perseverance of American lawyers, among them Art Raynes. Art and Ohio lawyer Craig Spangenberg became the voices of Canadian Thalidomide victims.

The cases proceeded from there, with all the usual ups and downs of complex litigation. Spangenberg pursued a class action in Canada, and Art a series of cases in different American venues. In the summer of 1984, a final series of settlements was consummated, which he told *The Washington Post* “will close the book on the Thalidomide saga,” as the last victims in North America had finally been compensated. Art’s relationship with those he had represented did not end there. That same year, he hosted the first reunion of survivors at the same Montréal Hotel – the Queen Elizabeth – where



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his son, Stephen, would later enter the American College. He remained in personal contact with many of his clients. Just inside the door of Art's office hung a picture of a smiling young athlete draped in medals won in athletic competitions, Thalidomide survivor Josee Lake. On a shelf near his desk, Art kept Allen Linden's treatise, "Canadian Tort Law," with a 1969 inscription from its author: "To victory and justice for all thalidomide children." And when Art passed suddenly in 2006, Josee Lake made the journey to Philadelphia to represent survivors at his funeral.

Steve Raynes was not yet a lawyer when the last Thalidomide case was settled, but because the case was so personal to Art and his entire family, he didn't just know the story, but also many of the Canadian survivors. Like his father, Steve also represented clients in an unusual number of complex international cases, such as the family of a doctor killed in the 2004 collapse of Terminal 2E at Paris's Charles deGaulle Airport, and more than 1,300 hemophiliacs in Spain who contracted HIV from tainted blood products. Not surprisingly, he also came to represent many Canadians, including the victims of one of the worst tragedies in Newfoundland history, the crash of an American-made helicopter transporting 16 workers to an offshore oil rig.

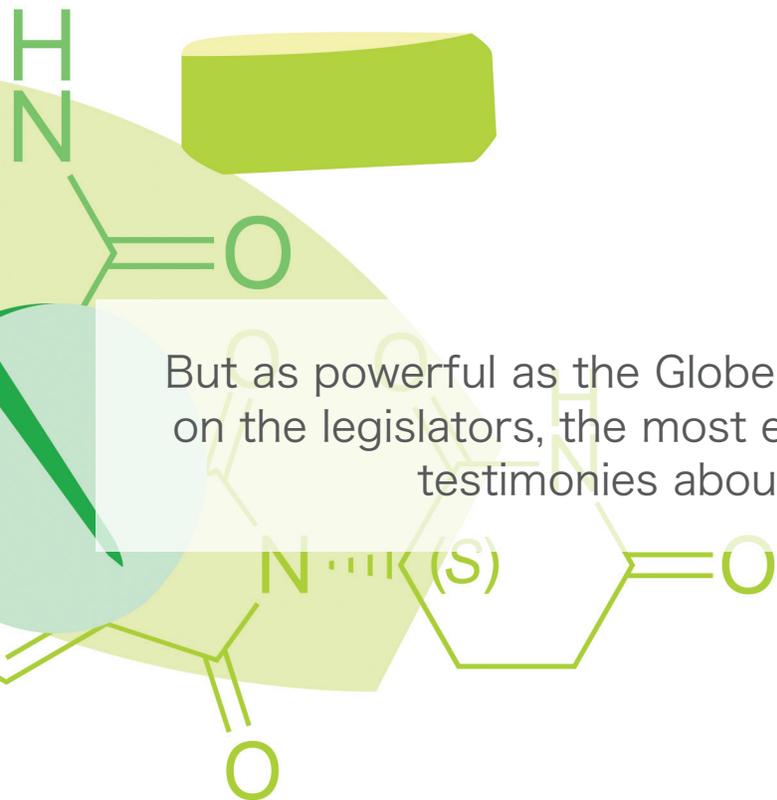
In late 2012, Steve received a call, urging him to come to a meeting of Thalidomide survivors in Canada. It was Mercedes Benegbi, who was not just a former client but a family friend and director of the Thalidomide Victims Association of Canada. The situation faced by her community had become dire, and in her mind, Steve was the only person who could help. When the cases had been settled decades before, no one knew how long the children of Thalidomide would live. Physicians could not predict how their needs would increase

as the normal toll of aging was layered on top of the ravages of the drug. The settlements were substantial and in some cases unprecedented for their time, but inflation exacted its toll. There was another group who for a variety of reasons did not participate in the American litigation. Quite literally, some of the survivors were selling their homes to meet expenses. Listening to their plight, it was clear to the younger Raynes that he was morally obligated to take up the fight first waged by his father decades before.

A path forward was unclear. Releases alone would present an insurmountable bar to litigation, let alone the statute of limitations. In digging back through the worldwide history of the crisis, Steve agreed with Benegbi that lessons could be learned from the other countries profoundly affected by the drug – where broad public campaigns had led to government support as recompense for regulatory failure. As Steve pondered possible approaches, one of the first calls he made was to a Vancouver Queens Counsel, Joe Fiorante, with whom he had co-counseled in major Canadian cases. Together, all three began to develop an almost inconceivable plan: to persuade Canadian Parliament that the country had, for all practical purposes, abandoned some of its most vulnerable citizens whose plight could be directly linked to government failures. The audacity of the campaign – what Art would proudly call "chutzpah" – was striking. In litigation, it's the threat of an adverse judgment that gives a lawyer leverage and none existed here.

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Both lawyers resolved to work pro bono, and absorb the costs associated with the campaign. They persuaded a former



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member of parliament, Barry Campbell, to volunteer his services as their advisor on the intricacies of the legislative process. A fair criticism of contemporary legal practice is that too many lawyers try to make themselves the center of a case, making the press conference de rigueur. Following the Raynes style generally, the team took the exact opposite approach, resolving that only a victim of Thalidomide would ever make a public statement. So began a nearly two-year process of painstakingly making the case and building pressure toward a public solution, during which time Steve shuttled back and forth from Canada, frequently walking the halls of the capitol in Ottawa. In yet another example of intersecting circles of life, he enlisted the support of Professor Linden, who had gone on to serve on Canada's Federal Court of Appeal, and whose treatise on Canadian tort law was by then in its 10th edition.

During the 1970s in England, a series of stories by *The Sunday Times*, published in the face of threatened legal action under Britain's strict law of defamation, had played an important part in sparking legislation. Once again, Art's legacy manifested itself. Time editor Sir Harold Evans had braved contempt to advocate for England's children. He had known and respected Art and introduced Steve to the editor-in-chief of Canada's most influential newspaper, *The Globe and Mail*. It quickly became the media voice for Canada's Thalidomide survivors, ultimately winning a Michener Award for its coverage, the equivalent of an American Pulitzer Prize. But as powerful as the Globe's stories were, for direct impact on the legislators, the most effective tool proved to be video testimonies about the survivors' lives. Steve crisscrossed the provinces interviewing survivors. Raynes McCarty continues to be a pioneer in the use of videos in litigation.

The case to legislators was quietly pressed over many months,

and when a bill was finally introduced, both its unanimous passage and its full funding occurred with remarkable speed. After decades of looking away, Canada committed CAN \$180 million in 2015 in support for the remaining children of Thalidomide. Sir Harold Evans, who had focused Britain's attention decades earlier, described the effort in an interview as a "huge and brilliant campaign...inspired by Mr. Stephen Raynes, a lawyer from Philadelphia, who succeeded in getting compensation in Canada increased to give the 100 or so victims a chance of a decent living." *The Globe and Mail's* health correspondent, André Picard, described the undertaking as "one of the most effective lobbying efforts in Canadian history," marveling that lawyers "did it all pro bono and with little public credit." But it's Benegbi, speaking on behalf of all survivors, who said it best, calling Steve "our miracle worker, the perfect combination of strategic brilliance and compassion." The night before the College induction ceremony in Montréal, Steve left the reception early, to have dinner with Benegbi and Canadian co-counsel, Joe Fiorante. They had fulfilled the quest laid down by Judge Linden some 30 years before: "To victory and justice for all Thalidomide children." Art could continue the peaceful sleep that is earned by the just, secure in the knowledge that his son had completed the mission. ■

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\* *Raynes McCarty is now known as Raynes Lawn Hehmeyer.*

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