

Federal Court



Cour fédérale

**Date: 20180309**

**Docket: T-1712-16**

**Citation: 2018 FC 280**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, March 9, 2018**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**DENIS RODRIGUE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for judicial review regarding the decision by Crawford – Class Action Services [Crawford], as an administrator and delegate of the Minister of Health, on August 24, 2016, in which the applicant was not eligible for financial support through the

Thalidomide Survivors Contribution Program [the Program], which is financed by the Government of Canada [the decision].

[2] The applicant is seeking a statement that he is a victim of thalidomide in Canada who is eligible to receive assistance under the Program because he meets its criteria; an order of *mandamus* requiring Crawford and/or the Minister of Health to pay the applicant the sum of \$125,000 and the annual payments set forth in the Program; and alternatively, an order of *certiorari* setting aside the decision and referring the applicant's application to the Minister in compliance with instructions that the Court deems appropriate.

[3] That decision, and that of *Briand v Attorney General of Canada* [*Briand*], will be issued simultaneously.

## II. Analysis

[4] The Court's findings in *Briand* ruled on a motion that was similar to that of Mr. Rodrigue in seeking financial assistance under the Program. In *Briand*, I allowed the motion and set aside Crawford's decision, which found that Ms. Briand was not eligible for the Program. The judgment was supported by a statement indicating that the policies regarding the administration of the program were "extremely unreasonable", aside from interpreting them to admit circumstantial evidence that is able to prove the likelihood that the applicant's malformations resulted from maternal use of thalidomide during the first trimester of pregnancy and that the applicant had met the requirements of the policies.

[5] To make its judgment, the Court relied on the Federal Court of Appeal's judgment in *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 (CanLII) [*Hupacasath*]. That judgment relied on the proposal that exercising executive prerogative power through policies used to administer the Program was justiciable because the conduct was of a nature that may be "amenable to the judicial process or suitable for judicial analysis". *Hupacasath* further describes a reasoned standard of judicial review that requires that an applicant establish an "extreme" situation in order to be given judgment. The crux of the Court's judgment in *Briand* was to determine the factors regarding an extreme situation that had to be used to assess the unreasonableness of the policies and apply them to Ms. Briand's circumstances.

[6] Ultimately, the determinative factual issue in *Briand* was to assess whether the exercise of executive prerogative power in the administration of the Program through its policies that imposed a categorical limit on admissible evidence that sought to demonstrate that thalidomide was the cause of Ms. Briand's malformations was "extremely unreasonable". The policies required direct or near-certain material evidence in the form of historical medical records or affidavits from professionals who have direct knowledge of the victim's thalidomide prescription (in those cases in 1958) in order to meet the requirements of the relevant admissibility criterion. The relevant criterion in the policies was described as follows:

Documentary proof (for example, medical or pharmacy records) of the maternal use of thalidomide (brand names Kevadon or Talimol) in Canada during the first trimester of pregnancy.

[7] In *Briand*, all direct documentary proof had been destroyed by fire or lost, while every witness who directly observed the fact that she was prescribed or had ingested thalidomide was deceased. I found that the Minister's policies for determining eligibility in the Program would be extremely unreasonable in cases where an applicant's medical records had been destroyed through no fault of the applicant's own, aside from interpreting them to admit circumstantial evidence that is able to prove the likelihood that the applicant's malformations resulted from the maternal use of thalidomide during the first trimester of pregnancy.

[8] After reviewing the issue, the Court's task was then to determine whether Ms. Briand was able to establish the merits of her cause through the filing of circumstantial evidence as to the likelihood that those malformations resulted from the maternal use of thalidomide during the first trimester of pregnancy in order to have the judgment set aside. It is also the only issue in this case.

[9] In *Briand*, I found that the applicant had surpassed the less strenuous threshold by simply being able to establish the evidence for review and instead established a likelihood that her malformations resulted from maternal use of thalidomide. The judgment was largely founded on the evidence in affidavit form from an independent witness who gave birth to a child in 1959, the same period when Ms. Briand was born. The independent witness stated that in autumn 1958, she had received trial samples of a [TRANSLATION] "new medication to reduce her nausea" from the same physician who had prescribed thalidomide to Ms. Briand's mother for the treatment of her nausea. I also found that the testimony of the independent witness was corroborated by objective facts that explained why she had decided not to take the medication, since her

American sister-in-law had given birth to a child with malformations during the same period. Those circumstances, which were purely coincidental but objective, led her not to take the medication to relieve her nausea. The evidence submitted by Ms. Briand was also corroborated to some degree by the evidence provided by her aunts (the sisters of the applicant's mother), who were in direct contact with the applicant after her birth.

[10] In this case, Mr. Rodrigue is in a similar position to that of Ms. Briand regarding the impossibility of providing historical medical evidence to establish that his mother had taken thalidomide during autumn 1958 through no fault of his own. In paragraph 11 of his affidavit, the applicant described the reasons for his inability to provide historical documentary evidence as follows:

[TRANSLATION]

11. Unfortunately, for reasons that are practical and beyond my control, it was impossible for me to find direct evidence to satisfy the third criterion of the Thalidomide Survivors Contribution Program. First, my mother's doctor during pregnancy and birth, Dr. Jean-Claude Labrosse ("Dr. Labrosse") is deceased. Second, it was impossible to find the archives of her medical records. And finally, a flood at the St. Joseph hospital in Sudbury where I was born destroyed all the medical records from the relevant time period. Therefore, it was impossible for me to submit a copy of my mother's medical record or an affidavit from Dr. Labrosse with my request form confirming that he provided thalidomide to my mother during the first trimester of pregnancy.

[11] The evidence filed by the applicant was described in paragraph 12 of his affidavit as follows:

[TRANSLATION]

12. The evidence that I succeeded in obtaining and submitting in support of my application is as follows:

- a) In or around 1991, when the Thalidomide Survivors Program had just been created, my mother, Gisèle Rodrigue, informed me (truthfully, I believe) that she had ingested thalidomide during the first months of her pregnancy in 1958 to relieve her severe nausea.
- b) My mother, Gisèle Rodrigue, also informed me (truthfully, I believe) that that the thalidomide that she had ingested during pregnancy had been given to her by her physician, Dr. Labrosse, in the form of samples.
- c) My mother died on April 7, 2007. I have attached my mother's death certificate as Exhibit "B".
- d) Dr. Labrosse was my mother's physician during pregnancy and it was also he who supervised my mother's delivery.
- e) On or around May 2016, I was informed (truthfully, I believe) by Dr. Edgard Leclair, a former family physician in Sudbury who is now retired, that he knew Dr. Labrosse and that he is now deceased.
- f) I tried unsuccessfully to obtain the archives of Dr. Labrosse's medical records regarding my mother's pregnancy in 1958.
- g) On or around May 30, 2016, I was informed by the worker at St. Joseph General Hospital that the hospital's medical archives for the 1950s and 1960s were lost following a flood.

[12] In addition to the abovementioned evidence submitted by the applicant, the Court also relied on its finding in *Briand*, in which thalidomide was available and advised by physicians for relieving morning sickness in Quebec in autumn 1958. The evidence with respect to that finding was identical in both judgments and in fact, both cases were heard separately because Ms. Briand continued to retain the services of her counsel after changing firms. The Court considers its finding regarding the availability of thalidomide in 1958 as being an essential factor, given that

counsel for the respondent relied several times on the fact that the medication was not available during this period as an important factor in its arguments in favour of the Minister's decision in both cases.

[13] In summary, the Court first determines that applicants can provide circumstantial evidence to demonstrate the likelihood that their malformations resulted from the maternal use of thalidomide during the first trimester of pregnancy; second, that thalidomide was available in 1958; and third, that the applicant's evidence described above has merit. When considered together, those factors present sufficient grounds to set aside the decision to refuse eligibility to the applicant for receiving financial support under the Program and to return the case for later consideration by the respondent's representative.

[14] However, it should be emphasized that, out of opposition to the Court's order in *Briand*, it is not in a position to make a judgment in this applicant's case. The applicant's evidence does not have the same persuasive weight as in *Briand*, which was corroborated by an independent witness. Both statements from the applicant's mother, which were apparently made several years after the applicant's birth, with no other corroboration, are at best evidence of a strong possibility and not a likelihood that thalidomide ingestion was the cause of the applicant's malformations. It is up to the Minister's representative to find whether all the evidence, which includes the finding regarding the availability of thalidomide in 1958 and its prescription by Quebec physicians in other cases, is sufficient to find that the applicant meets the eligibility criteria to receive financial support under the Program.

III. Conclusion

[15] As a result, the Court allows the motion, sets aside the decision and returns the case for review by the Minister's representative, but with the instruction to consider, as factual evidence, the additional finding that thalidomide was available and was a medication prescribed by Quebec physicians in autumn 1958 to relieve morning sickness.

[16] Costs are awarded to the applicant. If the parties are not able to agree on costs, they will be required to file their submissions to the Court.



**JUDGMENT in T-1712-16**

**THE COURT ORDERS that** the motion is allowed, the decision is set aside and the case is returned to the Minister's representative for review, with the instruction to consider, as factual evidence, the additional finding that thalidomide was available and was a medication prescribed by Quebec physicians in autumn 1958 to relieve morning sickness. Costs are awarded to the applicant.

“Peter Annis”

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Annis J.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T 1712-16

**STYLE OF CAUSE:** DENIS RODRIGUE v AGC

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** DECEMBER 4, 2017

**JUDGMENT AND REASONS:** ANNIS J.

**DATED:** MARCH 9, 2018

**APPEARANCES:**

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