

Federal Court



Cour fédérale

Date: 20250717

Docket: T-2621-24

Citation: 2025 FC 1275

Ottawa, Ontario, July 17, 2025

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

PHOEBE MIKE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Phoebe Mike seeks judicial review of a decision made by the Administrator [Administrator] of the Canadian Thalidomide Survivors Support Program [CTSSP]. Following reconsideration of a previous decision, the Administrator confirmed that Ms. Mike was ineligible for the CTSSP.

[2] This application for judicial review was heard together with similar applications brought by Barbara Blair (*Blair v Canada (Attorney General)*, 2025 FC 1274 [*Blair*]) and Léo Provencher (*Provencher v Canada (Attorney General)*, 2025 FC 1273). Much of the analysis supporting the Court's judgments in these applications is the same, and portions of the reasons appear *verbatim* in all three decisions.

[3] The Administrator, relying on a recommendation of its advisory committee, did not sufficiently explain its conclusion that Ms. Mike presented with only unilateral limb differences, which are not indicative of thalidomide embryopathy. It then relied on this conclusion to dismiss the uncontradicted evidence that her mother had ingested thalidomide during pregnancy.

[4] The application for judicial review is allowed, and the matter will be remitted to the Administrator for redetermination.

II. Background

[5] Thalidomide is a drug that was provided off-label to treat pregnant women with morning sickness in the late 1950s and early 1960s. In 1962, the drug was recalled after it was discovered that maternal ingestion of thalidomide in the first trimester of pregnancy was linked to miscarriages or birth defects [thalidomide embryopathy].

[6] In 1990, by Order in Council, the Government of Canada established the Extraordinary Assistance Plan for Thalidomide Victims [EAP] (*HIV-Infected Persons and Thalidomide Victims*

Assistance Order, PC 1990-4/872). In order to be eligible for the EAP, applicants were required to: (a) demonstrate that they had received a settlement from the drug company; (b) provide documentary proof of maternal ingestion of thalidomide in Canada during the first trimester of pregnancy; or (c) be listed on an existing government registry of thalidomide survivors.

[7] In 2015, the Government of Canada implemented a new program called the Thalidomide Survivors Contribution Program [TSCP]. The TSCP was open to individuals who qualified for the EAP and applied by May 31, 2016, or had already received payments under the EAP.

[8] Applicants under the TSCP who had not previously been recognized as thalidomide survivors were required to provide direct evidence of maternal ingestion of thalidomide in Canada during the first trimester of pregnancy. 168 applicants were rejected for failure to meet this evidentiary threshold (*Wenham v Canada (Attorney General)*, 2018 FCA 199 [*Wenham*] at para 12).

[9] In 2016, one of the rejected applicants under the TSCP challenged the eligibility criteria through a class proceeding, which was certified by the Federal Court of Appeal in 2018 [TSCP Class Proceeding] (see *Wenham*).

[10] On March 9, 2018, Justice Peter Annis found that the decision-making process under the TSCP was “egregiously unreasonable compared to the regular standards of proof applied in Canada” (*Briand v Canada (Attorney General)*, 2018 FC 279 [*Briand*] at para 78; see also *Rodrigue v Canada (Attorney General)*, 2018 FC 280).

[11] The CTSSP was established on April 5, 2019 by Order in Council (*Canadian Thalidomide Survivors Support Program Order*, PC 2019-0271 [2019 OIC]).

[12] Following the 2019 OIC, the parties to the TSCP Class Proceeding negotiated a settlement [TSCP Settlement Agreement] that included the following terms (*Wenham v Canada (Attorney General)*, 2020 FC 588 at para 45):

- (a) the Administrator would apply a balance of probabilities standard in its preliminary assessment;
- (b) the eligibility process would use the Diagnostic Algorithm for Thalidomide Embryopathy [valiDATE];
- (c) reasons would be provided for any applications that were refused; and
- (d) class members would be entitled to request reconsideration of an application that was refused, with the option of an oral hearing if their application was refused at the third step.

III. CTSSP Eligibility

[13] To qualify for the CTSSP, applicants must meet one of the following criteria: (a) they were determined to be eligible under the EAP or TSCP; (b) they were listed on a Canadian

government registry of thalidomide survivors; or (c) they have been found eligible by the Administrator. Under the third criterion, the Administrator follows a three-step process prescribed by s 3(5) of the 2019 OIC.

[14] First, the Administrator conducts a preliminary assessment to determine whether: (a) the applicant's date of birth in Canada falls between December 3, 1957 and December 21, 1967; (b) the applicant's date of birth or any other available information is consistent with maternal ingestion of thalidomide in the first trimester of pregnancy; and (c) the nature of the applicant's congenital malformations is consistent with known characteristics linked to thalidomide [Step 1]. Following Justice Panagiotis Pamel's decision in *Richard v Canada (Attorney General)*, 2024 FC 657 [*Richard*], the Administrator is no longer permitted to rely on an applicant's date of birth in the preliminary assessment.

[15] If the Administrator considers it likely, based on the preliminary assessment in Step 1, that an applicant's congenital malformations are the result of maternal ingestion of thalidomide in the first trimester of pregnancy, the application proceeds to the following step. The Administrator must then assess the probability that an applicant's malformations are consistent with known patterns of thalidomide embryopathy using the valiDATE [Step 2]. Physicians retained by the Administrator use the information provided at Step 1, as well as additional information solicited from the applicant at this stage, to complete a questionnaire. The answers are then processed through the valiDATE.

[16] The valiDATE uses a numerical weighted scoring system for each feature of thalidomide embryopathy. When the algorithm identifies a group of malformations that commonly appear together in thalidomide survivors, it assigns them an enhanced score.

[17] Based on the combined weighing of all responses, the valiDATE generates a report assessing the “likelihood” that an applicant’s malformations are the result of thalidomide embryopathy. A report has three possible results: unlikely, uncertain/inadequate information, or probable/possible. The applicant’s answers to the questionnaire and the valiDATE report are later verified by the applicant’s physician.

[18] Prior to August 9, 2022, only applicants who received a valiDATE report with a “probable/possible” score advanced to Step 3. Following the consent judgment issued by Justice Russel Zinn in *O’Neil v Canada (Attorney General)*, 2022 FC 1182, this is no longer a precondition for an application to proceed to the next step.

[19] Finally, the Administrator refers the application to a multi-disciplinary committee of medical and legal experts [MDC]. The MDC reviews the application, conducts any tests or examinations it deems necessary, and provides the Administrator with its recommendation on whether the person should be found eligible under the CTSSP [Step 3].

IV. Ms. Mike's Application

[20] Ms. Mike was a member of the TSCP Class Proceeding. She submitted her initial application to the CTSSP in October 2019. Her application was supported by a notarized letter from a family doctor, who confirmed that Ms. Mike's mother said she had taken thalidomide when she was pregnant with Ms. Mike; photographs and scans of Ms. Mike's injuries; and medical reports, including a geneticist's report that stated it was "highly unlikely" that Ms. Mike's right upper limb abnormalities were caused by a single gene disorder. Ms. Mike's application also explained that records that might have corroborated her mother's ingestion of thalidomide were destroyed in accordance with institutional record retention policies.

[21] On December 6, 2019, the Administrator informed Ms. Mike that her application would advance to Step 2.

[22] On August 28, 2020, the Administrator confirmed that Ms. Mike's valiDATE report indicated it was "probable" that her congenital deformities were caused by maternal ingestion of thalidomide. Her application advanced to Step 3.

[23] On June 30, 2022, the Administrator found that Ms. Mike was ineligible for the CTSSP for the reasons contained in the MDC's recommendation. The MDC found, in the absence of a confirmed thalidomide embryopathy diagnosis by a clinician, that her damage patterns were likely caused by alternative non-genetic conditions.

[24] Ms. Mike requested reconsideration of the Administrator's initial decision on January 30, 2023. In support of her reconsideration request, she submitted the following additional documents:

- (a) medical records indicating that her mother had very difficult pregnancies;
- (b) her birth certificate;
- (c) photographs of herself as a child demonstrating that her injuries affected her entire right side;
- (d) current photographs of herself at different angles to demonstrate the size of her shoulders, arms, and hands;
- (e) various scans of her hands, elbows, and wrists; and
- (f) a rheumatology consultation report dated January 20, 2023.

V. Decision under Review

[25] On December 11, 2023, the Administrator found Ms. Mike to be ineligible for the CTSSP for the reasons contained in the MDC's recommendation following reconsideration.

[26] The MDC acknowledged Ms. Mike's extensive but unsuccessful efforts to locate medical records to corroborate her mother's ingestion of thalidomide. The MDC remarked that the letter from the family doctor stated only that the mother had advised the physician that she received thalidomide samples during her pregnancy; however, there was no way to confirm that these were indeed thalidomide and there was no information about how many pills she was given or when.

[27] The MDC observed that Ms. Mike's file indicated unilateral limb differences, and thalidomide embryopathy generally presents bilaterally. While there are rare cases where patients have unilateral differences, the MDC noted that these are usually associated with damage to many internal organs, particularly where thalidomide was taken regularly during the first trimester of pregnancy.

[28] Finally, the MDC noted that medical records indicated Ms. Mike had Sprengel anomaly in one shoulder, which differs from anomalies reported in thalidomide embryopathy. The MDC suggested this anomaly may be linked to scoliosis. The MDC concluded that the evidence as a whole indicated Ms. Mike's damage patterns were likely caused by alternative non-genetic conditions.

VI. Issues

[29] This application for judicial review raises the following issues:

- A. Was the Administrator authorized to seek a further recommendation from the MDC when reconsidering its initial decision?
- B. Was the Administrator authorized to adopt the MDC's recommendation following reconsideration?
- C. Was the Administrator's decision reasonable?

VII. Analysis

[30] The Administrator's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only where "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[31] The criteria of "justification, intelligibility and transparency" are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[32] When the decision is of great significance to the individual, the decision maker must provide more justification and explanation (*Vavilov* at paras 133-135). In *Richard*, Justice Pamel noted that a decision respecting an applicant's eligibility for the CTSSP is "extremely important

for thalidomide survivors; it is a question of human dignity and quality of life or even of life and death” (at para 62).

A. *Was the Administrator authorized to seek a further recommendation from the MDC when reconsidering its initial decision?*

[33] Ms. Mike says that neither the 2019 OIC nor the TSCP Settlement Agreement contemplated the Administrator seeking a further recommendation from the MDC when reconsidering an initial decision to deny eligibility. She argues that the MDC was improperly given an opportunity to “bootstrap” its recommendation.

[34] The CTSSP Reconsideration Protocol states (at pp 10-11):

Requests for Reconsideration in Writing:

i. If the Administrator determines that the Request for Reconsideration Form is complete and contains Reconsideration Information, the File will then be forwarded to the Multi-disciplinary Committee for review and recommendation to the Administrator as to whether the Applicant should be found eligible under the CTSSP.

[35] Ms. Mike notes that the Reconsideration Protocol was created by the Administrator, and was published only after he had submitted her request for reconsideration.

[36] The Federal Court of Appeal has confirmed that administrative decision makers are masters of their own procedure. They are accorded the powers given to them expressly or impliedly by legislation. One implied power most have is the ability to fashion procedures

necessary to discharge their express legislative mandates, as long as they are consistent with the legislation and any requirements of fairness (*Hillier v Canada (Attorney General)*, 2019 FCA 44 at para 10).

[37] Pursuant to s 3(5)(c) of the 2019 OIC, the Administrator is expected to make decisions after receiving the recommendations of the MDC. The TSCP Settlement Agreement provides in s 4.05:

4.05 Reconsideration process

[...] Class Members whose applications are denied at the third stage described in subparagraph 3(7) of the OIC, after recommendation by the Multi-disciplinary Committee, shall be entitled to provide written submissions and/or an oral hearing with Third Party Administrator and at least one representative of the Multi-disciplinary Committee. [...]

[38] Where an enabling statute provides a decision maker with access to medical advice, it may be inferred that the decision maker has no particular medical expertise; it cannot reject medical opinions in the absence of credibility concerns or contradictory evidence (*Thériault v Canada (Attorney General)*, 2006 FC 1070 at paras 56-57; *Rivard v Canada (Attorney General)*, 2001 FCT 704 at paras 39-43).

[39] Both the 2019 OIC and the TSCP Settlement Agreement provide the Administrator with access to the MDC's expertise in the initial Step 3 decision and at oral hearings of reconsideration requests. These provisions suggest the Administrator has no particular medical expertise, and is not sufficiently qualified to make the necessary specialized medical assessments without the MDC's assistance.

[40] There is no practical reason why the Administrator should be precluded from seeking the recommendation of the MDC in reconsidering a previous decision, particularly since the request for reconsideration may be accompanied by new medical information that has not been previously considered by the MDC. The 2019 OIC and the TSCP Settlement Agreement support the conclusion that the Administrator may, and in most cases must, seek a further recommendation from the MDC before rendering a new decision following a reconsideration request.

[41] It was within the Administrator's discretion to seek a further recommendation from the MDC when reconsidering its initial decision. This was a procedural choice made by the Administrator as master of its own process, and is owed deference by this Court.

B. *Was the Administrator authorized to adopt the MDC's recommendation following reconsideration?*

[42] When an administrative decision contains no reasons, or only brief ones, a report or recommendation leading to the decision may be regarded as informing the reasons (*Virgen v Canada (Attorney General)*, 2022 FC 1544 at para 46, citing *Saber & Sone Group v Canada (National Revenue)*, 2014 FC 1119 at para 23; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37).

[43] However, decision makers must not fetter their discretion and "rubber stamp" a report that recommends a particular outcome (*Saulteaux v Carry the Kettle First Nation*, 2022 FC 1435 at para 89, citing *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para

24). They must confirm that they have considered the conclusions of a report and any submissions filed by the parties (*Greaves v Royal Bank of Canada*, 2019 FC 994 at para 38).

[44] The Administrator's decision following reconsideration included the following:

The MDC has made its written recommendation to the CTSSP Administrator in regard to the Reconsideration Information you provided in correlation with the totality of previous information related to the application including all of the application forms and supporting information you submitted to the CTSSP, the valiDATE report generated from the diagnostic algorithm at Step 2, and any other information it deemed relevant.

The CTSSP Administrator has carefully reviewed and considered the MDC's recommendation and has determined that you are not eligible under the CTSSP. The CTSSP Administrator concurs with the MDC's recommendation based on the reasons contained within the attached document.

[45] This language demonstrates that the Administrator reviewed and carefully considered the MDC's recommendation before deciding to concur with it. The Administrator's decision was communicated to Ms. Mike several days after the MDC completed its recommendation following reconsideration. There is nothing to suggest the Administrator improperly fettered its discretion, or rubber-stamped the recommendation without taking the appropriate time to review it.

[46] The MDC's recommendation following reconsideration is therefore subject to review by this Court as part of the Administrator's reasons. If the MDC's reasons fail to sufficiently explain why its recommendation diverged from the findings at Steps 1 and 2 of the application process, then the Administrator's decision will similarly be unreasonable.

C. *Was the Administrator's decision reasonable?*

[47] Ms. Mike challenges the reasonableness of the Administrator's decision on numerous grounds. Most of these must be rejected for the reasons provided in *Blair*. However, one is compelling. The application for judicial review will be allowed because the MDC, and in turn the Administrator, failed to adequately explain its conclusion that Ms. Mike's limb differences are unilateral.

[48] Ms. Mike's valiDATE report stated that her radial and carpal bone abnormalities were bilateral. It appears that this was derived from a report prepared by medical imaging consultants dated May 18, 2016, which stated:

There is abnormal shortening of the radius on both sides, right worse than left. On the right, this results in abnormal increased angulation of the radiocapitellar joint, associated with moderate secondary osteoarthritis of the radiocapitellar joint but no subluxation or dislocation. [...]

[49] In its initial recommendation, the MDC acknowledged the conflicting evidence regarding Ms. Mike's limb abnormalities:

There are conflicting radiological reports of the hands, but the [MDC] agreed after examining the scans that she presents with unilateral hand defects (on the right hand only) with absence of middle phalanges and hypoplasia of the distal phalanges. The combination of unilateral brachysyndactyly, thoracic asymmetry (one side smaller than *sic* the other) and Sprengel anomaly is suggestive of non-genetic sporadic conditions.

[50] It is unclear from the MDC's initial recommendation how it reached the conclusion that Ms. Mike "presents with unilateral hand defects". The initial recommendation stated only that the MDC agreed with this assessment "after examining the scans".

[51] In its recommendation following reconsideration, the MDC did not elaborate on, or offer further analysis of, the conflicting evidence. Instead, it referred only to Ms. Mike's "shortened right radius and ulna" without any mention of her left arm.

[52] In *Vavilov*, the Supreme Court of Canada recognized "the need to develop and strengthen a culture of justification in administrative decision making" (at paras 2, 14). It is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies (*Vavilov* at para 86).

[53] The MDC considered the unilateral nature of Ms. Mike's limb differences to be highly significant: in the absence of internal organ damage, the MDC found that the limb differences were not indicative of thalidomide embryopathy. However, the MDC did not physically examine Ms. Mike or requisition additional medical tests or assessments, as it was empowered to do under the 2019 OIC.

[54] The MDC did not sufficiently explain its analysis of the conflicting evidence submitted by Ms. Mike, and its conclusion that she presented with only unilateral limb differences. It then

relied on this conclusion as a central reason for dismissing the uncontradicted evidence that her mother had ingested thalidomide during pregnancy.

[55] The Administrator's adoption of the MDC's recommendation following reconsideration was therefore unreasonable.

VIII. Remedy

[56] Ms. Mike asks this Court to declare that she meets the eligibility criteria for the CTSSP. She says the outcome of her application is inevitable, and the extensive delay she has encountered in applying for recognition and support amounts to exceptional circumstances (citing *D'Errico v Canada (Attorney General)*, 2014 FCA 95 and *Briand*).

[57] Ms. Mike first submitted an application under the TSCP. She has been pursuing her claim for benefits for approximately one decade. While her circumstances are deserving of sympathy, I cannot conclude that the outcome of her application is inevitable. Nor does the Court have sufficient information or expertise to substitute its view for that of the Administrator.

[58] The Administrator failed to properly account for the conflicting evidence submitted by Ms. Mike, and unreasonably relied on its conclusion respecting Ms. Mike's limb differences to dismiss the uncontradicted evidence of her mother's ingestion of thalidomide during pregnancy. However, I am unable to say what the Administrator may decide following a comprehensive recommendation from the MDC that addresses these concerns.

[59] A determination at Step 3 involves a highly specialized and fact-driven analysis to be undertaken by the Administrator informed by the MDC's expert recommendation. The 2019 OIC entrusted this task to the Administrator supported by the MDC, and the Court must exercise restraint.

IX. Conclusion

[60] The application for judicial review is allowed, and the matter is remitted to the Administrator for redetermination. By agreement of the parties, no costs are awarded.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is allowed, and the matter is remitted to the Administrator for redetermination.
2. No costs are awarded.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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