Federal Court Cour fédérale

Date: 20250717

Docket: T-1470-24

Citation: 2025 FC 1273

Ottawa, Ontario, July 17, 2025

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

LÉO PROVENCHER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Léo Provencher 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 Mr. Provencher 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 Phoebe Mike (*Mike v Canada (Attorney General)*, 2025 FC 1275). 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, failed to adequately explain its conclusion that Mr. Provencher's malformations do not fall within the spectrum of thalidomide embryopathy. The application for judicial review is therefore allowed, and the matter will be remitted to the Administrator for redetermination.

II. Background

[4] 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].

[5] 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.

[6] 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.

[7] 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).

[8] 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*).

[9] 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).

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

[11] 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

[12] 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.

[13] 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.

[14] 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.

[15] 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.

[16] 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.

[17] 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.

[18] 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. Mr. Provencher's Application

[19] Mr. Provencher was a member of the TSCP Class Proceeding. He submitted his initial application to the CTSSP in September 2020. His application included medical records, photographs, and an affidavit sworn by Mr. Provencher's mother affirming that she had taken thalidomide during her pregnancy.

[20] On November 12, 2020, the Administrator informed Mr. Provencher that his application would advance to Step 2.

[21] On June 29, 2021, the Administrator confirmed that Mr. Provencher's valiDATE report had indicated it was probable or possible that his congenital deformities were caused by maternal ingestion of thalidomide. Mr. Provencher's physician, Dr. Simon Toussaint, verified the answers on the valiDATE questionnaire and added a note that Mr. Provencher also has a small mandible (micrognathia). Mr. Provencher's application advanced to Step 3.

[22] On July 7, 2022, the Administrator found Mr. Provencher to be ineligible for the CTSSP for the reasons explained in the MDC's recommendation.

[23] The MDC concluded that Mr. Provencher's malformations were not as severe as those seen in thalidomide survivors, and were more consistent with other well-known conditions such as orofaciodigital syndrome or Hanhart's syndrome. While not excluding Mr. Provencher's claim on this ground, the MDC also observed that it was unlikely a physician would have

prescribed thalidomide to his mother two years after the drug was recalled. The MDC therefore found that Mr. Provencher's malformations were likely due to other causes.

[24] Mr. Provencher requested reconsideration of the Administrator's decision on June 29, 2023. He asked for an oral hearing, which was eventually scheduled for February 15, 2024. In support of his reconsideration request, Mr. Provencher submitted several documents relating to the history of the CTSSP, including the TSCP Settlement agreement, the 2019 OIC, and the contribution agreement between Canada and the Administrator.

[25] Mr. Provencher was accompanied at the oral hearing by his sister, Linda Provencher, and his legal representatives. He made the following arguments:

(a) the requirement that an applicant provide new or additional medical information is inconsistent with the 2019 OIC and TSCP Settlement Agreement;

(b) the Administrator failed to provide transparent and justifiable reasons for its decision to depart from the determinations at earlier steps, and the MDC's recommendation failed to consider the valiDATE algorithm and preliminary assessment;

(c) the MDC improperly drew an adverse inference from the fact that the maternal ingestion of thalidomide reportedly occurred in 1964, negating the grace period mandated by *Richard*;

(d) the MDC unreasonably found that a single dose of thalidomide during the first trimester would be expected to cause more severe malformations, including damage to internal organs; and

(e) the MDC did not adequately explain why the exceedingly rare alternative diagnoses of orofaciodigital syndrome or Hanhart's syndrome were more likely than thalidomide embryopathy, particularly given the direct evidence of maternal ingestion.

[26] Members of the MDC who were present at the oral hearing asked several questions. Ms. Provencher clarified that her mother consistently gave her children the same information: she had terrible morning sickness in the summer of 1964 while her doctor was on vacation, and she was given a packet of thalidomide by one of her sister's doctors. Ms. Provencher recalled that her mother had stated that she had taken only a half tablet once, rather than a full tablet.

V. Decision under Review

[27] On May 15, 2024, the Administrator found Mr. Provencher ineligible for the CTSSP for the reasons explained in the MDC's recommendation following reconsideration.

[28] The MDC confirmed that it was applying a balance of probabilities standard, and stated that it had considered the determinations at Step 1 and Step 2 in arriving at its conclusion. The

MDC remarked that, if the previous steps were determinative of the outcome, then it would have no reason to exist.

[29] The MDC confirmed that it had considered the valiDATE result in its original recommendation, but stressed that this did not supersede the other evidence before the MDC, such as the MDC's expert opinion and "other evidence relating to a specific allegation". The MDC also expressed concern regarding the proprietary and opaque nature of the algorithm.

[30] The MDC maintained its original opinion that it was unlikely, although possible, that a physician would prescribe thalidomide two years after the drug was recalled. The MDC accepted that the statements of Mr. Provencher's mother had been made in good faith, but again found that his malformations were not compatible with those seen in thalidomide survivors.

[31] The MDC acknowledged that its mandate did not extend to making alternative diagnoses, but found no reason to doubt Mr. Provencher's 1966 diagnosis of orofaciodigital syndrome. It noted that its practice was to require genetic testing only where an applicant's damage patterns were consistent with both a genetic disorder and thalidomide embryopathy. Because it found Mr. Provencher's malformations to be inconsistent with thalidomide exposure, the MDC did not order genetic testing.

VI. Issues

[32] 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

[33] 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).

[34] 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).

[35] 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?*

[36] Mr. Provencher 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. He argues that the MDC was improperly given an opportunity to "bootstrap" its recommendation.

[37] 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.

[38] Mr. Provencher notes that the Reconsideration Protocol was created by the Administrator, and was published only after he had submitted his request for reconsideration.

[39] 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).

[40] 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. […]

[41] 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).

[42] 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.

[43] 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.

[44] 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?*

[45] 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).

[46] 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).

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

> [TRANSLATION]
>
> The MDC has made its written recommendation to the CTSSP Administrator taking into account the Reconsideration Information you provided in combination 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 by the diagnostic algorithm at Step 2, and all 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.

[48] 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 Mr. Provencher 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.

[49] 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?*

[50] Mr. Provencher 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 Mr. Provencher's malformations do not fall within the spectrum of thalidomide embryopathy.

[51] In its recommendation following reconsideration, the MDC largely adopted the analysis and conclusions contained in its initial recommendation. In its initial recommendation, the MDC expressed the view that ingesting a single thalidomide tablet early in pregnancy would have caused more severe malformations, including abnormalities in Mr. Provencher's internal organs. The MDC acknowledged that the mild scoliosis in Mr. Provencher's thoracic spine could be consistent with thalidomide embryopathy, but noted that scoliosis is also associated with other syndromes, some genetic and others sporadic. Taking into account Mr. Provencher's other malformations, which the MDC considered to be unrelated to maternal thalidomide ingestion, the MDC concluded that it was unclear what caused his scoliosis.

[52] The MDC did not require Mr. Provencher to undergo genetic testing. In the absence of genetic testing, the MDC could not definitively confirm whether Mr. Provencher suffers from a

genetic disorder. The MDC conceded that it could not arrive at a diagnosis based solely on photographs and clinical descriptions, but nevertheless expressed the view that the abnormalities presented by Mr. Provencher could be explained by other well-known conditions, such as orofaciodigital syndrome or Hanhart syndrome.

[53] The MDC did not explain which of Mr. Provencher's malformations are inconsistent with thalidomide embryopathy or why. The valiDATE report indicated that he has scoliosis, a cleft palate, and malformations in his upper and lower limbs. The MDC acknowledged that scoliosis had been seen in thalidomide survivors, and cited an article confirming that his other malformations had also been reported in cases of thalidomide embryopathy (Smithells R. & Newman C., "Recognition of Thalidomide Defects" (1992) *Journal of Medical Genetics* 29(10):716-723 at pp 721, 719).

[54] Mr. Provencher raised this issue in his request for reconsideration (at para 71):

> With respect to the MDC's statement that Mr. Provencher's malformations do not fall on the "spectrum" of Thalidomide embryopathy, no scientific evidence could be given, as scoliosis, cleft palate, and bilateral digital malformations do fall on the spectrum of Thalidomide embryopathy. […]

[55] The MDC's recommendation provided only the following explanation:

> [TRANSLATION]
>
> […] The birth differences are not compatible with those associated with thalidomide embryopathy. The characteristics of Thalidomide embryopathy have been reviewed in multiple publications (for

> example, Smithells and Newman, 1992; Vargesson, 2015; Vargesson et al., 2023; Vianna et al., 2013).

[56] 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).

[57] The MDC's recommendation, and in turn the Administrator's decision, provided no explanation of how Mr. Provencher's malformations differ from those described in the scientific literature. Considering the significance of the Administrator's decision to Mr. Provencher, the reasons do not exhibit the requisite degree of justification, transparency and intelligibility. The Administrator's failure to meaningfully grapple with key issues raised by Mr. Provencher in his request for reconsideration calls into question whether it was actually alert and sensitive to the matter before it (*Vavilov* at para 128).

[58] The MDC's conclusion that Mr. Provencher's malformations are inconsistent with thalidomide embryopathy was the basis for its decision not to require him to undergo genetic testing. This also provided the implicit basis for its rejection of the direct evidence of Mr. Provencher's mother that she ingested a half tablet of thalidomide during pregnancy.

[59] Genetic testing would have provided important additional information to either confirm or refute the MDC's hypothesis that Mr. Provencher's malformations may be explained by

orofaciodigital syndrome or Hanhart syndrome. The MDC unreasonably attributed Mr. Provencher's malformations to a genetic disorder without first exercising its authority to require him to undergo genetic testing.

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

VIII. Remedy

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

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

[63] I have found that the Administrator failed to adequately explain its conclusion that Mr. Provencher's malformations do not fall within the spectrum of thalidomide embryopathy. I have also found that the MDC unreasonably attributed his birth differences to a genetic disorder. I am

unable to say what the Administrator may decide following a comprehensive recommendation from the MDC that addresses these concerns.

[64] 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

[65] 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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APPEARANCES:

David Rosenfeld Sue Tan	FOR THE APPLICANT
Christine Mohr Margaret Cormack	FOR THE RESPONDENT

SOLICITORS OF RECORD:

KOSKIE MINSKY LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT