Federal Court Cour fédérale

**Date: 20250717**

**Docket: T-1745-24**

**Citation: 2025 FC 1274**

**Ottawa, Ontario, July 17, 2025**

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

**BETWEEN:**

**BARBARA BLAIR**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Barbara Blair 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. Blair was ineligible for the CTSSP.

[2] This application for judicial review was heard together with similar applications brought by Léo Provencher (*Provencher v Canada (Attorney General)*, 2025 FC 1273) 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] Ms. Blair has not demonstrated that the Administrator improperly involved its advisory committee in the reconsideration of its initial decision, improperly adopted the recommendation of the advisory committee, or rendered a decision that was unreasonable. The application for judicial review must therefore be dismissed.

## 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 [*Rodrigue*]).

[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. Ms. Blair's Application

[19] Ms. Blair was a member of the TSCP Class Proceeding. She submitted her application to the CTSSP in October 2019. Her application included medical records and photographs, and affidavits from her siblings who said it was known in their household that their mother had ingested a thalidomide sample under the brand name Kevadon. The sample was provided by their aunt, who worked as a nurse.

[20] On December 10, 2019, the Administrator informed Ms. Blair that her application would advance to Step 2.

[21] On September 8, 2020, the Administrator confirmed that Ms. Blair's valiDATE report indicated it was "probable" or "possible" that her congenital malformations were caused by maternal ingestion of thalidomide. As a result, her application advanced to Step 3.

[22] On June 30, 2022, the Administrator found that Ms. Blair was not eligible under the CTSSP for the reasons explained in the MDC's recommendation.

[23] Ms. Blair requested reconsideration of the Administrator's decision on October 24, 2022. She submitted additional documents, including dental x-rays and photographs. Ms. Blair's reconsideration request asserted that the MDC:

(a) misunderstood her statements regarding her mother's ingestion of thalidomide, and in fact her application indicated that her mother took thalidomide in the sixth week of pregnancy;

(b) unreasonably dismissed the conclusion of her physicians that she had phocomelia, an indicator of thalidomide embryopathy;

(c) omitted a reference to a report stating that she had deformed teeth roots;

(d) unfairly dismissed her application based on age-related symptoms, such as arthritis and Sicca Syndrome; and

(e) failed to mention her ultrasound reports, which revealed a larger right kidney and evidence of some liver damage, and did not take into account the pain in her hands, wrists, arms, shoulders, and cervical spine.

## V. Decision under Review

[24] On November 16, 2023, the Administrator found that Ms. Blair was not eligible for the CTSSP for the reasons explained in the MDC's recommendation following reconsideration.

[25] The MDC accepted Ms. Blair's clarification that her mother had ingested thalidomide in the first trimester via a sample provided by her aunt, but noted that "the base question is whether

the conclusion that the Applicant's mother ingested thalidomide is justified, given the Applicant's birth differences".

[26] The MDC found that Ms. Blair did not have phocomelia, and concluded that the repeated references to thalidomide exposure in her medical records likely arose from the family's recollection that their mother had ingested thalidomide. While acknowledging Ms. Blair's liver damage and kidney abnormality, the MDC referred to medical literature indicating that thalidomide embryopathy causes significant and wide-spread internal organ damage.

[27] As a result, the MDC concluded that Ms. Blair's birth differences were not consistent with thalidomide embryopathy, and maintained its previous recommendation to deny her eligibility under the CTSSP.

## VI. Issues

[28] 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

[29] 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).

[30] 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).

[31] 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?*

[32] Ms. Blair 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.

[33] 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.

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

[35] 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).

[36] 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. […]

[37] 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).

[38] 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.

[39] 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.

[40] 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?*

[41] 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).

[42] 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).

[43] 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.

[44] 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. Blair 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.

[45] 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?*

[46] Ms. Blair challenges the reasonableness of the Administrator's decision on three grounds: (1) the Administrator unreasonably discounted the "probable" result of the valiDATE report; (2) the Administrator unreasonably rejected the evidence of maternal ingestion of thalidomide; and

(3) the Administrator unreasonably applied a diagnostic standard rather than the balance of probabilities.

*(1) Did the Administrator unreasonably discount the "probable" result of the valiDATE report?*

[47] The TSCP Settlement Agreement states that the MDC must consider the Step 2 result in making its recommendation (at s 4.02(c)):

> The Diagnostic Algorithm referred to in subparagraphs 3(5) and 3(6) of the OIC that is intended to be used at the second stage of the process as a diagnostic tool by the Third Party Administrator, is known as the Diagnostic Algorithm for Thalidomide Embryopathy also referred to as valiDATE; and it shall be considered by the Multi-disciplinary Committee referred to in the OIC in determining a person's eligibility under the Program pursuant to subparagraph 3(1)(c) of the OIC.

[48] The 2019 OIC states in s 3(7) that the MDC's recommendation must be based on "the totality of the information related to the application and any other evidence that it considers to be relevant."

[49] The valiDATE is a proprietary algorithm, and its owners have not disclosed the manner in which it processes the information obtained from an applicant's questionnaire. The MDC discussed the algorithm used by the valiDATE only in its recommendation preceding the Administrator's initial decision, which is not the subject of this application for judicial review. To the extent that the MDC's initial recommendation informed its reconsideration, the following excerpt from the former is pertinent:

> Application of the valiDATE algorithm resulted in the program administrator referring this claimant's application to the [MDC] for review. However, the committee has concluded that it should not solely base its recommendation on the outcome of the analysis by the valiDATE algorithm. […]
>
> […] there is nothing before the committee that permits it to know of the assumptions from which the algorithm was derived, whether the assumptions underlying the algorithm are consistent with the current state of medical knowledge regarding the etiology of Thalidomide Embryopathy, the extent to which application of the algorithm has produced false-positive or false-negative results, or the extent to which bias, however innocent, may have affected development of the algorithm. For purposes of comparison, the [MDC] has not been afforded the opportunity to assess clinical data relating to any claim that the algorithm has identified as one that is inconsistent with a finding of Thalidomide Embryopathy. […]

[50] Ms. Blair says that the MDC failed to consider an article written by the creators of the valiDATE that discusses the algorithm and its ability to assist in diagnosing thalidomide embryopathy (Mansour S. et al, "A clinical review and introduction of the diagnostic algorithm for thalidomide embryopathy" (2019) *Journal of Hand Surgery (European Volume)* 44(1):96) [Mansour Article].

[51] The Mansour Article does not appear in the certified tribunal record. Even if it had been before the MDC, the article was written while the software and scoring thresholds were still under development (Mansour Article at p 107). Moreover, the article recognized that, in practice, a clinician would enter the clinical details of the patient and the valiDATE software would then determine the "probability" of the patient's malformations being caused by thalidomide: "Clearly, the accuracy of this assessment will be dependent on the information provided by the

clinician". Accordingly, the algorithm "functions as an aid to diagnoses rather than a 'stand alone' test" (Mansour Article at p 108; figure 5 at p 107).

[52] The MDC's findings also provided a coherent explanation for rejecting the result of the valiDATE report. The MDC's recommendation following reconsideration concluded that Ms. Blair had been misdiagnosed with phocomelia:

> In many of the letters, notes and clinical records that are part of the file and reconsideration material, there is reference to a conclusion that the Applicant has "partial phocomelia" in her left arm […] The medical definition of Phocomelia is the absence of or severe reduction in the length of one or more of the long bones of the limbs of the embryo, such that any digits are attached to a part of the limb without the presence of a normally developed intervening or connecting long bone. […]
>
> The Applicant presents with slight shortening of her left arm humerus, radius, and ulna with digits articulating from the radius and ulna. The limb difference is in the development of the digits and thumb, which does not constitute phocomelia. Rather, the appropriate term in this case is "hypoplasia" of the digits of the left hand.

[53] Ms. Blair's questionnaire response at Step 2 included the following answers regarding her upper and lower body respectively:

> Is there amelia and/or phocomelia with some digits?
> UNILATERAL LEFT
>
> […]
>
> Is there amelia and/or phocomelia with some digits?
> UNCLEAR

[54] According to the Mansour Article, upper limb phocomelia/amelia is “Classical TE Typical and highly suggestive of TE (occurs rarely otherwise)” (at p 102). A response to the questionnaire that confirms the presence of amelia and/or phocomelia will inevitably affect the result of the algorithm.

[55] The MDC’s conclusion that Ms. Blair had been misdiagnosed with amelia and/or phocomelia provided a legitimate basis to doubt the result of the valiDATE report. Ms. Blair has not demonstrated that the MDC, and in turn the Administrator, unreasonably discounted the “probable” result of the valiDATE report.

*(2) Did the Administrator unreasonably reject the evidence of maternal ingestion of thalidomide?*

[56] Ms. Blair says the MDC assessed her evidence of maternal ingestion against the heightened evidentiary standard that was discredited in *Briand* and *Rodrigue*.

[57] Ms. Blair submitted medical documentation in which multiple doctors referred to her malformations as thalidomide-related. She also submitted affidavits from her siblings, who said it was common knowledge in their household that their mother had been given a thalidomide sample by their aunt while she was pregnant.

[58] Ms. Blair’s older brother, who was 11 years old at the relevant time, said the following in his affidavit (at paras 6-8):

> I was living at home […] and began hearing a lot of media reports about children being born around the world with severe deformities. […]
>
> Around this time, (1961) I also became aware that our own mother […] had taken a pill for morning sickness, apparently obtained by her sister […] a medical professional working at the Great War Memorial Hospital in Perth, Ontario.
>
> During the wide media coverage and subsequent news reports of the Thalidomide danger to pregnant mothers, there was constant table talk at our house about my mother taking the drug, and great apprehension for the baby they were expecting […]

[59] The MDC found as follows:

> […] the MDC accepts that the Applicant's position is that her mother had ingested Thalidomide in the first trimester by way of a sample provided by the aunt, […] The base question is whether the conclusion that the mother ingested Thalidomide is justified, given the birth differences.

[60] In *Briand*, the applicant's mother and her doctor died before she applied for benefits under the TSCP, and a fire destroyed her mother's hospital records. The applicant's evidence included her own recollection that her mother had often told her that she had taken thalidomide, an affidavit from her aunt attesting to the same, and references to discussions with her former doctor attributing her malformations to thalidomide. Justice Annis found that this evidence cumulatively supported "a conclusion that there is a significant persuasive value that resembles a finding that falls within a range of possible and acceptable outcomes" (*Briand* at para 54).

[61] The applicant's evidence in *Briand* was corroborated at least in part by the testimony of another woman who had been prescribed thalidomide for morning sickness by the same physician. Justice Annis found that this was "sufficient to establish in a very persuasive manner that the applicant's mother probably used thalidomide during the first trimester of her pregnancy" (*Briand* at para 55).

[62] In *Rodrigue*, the applicant was unable to provide direct evidence of maternal thalidomide ingestion, as his mother and her physician had both died and the hospital records were lost in a flood. Justice Annis found the decision to reject the application based on a lack of direct evidence to be unreasonable, but remitted the matter for redetermination (*Rodrigue* at para 14):

> 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 … is sufficient to find that the applicant meets the eligibility criteria to receive financial support under the Program.

[63] In Ms. Blair's case, the indirect evidence that her mother ingested thalidomide during the first trimester of pregnancy consisted of her own recollection, and that of her siblings, that her mother had ingested a sample of thalidomide provided by their aunt. A journal entry in the mother's diary from the late 1980s mentioned thalidomide, but it was unclear what the significance of this may have been. In oral argument, counsel for Ms. Blair emphasized the high incidence of thalidomide survivors in the small town of Perth, Ontario (three reported cases in a

population of approximately 6,000), but it is unclear whether any inference may be reliably drawn from this.

[64] Numerous physicians attributed Ms. Blair's malformations to her mother's ingestion of thalidomide. The MDC's recommendation following reconsideration included the following commentary:

> The MDC is mindful of the fact that throughout the file and reconsideration material, the Applicant's birth differences are attributed to "Thalidomide exposure". The MDC cannot find anything in the material indicating the source or initial diagnosis from which that repeated observation came. Rather, it appears to have been accepted as fact by numerous examining physicians, without further explanation. There is no evidence in the documents of the Applicant having been examined or diagnosed by an individual with expertise in Thalidomide Embryopathy. The repeated reference to Thalidomide exposure likely arose from the family's recollection that the Applicant's mother ingested one tablet from a sample provided by the mother's sister, in conjunction with the misconception that any limb anomaly can be attributed to Thalidomide.

[65] Following this Court's decisions in *Briand* and *Rodrigue*, applicants are no longer required to present direct evidence of maternal ingestion of thalidomide. The relaxation of the standard of proof acknowledges that the events in question occurred decades ago, and the availability of corroborating evidence may have been adversely affected by the passage of time.

[66] However, the relaxed standard of proof does not relieve an applicant of the requirement to adduce sufficient evidence of maternal ingestion that, in combination with all other evidence, establishes eligibility under the CTSSP.

[67] Ms. Blair's application was not rejected at a preliminary stage, preventing "consideration of any other evidence likely to demonstrate on a balance of probabilities that she was a victim of thalidomide" (*Briand* at para 46). Her application progressed to the MDC twice, where evidence of maternal ingestion was carefully considered in the context of her application as whole.

[68] Ms. Blair has not demonstrated that the MDC, and in turn the Administrator, unreasonably rejected the evidence of maternal ingestion of thalidomide.

*(3) Did the Administrator unreasonably apply a diagnostic standard rather than the balance of probabilities?*

[69] Ms. Blair argues that the MDC applied a diagnostic standard, rather than a balance of probabilities, by seeking to "confirm" whether she had thalidomide embryopathy. She says that her strabismus/Duane's syndrome, internal organ damage, and spinal anomalies are all consistent with thalidomide embryopathy.

[70] Ms. Blair's criticisms of the MDC's analysis are directed towards its initial recommendation. In its recommendation following reconsideration, the MDC said the following:

> It is important to note that the MDC can only address the question of whether the Reconsideration Information provided confirms, on a balance of probabilities, that the Applicant was affected by Thalidomide. The MDC role is not to diagnose alternative conditions or diseases that could explain the birth differences, but may, in some cases, suggest potential alternative causes in its Recommendation letter.

[71] The MDC acknowledged that Ms. Blair has suffered from an array of serious physical and mental challenges throughout her life. These include:

- aspects of Sicca syndrome including an inability to produce tears when crying and crocodile tears;
- strabismus that was surgically corrected in 2001;
- migraine headaches;
- chronic neck pain;
- multilevel disc degeneration;
- multilevel joint arthropathy;
- moderate osteo-arthritis;
- cervical spine stenosis and subtle myelopathy;
- pneumatization of sinuses and mastoids;
- deformed teeth roots;
- left hand and arm hypoplasia; stub-like digits coupled with decreased power for flexion and opposition in thumb, reduced movement and pain in wrist and forearm in 1988, short metacarpal bones in 4 fingers, particularly in two middle fingers, extensor tendinitis, and osteopenia of metacarpals;
- slightly unusual phalanges in right hand coupled with no thumb flexion/opposition at the metacarpal phalangeal joint and minimal thumb flexion at the inter phalangeal joint;
- reported chronic bilateral shoulder pain including difficulty lifting arms;
- spondyloarthropathy;

- Raynaud's syndrome in all fingers;
- Raynaud's syndrome in toes;
- Rectal bleeding that was surgically corrected in 2012;
- Bilateral ankle monofilament creating a 'pins and needles feeling';
- Reported inability to fully weight-bear on right side and left hip and knee pain;
- Fibromyalgia, depression, hypertension, chronic constipation due to pain medication, three 5mm lesions in right kidney and multiple echogenic foci noted in spleen.

[72] The MDC concluded as follows:

> The Applicant presents with slight shortening of her left arm humerus, radius, and ulna with digits articulating from the radius and ulna. The limb difference is in the development of the digits and thumb, which does not constitute phocomelia. Rather, the appropriate term in this case is "hypoplasia" of the digits of the left hand.
>
> The MDC recognizes that the Applicant's right kidney is larger than the left, and that there is some indication of liver damage. The experience of the Thalidomide experts on the MDC, which is confirmed by medical literature, is that ingestion of Thalidomide in the early stages of pregnancy causes significant and congenital wide-spread internal organ damage.
>
> […] Based on the accumulated understanding of the mechanism of action and presentation of Thalidomide Embryopathy, the MDC, which includes experts in Thalidomide Embryopathy, is of the opinion that the Applicant's birth differences are not consistent with Thalidomide Embryopathy.
>
> The MDC is also mindful that 3% of all live births have some form of birth difference. In the majority of cases, the cause is unknown. This situation will also have occurred during the period of Thalidomide availability.

[73] Ms. Blair argues that the MDC improperly ruled out phocomelia, an important indicator of thalidomide embryopathy, and never confirmed that she did not have a reduction or loss in the long bones. She notes that during a meeting of the World Health Organization, which was attended by two members of the MDC, participants discussed the challenge of identifying a "core set of effects" associated with thalidomide. While probable effects can be identified, there are also possible effects that are seen less frequently. She says that the MDC applied a standard of certainty to indicators of thalidomide embryopathy, and failed to consider that damage patterns can vary among thalidomide survivors. She notes that the MDC never required further testing, as it was empowered to do.

[74] The Respondent replies that the MDC had a discretion to require further testing, but was not obliged to pursue this unless it was considered necessary to form a recommendation. Despite the relaxation in the standard of proof, the onus remained on Ms. Blair to adduce sufficient evidence to demonstrate her eligibility under the CTSSP.

[75] A reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker. The decision maker's reasons are to be read with due sensitivity to the administrative setting in which they were given, bearing in mind that "administrative justice" will not always look like "judicial justice" (*Vavilov* at paras 125, 92). As the Supreme Court of Canada stated in *Vavilov* (at para 93):

> Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This

> demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[76] Ms. Blair has not demonstrated that the MDC, and in turn the Administrator, unreasonably applied a diagnostic standard rather than the balance of probabilities.

## VIII. Conclusion

[77] From the age of seven, Ms. Blair has consistently been told that her injuries resulted from her mother's ingestion of a thalidomide sample provided by her mother's sister. The family has suffered profound emotional anguish because of this, and much of Ms. Blair life has been framed by this narrative.

[78] The Court has considerable sympathy for those who in good faith attribute their birth differences to thalidomide and seek support from their government. It is possible that Ms. Blair's malformations and other health conditions are an atypical presentation of thalidomide embryopathy. Nevertheless, the Administrator's reasons allow the Court to understand why the decision was made. The decision is justified, intelligible and transparent, and falls within a range of acceptable outcomes defensible in respect of the facts and the law.

[79] The application for judicial review is dismissed. By agreement of the parties, no costs are awarded.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed without costs.

"Simon Fothergill"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1745-24 |
| **STYLE OF CAUSE:** | BARBARA BLAIR v THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | APRIL 9, 2025 |
| **JUDGMENT AND REASONS:** | FOTHERGILL J. |
| **DATED:** | JULY 17, 2025 |

**APPEARANCES:**

| | |
|---|---|
| David Rosenfeld<br>Sue Tan | FOR THE APPLICANT |
| Christine Mohr<br>Margaret Cormack | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| KOSKIE MINSKY LLP<br>Barristers and Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |