Federal Court  Cour fédérale

Date: 20240429

Docket: T-1321-21

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[ENGLISH TRANSLATION]

Ottawa, Ontario, April 29, 2024

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

PAUL RICHARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Thalidomide is a medication that was prescribed and given to pregnant women in Canada in the 1950s and 1960s to treat pregnancy-induced nausea. There were serious reasons to believe that this medication caused significant birth defects when used during the first trimester of pregnancy. Near the end of 1961, the two pharmaceutical companies that were producing this

medication launched a warning campaign through letters sent to physicians indicating that thalidomide should not be administered to pregnant women. This medication was withdrawn from the Canadian market at the request of the Department of Health in early March 1962. However, it would seem that the damage was already done: many children were born with birth defects in Canada.

[2] Despite the many efforts made by the Department of Health in 1962 to inform the medical community of the effects of this medication and to ensure the recall and destruction of the inventory of thalidomide in circulation across the country, the Department of Health has no conclusive information about the quantity of thalidomide that was not returned to the pharmaceutical companies or destroyed following these efforts, or about the shelf life of the thalidomide that was available on the market at the time; modern thalidomide has a shelf life of five years. Still today, the main obstacle to identifying the victims of thalidomide is the lack of conclusive medical testing to establish that a person's birth defects were caused by thalidomide. In fact, 3% to 5% of Canadians are born with birth defects although it is now practically impossible that pregnant women or women likely to become pregnant have taken thalidomide.

[3] As early as 1963, the Canadian government demonstrated that supporting thalidomide survivors was important by providing funding for research, creating specialized rehabilitation centres and provincial assistance programs, providing assistance to families who were seeking settlements with the pharmaceutical companies, and creating a registry of children born in Canada who were affected by thalidomide. This government registry was maintained from 1963 to 1974 and identified 74 living children affected by thalidomide.

[4] The applicant, Paul Richard, was born on March 20, 1969, in Miramichi, New Brunswick, with numerous birth defects. Among other things, Mr. Richard has phocomelia, a condition characterized by significant atrophy of the upper or lower limbs; in Mr. Richard's case, his two upper limbs are affected. Mr. Richard's malformations and other after-effects include:

(a) a serious malformation of the right arm and the right hand that required three operations from birth to age 7;

(b) a malformation of the left arm that required an operation at age 24;

(c) limited function in the fingers of the right hand and no function in the right thumb;

(d) reduced mobility in the left elbow and wrist;

(e) Berger's disease (IgA nephropathy) discovered in recent years that caused a 70% reduction in the normal capacity of his kidney function.

[5] Mr. Richard's malformations and other after-effects correspond to an in utero exposure to thalidomide, and a genetic analysis did not reveal any genetic mutation that could explain these malformations. Although there is no medical evidence that his mother was prescribed thalidomide during her pregnancy—all the medical records at the time of Mr. Richard's birth were destroyed or have disappeared—Mr. Richard states, with his mother's supporting affidavit, that she took the thalidomide her physician prescribed to her in the beginning of her pregnancy in 1968, and that no other person in his extended family was born with birth defects.

[6] Moreover, three government programs were then created in 1991, 2015 and 2019 to offer financial support to thalidomide survivors.

[7] In 1990, the Governor in Council enacted the *HIV-infected persons and Thalidomide Victims Assistance Order*, PC 1990-0872. The Department of Health implemented the 1991 Extraordinary Assistance Plan [1991 Assistance Plan] to oversee the granting of payments. In order to be eligible for payments under the 1991 Assistance Plan, thalidomide victims had to show, among other things, that their mothers had been treated in Canada and had taken thalidomide during the first trimester of pregnancy. To meet this requirement, the 1991 Assistance Plan established three criteria, namely, that the applicant (1) provide verifiable information regarding an out-of-court settlement with a pharmaceutical company; (2) provide documentary evidence (i.e., medical or pharmaceutical record) that the applicant's mother took thalidomide in Canada during the first trimester of her pregnancy; or (3) be included on the list drawn from the government registry of thalidomide victims. In all, the 1991 Assistance Plan accepted only 109 applications. The oldest survivor in Canada confirmed by the 1991 Assistance Plan was born in June 1960, and the youngest at the end of 1964.

[8] Mr. Richard did not submit an application under the 1991 Assistance Plan. In fact, Mr. Richard does not appear on the government registry of thalidomide victims and never reached an out-of-court settlement agreement with a pharmaceutical company with regard to his health condition; nothing in the record explains why. However, from my understanding of the parties, I must state that the individuals concerned did not always register themselves in the

government registry, but that it was the federal government, in collaboration with hospitals and medical professionals, that managed the registry until 1974.

[9] In 2015, a departmental policy established an *ex gratia* payment program for thalidomide survivors, called the Thalidomide Survivors Contribution Program [2015 Program], that incorporated by reference the three eligibility criteria of the 1991 Assistance Plan. A third party administrator assessed the eligibility of the applicants to this program. Mr. Richard submitted an application under the 2015 Program, which was found to be ineligible by the third party administrator. As I indicated above, Mr. Richard did not enter into an out-of-court settlement with a pharmaceutical company, his name does not appear in the government registry and he does not have documentary evidence (medical records or other) found to be admissible by the third party administrator to show that his mother took thalidomide during the first trimester of her pregnancy. Of the 193 new applications submitted under the 2015 Program (people who had not received payments under the 1991 Assistance Plan), 25 new survivors were approved, with the oldest born in July 1960, and the youngest in May 1964.

[10] Shortly after the announcement of the 2015 Program, several people raised concerns about some aspects of the program, in particular, the second criterion of the 1991 Assistance Plan, to provide sufficient documentary evidence more than 50 years after the events. In fact, in 2018, the Court found the application of this second criterion to be unreasonable in *Briand v Canada (Attorney General)*, 2018 FC 279 [*Briand*]; Justice Annis found that the application of this criterion, in accordance with the directives and policies developed by the program's administrator, which required, as acceptable medical proof, the mother's medical records or an

affidavit by a medical professional with direct knowledge of the event, was unreasonable. In particular, Justice Annis stated that "the policies … are unreasonable to the point of being egregious, 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 …". There is certainly a distinction to be made with *Briand*, which did not address the reasonableness of an eligibility criterion (as in the present case) but the interpretation of a criterion by the third party administrator and its application to the requests submitted by the applicants; however, I am of the opinion that it is an inconsequential distinction.

[11] Moreover, the individuals who were denied by the 2015 Program because of the nature of the documentary evidence required to be eligible initiated a class action against the government in 2016; the Federal Court of Appeal certified the class action in November 2018 (*Wenham v Canada (Attorney General)*, 2018 FCA 199 [*Wenham*]. The Court approved the class action settlement in May 2020 (*Wenham v Canada (Attorney General)*, 2020 FC 588).

[12] At any rate, in response to these concerns, in February 2018, the government announced that the 2015 Program would be expanded; it would extend eligibility to thalidomide survivors who had been excluded from the previous programs. In January 2019, the Department of Health announced the creation of the Canadian Thalidomide Survivors Support Program [CTSSP], which replaced the 2015 Program; the CTSSP was established by the *Canadian Thalidomide Survivors Support Program Order*, PC 2019-0271 [2019 Order], made by the Governor in

Council on the Minister of Health's recommendation. A person is eligible for the program if he or she meets one of the three conditions stated in the 2019 Order:

(a) he or she was found to be eligible under the 1991 Assistance Plan or the 2015 Program,

(b) he or she is listed on the government registry of thalidomide victims, or

(c) he or she is determined by the third party administrator to be eligible.

A third party administrator determines whether the third condition stated in the 2019 Order has been met. Mr. Richard was not eligible for the 1991 Assistance Plan or the 2015 Program, and his name is not in the government registry of thalidomide victims; therefore, it is the third condition of the CTSSP that is relevant in this case.

[13] The two parties acknowledge that, contrary to the 1991 Assistance Plan and the 2015 Program, which most often required documentary proof, eligibility for the CTSSP was determined on the basis of the probability that a person's birth defects were the result of maternal use of thalidomide in the first trimester of pregnancy. Therefore, for the third party administrator to find that a person is eligible under the third condition of the CTSSP, the 2019 Order set out a three-step process to determine eligibility:

> 1. preliminary assessment by the third party administrator that it is likely that the person's congenital malformations are the result of maternal ingestion of thalidomide in the first trimester of pregnancy;
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> 2. use of a diagnostic algorithm for thalidomide embryopathy;
>
> 3. recommendation of a multi-disciplinary committee of medical and legal experts.

[14] With regard to the first step of the eligibility process, the preliminary assessment, under paragraph 3(5)(a) of the 2019 Order, Mr. Richard must show that he meets each of the following criteria:

> (i) his date of birth falls within the period beginning on December 3, 1957, and ending on December 3, 1967 [date of birth criterion];
>
> (ii) his date of birth or any other information available is consistent with maternal ingestion of thalidomide in the first trimester of pregnancy; and
>
> (iii) the nature of the congenital malformations is consistent with known characteristics linked to thalidomide.

[15] According to the 2019 Order, each criterion must be considered to show the probability that an applicant's congenital malformations are indeed due to the maternal ingestion of thalidomide in the first trimester of pregnancy. In this case, it is the date of birth criterion, a temporal criterion under subparagraph 3(5)(a)(i) of the 2019 Order, that is relevant. Mr. Richard was found to be ineligible for the CTSSP because he was born in 1969. The third party administrator's refusal letter indicates that Mr. Richard met the other two preliminary assessment criteria, namely, that his date of birth or any other information available is consistent with maternal ingestion of thalidomide in the first trimester of pregnancy and the nature of the congenital malformations is consistent with known characteristics linked to thalidomide. Mr. Richard's application was therefore rejected at the first step of the preliminary assessment and was not examined at the second and third steps to establish a link between his congenital malformations and the maternal ingestion of thalidomide, solely because he was born in 1969.

II. Nature of the application, issues and standard of review

[16] Mr. Richard has filed an application for judicial review under section 18.1 of the *Federal Courts Rules*, RSC 1985, c F-7, and seeks to have the date of birth criterion under the 2019 Order set aside on the ground that it is unreasonable. He states that the temporal criterion was established without any justification for the dates chosen. The Attorney General of Canada [AGC] states that this criterion is reasonable but, at any rate, the reasonableness of the date of birth criterion is not a justiciable issue. The two parties confirmed during the hearing that they are not seeking costs, regardless of the outcome of the application.

[17] The parties agree that if the issue of the date of birth criterion is justiciable, the applicable standard of review would be reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 88–90; *Portnov v Canada (Attorney General)*, 2021 FCA 171 [*Portnov*] at para 44). However, the AGC states that the Court must consider the broad discretion the Governor in Council had to adopt the criteria he considered appropriate, and that the Court must not review the wisdom or effectiveness of the choice of criteria, in this case, the dates of the eligibility period in the first step of the preliminary assessment, or question whether the Governor General should have stated the criteria differently.

[18] The debate over the method to use when considering a challenge to the validity of a regulation, a statutory instrument or a decision made under the prerogative is far from over (*International Air Transport Association v Canadian Transportation Agency*, 2022 FCA 211 [*IATA*] at paras 187–91).

[19] In *Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210 [*Innovative Medicines*] at paragraph 26, the Federal Court of Appeal clearly stated that when assessing a challenge to the validity of an administrative decision made under the royal prerogative, whether through legislative or regulatory means or by order, *Portnov* requires us to follow the methodology in *Vavilov*, not the "hyperdeferential" approach (Paul Daly, "Regulations and Reasonableness Review", (January 29, 2021), online (blog): <www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review>) in *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz*], where the challenger of a regulation can only overcome the presumption of validity if the regulation is "'irrelevant', 'extraneous' or 'completely unrelated' to the statutory purpose", if there was a loss of "jurisdiction" through some rare and significant errors, including cases where there was a "jurisdictional defect" of exceeding an authority (*Katz* at paras 24, 25 and 28; *Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106, 1983 CanLII 20 (SCC) [*Thorne's Hardware*] at p 111). This method of analysis has become "an artefact from a time long since passed" and, other than very few exceptions, for example bad faith, it has been replaced by *Vavilov* (*Portnov* at para 22; *Innovative Medicines* at para 59).

[20] However, I note that a recent Supreme Court of Canada decision on this issue leads me to think that in order to succeed in a claim that a regulation is *ultra vires*, it may be necessary to rely on the *vires* principle and show that the regulation is invalid, since regulations benefit from a presumption of validity (*Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 [*Canadian Council for Refugees*] at para 54, referring to *Katz* at para 25). However, that decision does not mention *Innovative Medicines* or *Portnov* or *IATA*, and

the reference to the presumption of validity of regulations and *Katz* seems to have been made in response to a somewhat muted argument by the appellants on the issue, without much discussion. It is also possible that the Supreme Court did not think *Canadian Council for Refugees* was the right decision to address the issue.

[21] For the purposes of this case, the current consensus of the country's courts and legal experts, while still uncertain, seems to align with the Federal Court of Appeal's position in *Portnov*. I will therefore apply the *Vavilov* principles in my analysis of the issue at bar. Moreover, to be clear, Mr. Richard is not alleging that the 2019 Order is *ultra vires* because of a legal restriction or because the Governor in Council did not have the jurisdiction to issue it, but simply that the date of birth criterion in the 2019 Order was unreasonable.

III. Analysis

A. *Preliminary issue: Is Cindy Moriarty's affidavit admissible?*

[22] In response to the request for documents under section 317 of the Rules, only the 2019 Order was transmitted, considering that all the other documents were, according to the AGC, protected confidences of the Privy Council and that a certificate had been issued by the Clerk of the Privy Council under section 39 of the *Canada Evidence Act*, RSC 1985, c C-5 [certificate]. No judicial review was sought against the certificate.

[23] In response to the application for judicial review, the AGC filed the affidavit of Cindy Moriarty, Director General of Health Canada's Health Programs and Strategies. It comprises of 85 paragraphs and 31 exhibits, for a total of 821 pages. Mr. Richard submits that

this affidavit is new evidence that was not available to the Privy Council at the time the decision that is now under judicial review was made, that the respondent's record includes no ground or documentation to justify the decision to automatically exclude any person born before December 3, 1957, or after December 21, 1967, from the CTSSP and that the AGC is attempting to rely on Ms. Moriarty's affidavit to justify the date of birth criterion. Although it is impossible to know whether the information in the affidavit was known to the Privy Council at the time it made the 2019 Order, considering the Clerk of the Privy Council invoked the protection of confidential information under the certificate, Mr. Richard states that the affidavit contains new information on the issue that the Governor General in Council was to decide when he adopted the 2019 Order, the document that states the eligibility criteria for the CTSSP.

[24] Mr. Richard therefore brought an interlocutory motion before Associate Judge Tabib to strike the affidavit. Associate Judge Tabib dismissed the motion because Mr. Richard did not show that there were exceptional circumstances that required the Court's intervention on an interlocutory basis, and left the determination of the admissibility of Ms. Moriarty's evidence to the judge on the merits. However, she issued the following comments in response to Mr. Richard's argument that the evidence regarding the availability period of thalidomide should be inadmissible:

> [TRANSLATION]
> However, the issue of whether thalidomide was available in Canada after December 21, 1967, is a factual issue that the applicant himself raised in his notice of application and about which he himself introduced new evidence that was not before the decision maker. Insomuch as the applicant's evidence is admissible, it can reasonably be argued that the respondent's evidence on the subject is admissible in response to the applicant's evidence. The same can be said for the evidence regarding the

> "contextual situations" raised by the applicant in his notice of application and in the evidence he submitted.

[25] As a general rule, a court called upon to review the legality of a decision cannot consider evidence that was not before the administrative decision maker. One of the exceptions is when the affidavit provides general information in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19, 20).

[26] I am of the opinion that the situation in the present case falls under this exception. Moreover, during the hearing, the two parties supported their arguments using Ms. Moriarty's affidavit. I will therefore not strike Ms. Moriarty's evidence.

B. *Question 1: Is the issue of the reasonableness of the date of birth criterion justiciable?*

[27] During the hearing, Mr. Richard confirmed that although it involves the 2019 Order, his application is not specifically on the temporal eligibility criterion; that is not the issue. Rather, his motion is on the choice of the period of the dates of birth, which ends in 1967, five years after thalidomide was withdrawn from the Canadian market in 1962.

[28] In *Wenham* at paragraph 59, the Federal Court of Appeal states that the governing authority on justiciability is *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 [*Hupacasath*], which drew directly from the Supreme Court of Canada's decision in *Operation Dismantle Inc v The Queen*, [1985] 1 SCR 441, 1985

CanLII 74 (SCC) [*Operation Dismantle*]. I will start by citing Justice Stratas in *Hupacasath* at paragraphs 62 to 66:

> [62] Justiciability, sometimes called the "political questions objection," concerns the appropriateness and ability of a court to deal with an issue before it. Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.
>
> [63] Whether the question before the Court is justiciable bears no relation to the source of the government power …. For some time now, it has been accepted that for the purposes of judicial review, there is no principled distinction between legislative sources of power and prerogative sources of power ….
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> [64] I also agree with the Court of Appeal for Ontario in *Black*, *supra*, at paragraph 44 that "the source of the power—statute or prerogative—should not determine whether the action complained of is reviewable."
>
> [65] So what is or is not justiciable?
>
> [66] In judicial review, courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action" …. In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers.
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> [Citations omitted; emphasis added.]

[29] The AGC raises five arguments in support of his claims that the issue of the merits of the date of birth criterion and the specified period are not justiciable and therefore, the application should be dismissed.

(1) The 2019 Order is politically motivated

[30] First, the AGC states that the Governor in Council's decision to issue the 2019 Order is politically motivated, being based on ideological, political, cultural, social, moral and historical considerations that are outside the Court's jurisdiction. The AGC relies on the Supreme Court of Canada's decision in *Thorne's Hardware*, in which the Supreme Court had to decide whether a federal order in council extending the limits of the Port of Saint John so as to include the appellants' waterfront property was "'void, unlawful, unjust, discriminatory and *ultra vires*' the Governor in Council." The appellants alleged that the order had been made in bad faith and for improper motives to increase harbour revenues. The Supreme Court found that the courts have "neither [the] duty nor … right to investigate the motives which impelled the federal Cabinet" (*Thorne's Hardware* at p 112). I agree with this statement, but do not see how it applies in this case. After all, the reason the Governor in Council created the date of birth criterion is not an issue that should be submitted to the Court for review; however, Mr. Richard is not questioning the Governor in Council's motivation in this case.

[31] The AGC insists that the decisions made by the Governor in Council "in matters of public convenience and general policy are final and not reviewable in legal proceedings" and although the 2019 Order could be struck down "on jurisdictional or other compelling grounds", only an "egregious" case would warrant such action (*Thorne's Hardware* at p 111). At any rate, in *Thorne's Hardware*, the Supreme Court noted the evidence on the record, not to review the considerations that may have motivated the Governor in Council to issue the order, but to show that the extension of the port was indeed an economic and political issue. However, in the present case, because of the lack of evidence on the issue of the temporal criterion other than the

2019 Order itself, there is no evidence before the Court to establish that the Governor in Council's decision was based on ideological, political, cultural, social, moral or historical considerations, as asserted by the AGC; the underlying considerations—political or not—are not before the Court.

[32] In my opinion, the decision to limit the date of birth criterion to the dates at issue in this case is also not such that it can be determined prima facie that the underlying considerations are "so political that courts are incapable or unsuited to deal with them, or should not deal with them" (*Hupacasath* at para 62) and, therefore, that they are outside the Court's jurisdiction, as in the case of a general's strategic decision to deploy military forces in a given way during wartime (see *Operation Dismantle*); the decision to end an investigation into the actions of the Canadian Armed Forces in Somalia (see *Dixon v Canada (Governor in Council)* (CA), 1997 CanLII 6145 (FCA), [1997] 3 FC 169 [*Dixon*]; the order in council allowing military vessels access to certain Canadian ports (see *Vancouver Island Peace Society v Canada* (TD), 1993 CanLII 2977 (FC), [1994] 1 FC 102 [*Vancouver Island*]; or, lastly, whether an *ex gratia* payment under an order issued pursuant to the royal prerogative was fair (see *Stemmler v Canada (Attorney General)*, 2016 FC 1299 [*Stemmler*]).

[33] On the contrary, the issue of the reasonableness of the date of birth criterion does not call into question the considerations that may have led the Governor in Council to establish the CTSSP or to make the decision to impose a temporal limit as a criterion of the program. The question before me is the reasonableness of the temporal limits that were actually set. In my opinion, this issue, with no other evidence, does not seem to correspond to a politically

motivated consideration. I do not doubt that the decision to create the CTSSP and perhaps even the decision to include a temporal aspect as an eligibility criterion based on probability were political decisions, but the determination of the exact time period likely was not, until proven otherwise, and we do not have that proof in this case. It seems that we have crossed the line that separates policy and the implementation of that policy, an example of "law-making" that must be reviewed using *Vavilov* (*Innovative Medicines Canada v Canada (Attorney General),* 2022 FCA 210 at para 38).

[34] As I mentioned, in *Dixon*, the Federal Court of Appeal had to determine whether the Governor in Council had acted *ultra vires* by terminating an investigation into the actions of the Canadian Armed Forces in Somalia. I do not see how this decision supports the AGC's position. It is not, as in *Dixon*, a matter of determining whether the Governor in Council had overstepped his jurisdiction by setting the date of birth criterion, but rather of determining whether that criterion is reasonable. Moreover, I acknowledge that the Federal Court of Appeal determined that the legislative provision in this case does not grant the Court the jurisdictional basis to review the reasonableness of a validly enacted exercise of discretion by the Governor in Council (*Dixon* at p 182); however, especially since *Hupacasath*, I do not think that such a statement can support the simple fact that a discretionary decision by the Governor in Council could, in itself, insulate that decision from the judicial review of the Court. In fact, the Federal Court of Appeal clearly stated that it "may well be" that the refusal of the Governor in Council to extend the investigation was motivated by political expediency, but that is not the business of the Court (*Dixon* at p 182). In this case, I do not have this level of certainty.

[35] In *Vancouver Island*, the Court had to decide whether the orders in council to allow military vessels to access certain Canadian ports had been issued in bad faith and constituted an abusive exercise of the royal prerogative. The Court ruled that it was a political issue related to international relations and national defence. The AGC cited the following paragraph at page 132:

> Clearly the Orders in Council here questioned are decisions legislative in nature, made in the exercise of discretion and beyond the scope of judicial review so far as they lie within the jurisdiction of the Governor in Council under the prerogative power. Whether they do so lie is an issue dealt with after considering other preliminary issues raised.

[36] The AGC submits that this decision confirms the position that the Governor's discretionary power is not subject to judicial review. Aside from the fact this decision was rendered 21 years before *Hupacasath*, there is no doubt that the contested order in council in that case was strictly a foreign and defence policy matter of the Government of Canada, and involved political considerations pure and simple. As with *Dixon*, I am not convinced that this is true in the present case.

[37] The AGC also relies on *Canadian Society of Immigration Consultants v Canada (Citizenship and Immigration)*, 2011 FC 1435, [2013] 3 FCR 488 [*CSIC*], in which the Court had to review the validity of the orders and regulations that revoked the licensing power of the Canadian Society of Immigration Consultants and then transferred this power to another regulatory body chosen by the government. The AGC cited paragraph 103, reproduced below for convenience:

> [103] Five, regulations or policies of the Governor in Council or the minister are not reviewable, except in cases of excess of jurisdiction, failure to comply with legislative or regulatory requirements. In other words, it is not open to a court to determine

> the wisdom of the regulation or policy and to assess their validity on the basis of the court's preferences. See *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136, at paragraph 57 and *Mercier v. Canada (Correctional Service)*, 2010 FCA 167, [2012] 1 F.C.R. 72, at paragraphs 78 and 80). Such approach is entirely consistent with the treatment reserved in cases of legislation passed by Parliament or a legislature (*Imperial Tobacco*, above, at paragraphs 58 to 60).

[38] First, that decision was rendered before *Hupacasath*. Moreover, in that decision, the applicant stated, among other things, that the Governor in Council and the minister had exceeded their jurisdiction and acted *ultra vires* their regulation-making authority under the Act for abuse of statutory discretion because the impugned decisions were not made in good faith and with impartiality, and that the Minister's revocation of the Canadian Council for Refugees' designation was vitiated for breach of procedural fairness. Indeed, the issue in *SCCI* was whether the process leading to the impugned enactments was fair and transparent. These are not the issues Mr. Richard is raising before me and that decision is of limited usefulness.

(2) The Crown's royal prerogative to use discretion to grant *ex gratia* payments

[39] The AGC states that the date of birth criterion is part of an order in council issued under the Crown's royal prerogative to grant *ex gratia* payments, a discretionary power that is relatively free of legal constraints. As the Governor in Council did not have the legal obligation to create the CTSSP or to develop eligibility criteria a certain way, there are no legal issues to be raised in this case, not even by Mr. Richard. The validity or reasonableness of the date of birth criterion is part of an order in council that was established under the prerogative to grant *ex gratia* payments, a power that is not constrained by a law and should not be subject to review by the Court.

[40] The AGC states that he is not arguing that the nature of the power exercised is a determining factor in itself; however, he is of the opinion that the important thing is that the power is exercised without constraint. There is no law that governs or defines, for example, the standard of review that should apply or how the decision maker should make the decision.

[41] First, as I noted above, the fact that a decision made by the Governor in Council was discretionary cannot, in itself, insulate the decision from the judicial review of the Court; *Hupacasath* teaches us that this is not relevant (*Hupacasath* at paras 61-64). Moreover, a decision regarding whether an *ex gratia* payment is to be made can be subject to judicial review (*Stemmler* at para 70). Additionally, regardless of the issue of whether Mr. Richard had a reasonable expectation of receiving financial support through the CTSSP, Mr. Richard acknowledges that the Canadian government had no legal obligation to create the CTSSP. Ms. Moriarty's testimony simply states that the CTSSP, the 1991 Assistance Plan and the 2015 Program were implemented because the government thought it was necessary to provide financial support to thalidomide survivors. However, unlike the establishment, for example, of compensation levels for a government program which is based in particular on political, cultural, social, moral and historical considerations, which Mr. Richard concedes, the determination of a specific temporal element of the eligibility criterion is not based on such considerations. I agree. The fact that there was no legislative or regulatory constraint on the Governor in Council when he issued the 2019 Order does not change the issue of whether the decision that was made regarding the date of birth criterion was "the sort of things that courts in their judicial review role can assess" (*Wenham* at para 63).

[42] Lastly, the AGC raised *Fontaine v Attorney General*, 2017 FC 431 [*Fontaine*], a decision involving the 2015 Program in which the Court ruled that the eligibility criteria for the Program comprised part of a policy decision and were subject to judicial review (*Fontaine* at para 43). However, in *Wenham*, the Federal Court of Appeal noted that the validity of *Fontaine* was questionable since the Federal Court did not consider the above-noted principles, stated in *Hupacasath* (*Wenham* at para 59). The Federal Court of Appeal noted that:

> the challenge is to the reasonableness of a decision to limit the availability of benefits to a particular group of claimants and to narrow the evidence that will be considered. As explained in *Hupacasath*, these are very much the sort of things that courts in their judicial review role can assess (*Wenham*, at para 63).
>
> [Emphasis added.]

[43] Even without the Federal Court of Appeal's comments about that decision, it is clear from paragraph 39 of *Fontaine* that the program in question comprised a policy decision by the Minister. As I stated above, I am not convinced that this is the case in the matter before me.

[44] I also find *Stemmler* to be of limited usefulness. That case was to determine whether the *ex gratia* payment to the applicant was sufficient. In the present case, even though payments through the CTSSP were *ex gratia*, the issue does not involve the payments themselves or the development of the CTSSP but rather the reasonableness of the decision to set the period as it was set in the criteria.

(3) Lack of reasonable expectation to receive financial support

[45] The AGC states that Mr. Richard does not have the right or reasonable expectation to receive financial support under the CTSSP, that the payments were made on compassionate grounds; Mr. Richard could therefore not have a reasonable expectation to receive financial support unless he met the eligibility criteria. The AGC referred to *Black v Canada (Prime Minister)*, 2001 CanLII 8537 [*Black*], from the Court of Appeal for Ontario, in which the issue was whether the exercise of the Crown honours prerogative—in that case, advice by the Prime Minister of Canada to the Queen about the nomination of Conrad Black as a peer—was justiciable; the Court found that it was not. In the decision, the Court refers to *Council of Civil Service Unions v Minister for the Civil Service*, [1984] 3 All ER 935, [1984] UKHL 9, [1985] AC 374 (HL), in which the House of Lords noted two ways in which the exercise of a prerogative might affect the rights of an individual: on one hand, by altering the individual's legal rights and obligations, meaning when the decision that is subject to judicial review has consequences on that person by altering rights or obligations that are enforceable by or against that person or by depriving that person of a benefit or advantage he or she had enjoyed in the past and could therefore legitimately expect to be permitted to continue enjoying; or, on the other, where the person has received assurance from the decision maker that the benefit or advantage will not be withdrawn without first providing the person with an opportunity to present reasons for which it should not be withdrawn.

[46] First, I am not convinced that the absence of a reasonable expectation of financial support constitutes a strictly necessary element in the circumstances for the issue to be justiciable. At any rate, I asked the AGC if the members of the class action, settled in 2020, nonetheless had a reasonable expectation of receiving financial support from the CTSSP. The AGC replied in the

negative, given the fact the *ex gratia* payment that was made on compassionate grounds, with no obligation, resulted from the Governor in Council's prerogative, a power unconstrained by legislation.

[47] I was not convinced by this point by the AGC; there is no evidence in the record about whether there was a link between the government's risk of liability regarding the class action and the CTSSP. We must keep in mind that in February 2018 the government announced that the 2015 Program would be expanded and that the class action was certified by the Federal Court of Appeal in November 2018, As a result, I am not prepared to conclude that the payments made under the CTSSP were made on strictly compassionate grounds. Moreover, with no such evidence, I cannot conclude that the government's announcement in February 2018, the class action or any related settlement did not create a reasonable expectation for Mr. Richard to receive financial support under the CTSSP; objectively, it is entirely possible that it did. The AGC submitted that the Court's approval of the class action settlement in 2020 postdates the implementation of the CTSSP. I do not see how this is relevant. The fact remains that the initial class action was launched in 2016, well before the implementation of the CTSSP, and there is nothing in the record that leads me to conclude that the manner in which the class action proceeded did not create a reasonable expectation on the part of thalidomide survivors that had been excluded from the 2015 Program because they did not have the required documents.

[48] I am not stating that the Court must conduct an investigation into the Governor in Council's reasons; I am simply stating that nothing in the record leads me to conclude that the government's announcement in February 2018, the class action or any related settlement did not

create a reasonable expectation on the part of Mr. Richard that he would receive financial support through the CTSSP. At any rate, as I have already stated, I am not convinced that the lack of a reasonable expectation of financial support would constitute a strictly necessary element in the circumstances for Mr. Richard to meet the criterion of justiciability.

(4) No Charter violation and no breach of the principles of procedural fairness

[49] The AGC submits that Mr. Richard's application does not raise any legal issue such as a Charter violation, a breach of the principles of procedural fairness or the exercise of a power contrary to law that the Court could determine; such grounds would have allowed the Court to review the Governor in Council's political decision. As I have noted, in *Hupacasath*, the Federal Court of Appeal stated that there are rare cases in which executive power is exercised on the basis of ideological, political, cultural, social, moral and historical considerations that do not lend themselves to judicial analysis and that the category of non-justiciable cases is very small. It also noted that there is no principled distinction between legislative and prerogative sources of power (*Hupacasath* at paras 63, 67). I agree that the application does not raise any legal issue involving a Charter violation, a breach of the principles of procedural fairness or the exercise of a power contrary to a law that the Court could determine; however, as was the case in *Hupacasath*, the cases cited by the AGC "do not stand for the broad proposition that all other exercises of the Crown prerogative are not justiciable. In fact … some are" (*Hupacasath* at para 61; see also *Black* at para 46).

(5) The application for judicial review does not address the interpretation or the application of a criterion

[50] The AGC states that the application for judicial review does not address the interpretation or the application of a criterion but rather the validity of the criterion itself. In his opinion, the issue in the present case is not the implementation of the CTSSP but rather the validity of the date of birth criterion. This does not involve the application of a criterion at the request of an individual or its interpretation.

[51] In *Briand*, it was the administrator that established a policy to interpret the criterion in question. In the present case, the date of birth criterion is not subject to interpretation and flows from the royal prerogative to grant *ex gratia* payments, a power that is relatively unconstrained. However, as I have noted above, the distinction between this case, which involves the reasonableness of an eligibility criterion for the CTSSP, and the situation in *Briand*, which involves the interpretation of the criteria established by the third party administrator and its application to the claims submitted by the applicants, is not significant.

[52] *Briand* involved the judicial review of the decision by the administrator, a delegate of the Minister of Health, that Ms. Briand was not eligible for financial support through the 2015 Program, meaning she was denied access to the 2015 Program. We must note that the 1991 Assistance Plan had been adopted by order in council. However, the 2015 Program was not adopted by order in council: the Minister of Health simply announced the additional support measures. In my opinion, this distinction is of no importance because a Minister can exercise the royal prerogative independently, without it taking a specific form; a ministerial announcement is sufficient. At any rate, considering no new criteria were established in the 2015 Program beyond those that were already in the 1991 Assistance Plan, to encourage compliance with the 2015

Program criteria, the administrator, as the delegate of the Minister of Health, published directives on the eligibility policy and criteria. One of these directives describes the type of proof required to support an application, in this case, information from the mother's physician at the time, as direct documentary evidence confirming maternal use of thalidomide. Clearly, Justice Annis was referencing the criteria in the 1991 Assistance Plan, in particular the eligibility criteria that he called "policies". It is also clear from the decision that Justice Annis considered the eligibility policy as the Minister's policy and that this policy was subject to judicial review (*Briand* at para 37). In this case, Mr. Richard's application targets the date of birth criterion established in the 2019 Order. As I have noted, the distinction between *Briand* and the present case submitted by the AGC is not relevant.

[53] I do not see a significant distinction on this issue between the criteria stated in an order in council made by the Governor in Council under the Crown's royal prerogative and the admissible evidence required pursuant to a minister's policies to show that thalidomide was the cause of malformations. As was the case in *Wenham*, in the present case, "the challenge is to the reasonableness of a decision to limit the availability of benefits to a particular group of claimants and to narrow the evidence that will be considered[;] … these are very much the sort of things that courts in their judicial review role can assess" (*Wenham* at para 63; *Hupacasath* at paras 61, 66 and 67).

[54] While it is true that the date of birth criterion is clear and is not at all subject to interpretation, that is not the issue. What is being challenged is the reasonableness of the duration of the period, an issue that, in my opinion, is not a political issue.

[55] Thus, I am not convinced that the establishment of the date of birth criterion constitutes one of the rare cases where the exercise of executive power is beyond the jurisdiction of the courts that the Federal Court of Appeal referenced in *Hupacasath*. The cases cited by the AGC that rely on *Thorne's Hardware*—such *Black* and *Dixon*—involved issues based on considerations that were solely and clearly political, which is not the case here.

[56] As a result, the AGC's objection based on the justiciability of the 2019 Order cannot be accepted.

C. *Question 2: Should the Court draw an adverse inference from the invocation of section 39 of the* Canada Evidence Act*?*

[57] Mr. Richard submits that the Court should draw an adverse inference from the lack of reasons in support of the decision and the issuance of the certificate. He submits that the Supreme Court and the Federal Court of Appeal have affirmed that an adverse inference can be drawn from a certificate issued under section 39 (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 54, citing *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, 1995 CanLII 64 (SCC), at paras 165–66; *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 36; *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at paras 102, 111).

[58] The AGC submits that the Court should not draw an adverse inference from the invocation of section 39 because the applicant did not question the certificate issued under section 39 and did not allege an irregular claim to the protection that applies to Cabinet

confidences (*Spencer v Canada (Health)*, 2021 FC 621 at para 49). In the circumstances, the AGC argues that drawing an adverse inference would amount to suppressing the exercise of the prerogative regarding Cabinet confidences.

[59] In this case, I am not prepared to draw an adverse inference from the invocation of the protection of Cabinet confidences. It was not shown that the claim to protection was irregular, and drawing such an inference in this case would lead to a result that Parliament did not expect.

D. *Question 3: Was the Governor in Council's decision to adopt the date of birth criterion reasonable?*

[60] *Vavilov* teaches us that when faced with a decision without reasons or a decision for which there is no certified tribunal record, the underlying reasoning for the decision is not usually indiscernible. A reviewing court must look to the record as a whole to understand the decision and in doing so, the court will often uncover a clear rationale for the decision (*Vavilov* at para 137). In this case, due to the certificate issued under section 39, the Court has few to no reasons in support of the decision. With no reasons, and considering the relative lack of legal constraints in this case, there is only the 2019 Order itself and the circumstances surrounding its issuance, described in Ms. Moriarty's affidavit and exhibits and in the transcript of her cross-examination.

[61] *Vavilov* also teaches us that the fundamental shortcomings that could render a decision unreasonable include an internally incoherent reasoning process and a failure to respect the legal and factual constraints. Mr. Richard is not denying that when the enabling legislation does not

impose any preconditions on the decision to issue an order, as in the present case, the legal restrictions are reduced, whereas the scope of decisions that could be characterized as reasonable is much greater (*Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 [*Entertainment Software*] at paras 28–36). However, there are some relevant constraints here; in particular, when the decision is of great significance to the individual, the decision maker must provide more justification and explanation (*Vavilov* at paras 133–35; *Entertainment Software* at para 36).

[62] As for the legal and factual constraints, the importance of the Governor in Council's decision on thalidomide survivors is clear. Mr. Richard suffers from serious malformations in both arms. The purpose of the CTSSP is to pay thalidomide survivors a lump sum of $250,000 and an annual disability pension and to provide access to exceptional medical resources. Therefore, I think this issue is extremely important for thalidomide survivors; it is a question of human dignity and quality of life or even of life and death. There is a second constraint that is not in dispute, namely, the objectives of the CTSSP: expanding the eligibility criteria of the program such that all thalidomide victims receive the financial support they need and ensuring that the balance of probabilities standard is the standard used for the purposes of the new CTSSP.

[63] The CTSSP website states that [TRANSLATION] "the date of December 21, 1967, provides a five-year grace period after thalidomide was withdrawn from the Canadian market on March 2, 1962, and assumes a post-term delivery at 42 weeks." Considering that the medication was still available, particularly as samples, in physician's offices and not necessarily returned to the pharmaceutical companies, Mr. Richard accepts that there is a certain logic in the government's

decision to include a grace period after the date the medication was withdrawn from the market in March 1962. The issue is whether the cutoff date of December 21, 1967, five years after the official withdrawal of thalidomide from the Canadian market, was reasonable, considering the legal and factual constraints.

[64] Moreover, Mr. Richard states that the reasonableness of the date of birth criterion must be determined while taking the objective of the CTSSP into consideration, and although today it is highly unlikely that a baby's birth defects are attributable to maternal use of thalidomide, considering that the objective of the CTSSP is to compensate thalidomide survivors, the introduction of a temporal criterion that essentially defines the time the use of thalidomide became impossible must be justified to be reasonable. I agree.

[65] By focusing on the cutoff date of the date of birth criterion, which is at the core of Mr. Richard's concerns, Ms. Moriarty, in her testimony and in the documents enclosed with her affidavit, helps us to understand that the historical information the Department of Health possesses does not indicate the exact date on which thalidomide came onto the Canadian market—likely at the end of the 1950s—and a large number of mothers who were prescribed thalidomide in Canada did not receive it from a physician offering prenatal care but rather from another physician, often because that physician had the medication. For example, a pregnant woman could have obtained it from a family member who was a physician. Moreover, a large quantity of the thalidomide available at the time was in the form of samples, and the notes physicians kept about the distribution of samples to their patients was not as detailed as those

about prescriptions. Therefore, because thalidomide samples were distributed, it is impossible to know the exact number of women who received or took this medication.

[66] Moreover, the medication was withdrawn from the Canadian market at the request of the Department of Health in early March 1962; however, samples of thalidomide were still in circulation in physician's offices and medical networks after that date. Although the Minister of Health and Welfare at the time made multiple efforts to not only inform health professionals of the hazards of the medication for pregnant women but also to remove the thalidomide still in circulation from the market, the Department of Health has no information about the quantity of thalidomide that remained in circulation after it was withdrawn and after these efforts. Moreover, there is no evidence about the effectiveness of the Department of Health's efforts to make the dangers of thalidomide known immediately following the withdrawal of the product from the market or how much time was needed for physicians to fully understand the message. Instead, the record contains an article from the Canadian Medical Association Journal in March 1962 (the month thalidomide was officially withdrawn from the Canadian market) stating that the product had been available on the Canadian market for over a year and that no birth defects had been reported in Canada. Of course, this is false, as Ms. Moriarty confirmed during her cross-examination; she also confirmed that it took some time for the message about the dangers of thalidomide to be properly understood by all physicians.

[67] The evidence shows that a little over 900,000 doses of thalidomide were distributed in Canada by a single manufacturer before March 1962—they were distributed to physicians for clinical use; sent as advertising samples to more than 11,000 physicians; sold to pharmacists; and

provided as samples to sales people working for pharmaceutical companies so they could promote the medication with physicians—and that despite the Department of Health's recall, only around 72,500 doses were returned to the pharmaceutical companies in April 1962. Even considering that a large quantity of the medication had already been prescribed to patients, I fully understand why the Department of Health has no reliable information about the quantity of thalidomide that remained on the Canadian market after its official withdrawal.

[68] In fact, the medication was reintroduced to the Canadian market progressively and subjected to strict controls starting in 1963 (for experimental use only); then, in 1966, the *Food and Drug Regulations*, CRC c 870 was amended to provide for the sale of thalidomide for emergency treatment.

[69] Lastly, the evidence shows that the Department of Health's records have no information about the shelf life of the thalidomide available in the 1960s; however, the current information indicates that modern thalidomide in capsules has a shelf life of five years.

[70] Mr. Richard submits that the date of birth criterion, in particular the cutoff date of December 21, 1967, deprives him arbitrarily and without justification of the opportunity to show that his malformations were likely caused by thalidomide. This is the case even if the other information is consistent with the maternal use of thalidomide and even if the nature of the malformations is consistent with birth defects linked to thalidomide, as is the case for the applicant in this case, which is recognized by the third party administrator. Mr. Richard submits that by adopting the date December 21, 1967, in the date of birth criterion, the Governor in

Council was relying on an unfounded generalization: that thalidomide was no longer available in Canada five years after its official withdrawal from the market and that, as a result, there was no chance that pregnant women took the medication after that date. Mr. Richard states that this constitutes a clear logical fallacy (*Vavilov* at para 104), and even if a person is born with birth defects that are consistent with those caused by thalidomide and submits other information that is consistent with maternal use of thalidomide, that application will not be considered if the person was born on December 22, 1967, instead of December 21, 1967.

[71] Additionally, Mr. Richard argues that the date of birth criterion is rigid and prevents the determination of whether he is a thalidomide victim, contrary to the very purpose of the CTSSP, based on the standard of probability, as indicated.

[72] Mr. Richard states that the date of birth criterion prevents the third party administrator from determining whether an applicant is a thalidomide survivor even when the other information is consistent with the maternal use of thalidomide. The Court decided in two judicial reviews that the purpose of the 2015 Program was to provide support to thalidomide survivors and that the eligibility of an applicant was to be determined on a balance of probabilities (*Briand* at para 46; *Rodrigue v Canada (Attorney General)*, 2018 FC 280 at para 4). The Court acknowledged that it was unreasonable to restrict the type of evidence accepted to prove that an applicant's malformations were a result of thalidomide (*Briand* at para 78). Similarly, the date of birth criterion in this case does not allow this determination to be made considering the evidence available because it automatically eliminates any person born before December 3, 1957, or after

December 21, 1967, without allowing people born outside this period to prove they are thalidomide victims on the basis of their malformations and other information.

[73] The AGC submits that the Governor in Council had the exclusive jurisdiction to adopt the date of birth criterion when exercising the royal prerogative on the use of public funds and that there is no basis for the Court to consider whether other factors or criteria could have been established. In the AGC's opinion, the adoption of the date of birth criterion is not arbitrary because it is part of a program based on the balance of probabilities and the evidence included with Ms. Moriarty's affidavit shows that it is unlikely that a physician would have prescribed thalidomide to a pregnant woman outside the period stated in this criterion. The AGC states that the date of birth criterion provides a five-year period after the official withdrawal of the medication and takes into consideration the efforts of the Department of Health to reduce access to thalidomide.

[74] As I have noted, Mr. Richard is not questioning the creation of a temporal criterion in a program based on probability, with the consequence that the probability a person took thalidomide decreases over time. Mr. Richard is raising two issues. First, this temporal criterion is rigid and absolute, with no mitigating circumstances introduced in compliance with the principles underlying an eligibility system based on probabilities: either the person was born during the defined period or they were not. Second, the decision to end the eligibility period five years after the official withdrawal from the Canadian market (particularly considering the length of pregnancy) is not justified.

[75] In my opinion it is difficult to conceive of the manner in which the date of birth criterion was determined, in particular the end date, because although the CTSSP is based on probabilities, the date December 21, 1967, does not at all take into consideration that the Department of Health had good reasons to believe that mothers might still be taking thalidomide after the Department of Health had officially ordered the withdrawal of the medication from the Canadian market. I can accept that at some point, a line had to be drawn and today we can probably conclude with sufficient certainty that birth defects in babies, without proof that the mother took thalidomide, are not likely due to maternal use of thalidomide in the first trimester of pregnancy. However, where this line was drawn was in part based on the fact that the thalidomide available today has a shelf life of five years, and adding this five-year shelf life to the date the medication was officially withdrawn in Canada in 1962 does not take into consideration the fact that samples were still certainly available in physicians offices after the withdrawal date. Making this decision with no reliable information about the quantity of thalidomide still available or about the shelf life of the medication at the time renders the criterion devoid of the characteristics of a reasonable decision, namely justification, transparency and intelligibility. This criterion is therefore unreasonable.

[76] Considering that mothers continued to use the medication after the beginning of 1962, that the product certainly remained available on the Canadian market after that date (according to Ms. Moriarty, the youngest confirmed thalidomide survivor in Canada was born in December 1964, which means that the mother used the medication in the spring or summer of 1964) and that the shelf life of the product at the time is unknown, it seems to me that if the government indeed chose an algorithm based on probabilities, the time limit should be consistent

with the principles that underly that algorithm. I do not see how the cutoff date of December 21, 1967, allows this objective to be achieved according to the record before me. I agree with Mr. Richard that the Governor in Council relied on an unfounded generalization that it was unlikely that, five years after its official withdrawal from the market, thalidomide could still be taken by pregnant women in Canada. According to my findings from Ms. Moriarty's affidavit, this is a clear logical fallacy.

[77] Moreover, even if today there is evidence of the shelf life of thalidomide, I note that there is no evidence in the record of the period after which the medication's teratogenic effects are sufficiently attenuated and are no longer a risk. It seems to me that even though I expect the teratogenic effects to diminish in time, as is the case for many medications, no evidence was presented to show that after the recommended shelf life, the teratogenic effects diminished to a point such that the mother could take the medication safely with no risk to the unborn child. As a result, I cannot see how the reference to a five-year shelf life for modern thalidomide can reasonably help establish an appropriate grace period after the official withdrawal date of the product from the Canadian market. However, according to Ms. Moriarty, this factor was considered when the decision was made.

[78] The AGC states that one of the factual constraints that led to the CTSSP was 2018 federal budget, which indicated that the CTSSP aimed to expand eligibility for the 2015 Program because concerns had been raised that certain thalidomide survivors had perhaps been excluded from previous programs, since the passage of time made it difficult to obtain documentary evidence of their situation, and the introduction of the CTSSP aimed to respond to this concern

for all eligible survivors. There is no indication that the new program, the CTSSP, would have mandatory temporal criteria.

[79] Another constraint of this type was announced on January 9, 2019, by the Minister of Health, according to which the new CTSSP would provide a fair and comprehensive approach to recognize thalidomide survivors, based on best practices abroad. Again, there is no mention of the fact that the new CTSSP would have mandatory temporal criteria, but again, I would not expect the ministerial announcement to go into detail about the eligibility criteria. The real issue, according to the AGC, was to recognize thalidomide survivors since the passage of time made it difficult to access medical records and because there was no specific medical test to confirm that a person's birth defects were caused by maternal use of thalidomide.

[80] I do not find the 2018 federal budget announcement or the January 2019 ministerial announcement on this issue to be particularly useful. The AGC also states that I should consider the 2019 Order in its entirety, according to which the administrator must conduct a full assessment of an applicant's eligibility. I agree, but understanding the method does not contribute to deciding whether the temporal criteria are reasonable. If the temporal criterion is not met, the administrator cannot take the person's overall situation into consideration to conduct a full assessment.

[81] The AGC then argues that an order in council, by its very nature, does not have any clearly established reasoning or justification. I agree, and it is one of the reasons I did not strike

Ms. Moriarty's affidavit, which attempted to provide the necessary justification. However, it did not provide any details on the issue of the cutoff date of December 21, 1967.

[82] I agree with the AGC that the Court should not use a granular approach to assess the reasonableness of the choice of five years as the cutoff date of the eligibility period of the CTSSP (*Bienvenu v Attorney General of Canada*, 2023 FC 175 [*Bienvenu*] at para 38). However, the choice of temporal limits was not a political decision but a decision based on factual considerations, which Mr. Moriarty confirmed in her affidavit and in her cross-examination. In this case, the choice of the cutoff date, December 21, 1967, was not reasonable. In fact, the evidence in Ms. Moriarty's affidavit, and particularly in her cross-examination, indicates that this date was not justified with regard to the factual constraints.

[83] This is not, as in *Bienvenu*, a review of the political validity of the 2019 Order. Rather, it is to decide whether the establishment of the date of birth criterion, as Ms. Moriarty explained, was reasonable considering the factual constraints. Regardless, in *Bienvenu*, the beneficiary submitted that the regulations that established the allowance were *ultra vires* because they treated certain individuals unfairly and were incompatible with the purpose of the applicable legislation. This is not the case here.

[84] For the above-noted reasons, the application for judicial review is allowed. Since the CTSSP ends on June 3, 2024, and age is a factor taken into consideration in the preliminary assessment set out in subparagraph 3(5)(a)(ii) of the 2019 Order, I see no point in suspending the effect of my decision in order to make the modifications to the date of birth criterion.

JUDGMENT in T-1321-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.

2. The Court declares that the date of birth criterion under subparagraph 3(5)(a)(i) of the April 5, 2019, *Canadian Thalidomide Survivors Support Program Order*, PC 2019-0271, is unreasonable.

3. The Court orders that the date of birth criterion under subparagraph 3(5)(a)(i) of the April 5, 2019, *Canadian Thalidomide Survivors Support Program Order*, PC 2019-0271, be set aside and that the third party administrator of the Canadian Thalidomide Survivors Support Program cannot consider it.

4. Without costs.

"Peter G. Pamel"

Judge

Certified true translation
Elizabeth Tan

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	PAUL RICHARD v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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