Federal Court Cour fédérale

Date: 20180309

Docket: T-1584-16

Citation: 2018 FC 279

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 9, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

CLAUDIE BRIAND

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

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

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

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

II. Concise summary of facts

[3] Thalidomide is a sedative that entered the market in Switzerland in 1953 to treat epilepsy. Thalidomide was then prescribed to pregnant women to counter the symptoms associated with morning sickness. The manufacturers, William S. Merrell Co. and F.W. Horner Ltd., offered the drug under the names "Kevadon" and "Talimol".

[4] According to documentary evidence dated March 2, 1965, in June 1959, the Food and Drug Directorate [the Directorate] of Health Canada (then the Department of National Health

and Welfare) did not know the exact date on which thalidomide arrived on the market under the name “Kevadon”. Merrell, however, indicated in a letter to the Directorate on June 23, 1959, that it wished to export samples of the new medication for clinical studies and for an exemption for clinical tests. The Directorate stated in its policies that it adopted in that regard that the medication had begun being distributed after those dates. A compliance visa regarding the presentation of the new drug Kevadon was published on November 22, 1960, for the sale of the drug, solely as a prescription medication.

[5] The applicant [Ms. Briand] argues that her mother, Georgette Dubé [Ms. Dubé], who passed away in 2007, had severe nausea and problems during her six pregnancies. In the fall of 1958, during the first trimester of Ms. Dubé’s pregnancy for Ms. Briand, her doctor, Dr. Gaston Simard, who passed away in the 1970s, gave her samples of Kevadon (thalidomide). The applicant argues that Ms. Dubé took Kevadon throughout her pregnancy.

[6] The applicant was born on July 3, 1959 in Baie-Comeau, Quebec with malformations that she claims are associated with thalidomide. Apart from her small size, the malformations affect her upper left member, her head, one ear, one eye and her skeleton.

[7] On March 2, 1962, after discovering that use of thalidomide while pregnant could cause miscarriages and serious birth defects, the Department of National Health and Welfare removed Kevadon and Talimol from the market.

[8] The information regarding Ms. Briand's birth was lost following a fire in the 1970s at the hospital where she was born. During that same period, Dr. Simard also passed away. Moreover, the documents from Ms. Briand's medical file at the Sainte-Justine Hospital from 1960 and 1961 that diagnose her as a victim of thalidomide are now missing.

[9] On February 13, 1990, the Minister of Health at the time announced a support program for victims of thalidomide who were still alive and born in Canada of mothers who had taken Kevadon or Talimol during their pregnancy. On May 10, 1990, the Governor in Council issued the *Order respecting ex gratia payments to Canadians who were victims of thalidomide* [the order]. Under the order, victims of thalidomide must demonstrate that their mother used Kevadon or a similar drug during the first trimester of her pregnancy and that they have birth defects that correspond to the specific clinical syndrome related to the malformations caused by thalidomide.

[10] Health Canada distributes the funding authorized by the orders under a 1991 policy entitled the "1991 Extraordinary Assistance Plan" [the 1991 policy]. Under the Assistance Plan, applicants are eligible for payments authorized by the order if they meet one of the following three criteria, only the second of which is relevant in this case:

1. Verifiable information of the receipt of a settlement from the drug company (criterion 1);
2. Documentary proof (for example, medical or pharmacy records) of the maternal use of thalidomide (brand names Kevadon or Talimol) in Canada during the first trimester of pregnancy (criterion 2);
3. Listing on an existing government registry of thalidomide victims (criterion 3).

[11] On March 6, 2015, the Minister announced a new offer of financial support for victims of thalidomide, the Thalidomide Survivors Contribution Program. He stated that, although the government was not legally required to provide financial support, it had a moral obligation to assist victims of that tragedy in the 1960s.

[12] To be eligible for the program, individuals submitting an application must have been declared eligible under the 1991 assistance plan or meet one of the three criteria for program eligibility. Those three criteria are the same as the required criteria set out in the 1991 policy.

[13] On May 22, 2015, the Minister announced that the Program would be administered by an independent third party, Crawford. Crawford's responsibility consists of verifying the eligibility of individuals claiming to be victims of thalidomide, assessing the health of individuals admitted to the program, and administering and distributing the Program funds.

[14] Crawford published a document entitled "Qualification Application FAQs" (the eligibility policy) for individuals submitting an application for benefits under the Program, in which questions 6 and 8 read as follows:

> [TRANSLATION]
>
> Q. 6 Some individuals may have disabilities, injuries or physical conditions that are generally similar to those associated with thalidomide survivors. Do they then become thalidomide survivors?
>
> Not necessarily. Each year, a certain number of children are born with spontaneous or otherwise unexplainable malformations similar to those caused by thalidomide. To be considered a

> Canadian thalidomide survivor, individuals must meet one (1) of the following three (3) criteria set out in 1991.
>
> […]
>
> Q. 8 When was thalidomide (Kevadon or Talimol) available in Canada?
>
> Thalidomide became available in the "form of sample tablets" in Canada in July 1959. It was approved for prescriptions on April 1, 1961, and it could be legally acquired in Canada until March 2, 1962.

[15] Crawford published another directive for applicants entitled: [TRANSLATION] "Thalidomide Survivors Contribution Program – Eligibility application form – Documentary evidence" [eligibility criteria 2], which stated the following:

> [TRANSLATION]
>
> […]
>
> If the survivor has difficulty providing proof of maternal use of thalidomide under the name Kevadon or Talimol in Canada during the first trimester of pregnancy, the following can be considered sufficient proof:
>
> > If no file is available, proof in the form of a sworn statement signed by a health care professional who had direct knowledge of the event could be acceptable, e.g. a doctor who states that he prescribed thalidomide to the survivor's mother during her pregnancy. A sworn statement from a non-medical professional (e.g. the mother or father, a family member, a friend, etc.) will **not** be accepted because the affidavit must replace medical documentation when none is available. The health care provider must be able to swear historical knowledge and not simply confirm a recent conversation. The affidavit must include the following information:
> >
> > 1. The name and position of the health care provider.

> 2. The period in which you were the provider's patient.
>
> 3. A description of how the provider acquired direct knowledge of your mother's use of thalidomide during the first trimester of her pregnancy for you.
>
> - The provider must state when he or she learned of the use (date, if possible, or some point of reference).
> - The supplier must indicate the context in which he or she learned of the fact (e.g. on reading a note in a medical file that is no longer available or in a direct conversation with a person who stated that there was sue – the content and concrete details of the conversation).
> - The supplier must confirm that there are no notes in his or her medical files to document the use.
>
> […]
>
> [Emphasis in the original]

[16] The 1991 policy, the eligibility policy and eligibility criterion 2 are referred to collectively as "the policies" [the policies].

[17] In May 2016, the applicant submitted her eligibility application form to Crawford. Having not received a settlement from a drug company, and not being listed on an existing government registry of thalidomide victims, the applicant tried to base her application on criteria 2, which requires documentary proof.

[18] The applicant included a document with her form in which she explained how her mother came to use thalidomide. She indicated that she was born on July 3, 1959, with birth defects. Her mother suffered from severe nausea during her pregnancy and, in the fall of 1958, Dr. Gaston Simard gave her some Kevadon samples. Dr. Simard passed away in the 1970s and the applicant's mother passed away in 2007. She added that the archives regarding her birth were destroyed in a fire at the Baie-Comeau hospital. Following her birth, there were discussions with the orthopedist, Dr. Roger Simoneau (now deceased) that thalidomide was the cause of the birth defects. The applicant's aunt stated in an affidavit that she was present at the time of those discussions. The medical file at the Sainte-Justine Hospital, however, contain no information from 1960 and 1961 and Dr. Simoneau's file was destroyed.

[19] The applicant also included medical records with her form, including the report from Dr. Melançon on July 4, 1979, indicating that Ms. Briand's major deformity could be caused by a sporadic occurrence or by a secondary anomaly from the use of medication [TRANSLATION] "and in particular thalidomide, as her date of birth is quite consistent with the period in which that drug was distributed on the market". The applicant's medical record contains other documents in which doctors state the opinion that the deformities were probably attributable to the use of thalidomide.

[20] The applicant included an affidavit with her form from an aunt who stated that the applicant's mother had received experimental medication from Dr. Simard, which she had taken [TRANSLATION] "throughout her pregnancy, giving her comfort and relieving nausea, unlike her other pregnancies, during which she did not take anti-nausea medication."

[21] The applicant also provided an affidavit from a former patient of Dr. Simard, Ms. Emma Chouinard, who apparently also received samples of a new anti-nausea medication for pregnant women at the same time as her mother. On her eligibility application form, the applicant explained how she had found that deponent as follows:

> [TRANSLATION]
>
> - In Baie-Comeau, my medical record and that of my mother were destroyed for the reasons indicated above.
> - Knowing that my mother had received thalidomide samples from Dr. Gaston Simard in the fall of 1958, I began searching Baie-Comeau for women who were still alive who had also received samples of that medication.
> - The affidavit from Emma Chouinard demonstrates that her doctor, the same as my mother, Dr. Simard, also gave her the samples in question one month before my mother.

[22] The body of Ms. Chouinard's affidavit reads as follows:

> [TRANSLATION]
>
> 1. In 1959, I was living in Baie-Comeau in the parish of St-Nom-de-Marie.
> 2. I had three children, including my daughter Sylvie Martin, born on May 22, 1959.
> 3 When I was pregnant with Sylvie, I had major nausea in the early stages of my pregnancy.
> 4. In the fall of 1958, in the beginning of my pregnancy, my doctor at the time, Dr. Gaston Simard, gave me some samples of a new medication being tested for morning sickness in pregnant women. According to Dr. Simard, it was very effective.
> 5. However, I preferred not to take it, as my sister-in-law on my husband's side, Zoel Martin, had just given birth to a

> baby with physical malformations in the United States and I was afraid for my unborn baby.
>
> 6. In the early 1960s, the tragedy of Thalidomide was reported in the papers and I knew right away that the samples provided by Dr. Gaston Simard were that medication. I was so happy that I had refused to take the samples.
>
> 7. I therefore confirm, and having spoken with other women at the time, that thalidomide samples were in circulation in Baie-Comeau in the fall of 1958.

[23] On June 3, 2016, Crawford wrote to the applicant to ask her to submit the documentary proof required by the form regarding her mother's use of thalidomide. Crawford included a document with its letter indicating that the documentary proof that could be accepted by Crawford consisted of medical or pharmaceutical records, or a copy of prescriptions. The document also indicated that "if no file is available, proof in the form of a sworn statement signed by a medical professional who had direct knowledge of the event **could** be acceptable. A sworn statement from a non-medical professional (e.g. the mother or father, a family member, a friend, etc.) will **not** be accepted, as the sworn statement must replace the medical document, if none is available." [Emphasis in the original]

[24] On June 29, 2016, the applicant submitted the report by Dr. D'Agostino, a geneticist, who concluded that the applicant's deformities were not genetic, but that the cause remained unknown.

[25] On July 4, 2016, Crawford again contacted the applicant to reiterate the request for additional information. The applicant did not submit any other information.

[26] On August 17, the applicant's file was assigned to a medical evaluator. He determined that the medical documents were not sufficient proof to satisfy one of the three criteria. He concluded that there was no specific document that showed that the applicant's mother had used thalidomide during the first trimester of her pregnancy:

> [TRANSLATION]
>
> CONSIDERATIONS REGARDING THE DISABILITY
>
> R1. The applicant does not meet the criteria for exposure to thalidomide, including verifiable information of the receipt of a settlement from a drug company, documentary proof in the records of maternal use of thalidomide during the first trimester of pregnancy, or being listed on an existing government registry of thalidomide victims. Although the applicant had reports indicating results consistent with a possible exposure to thalidomide, including reports from Dr. Demers dated 04/06/16 and from Dr. Melancon dated 07/04/79, there is no specific documentary proof in the review of the records regarding the use of thalidomide, the applicant's name on an existing government registry or receipt of a settlement by a drug company. As such, the application does not support a disability caused by thalidomide, as the documentation is not sufficient to support exposure.

[27] On August 24, Crawford advised the applicant that her file had been reviewed by a medical evaluator, and that it had been reviewed a second time. However, Crawford advised the applicant that she was not eligible for the Program because she did not meet any of the three criteria. On September 22, 2016, the applicant filed a notice of application for judicial review of the Crawford decision.

III. Issues

1. Are the Minister's policies regarding eligibility to participate in the Program subject to judicial review and, if so, under what standard?

2. Did the Minister's application of the policies to the applicant breach the standard of reasonableness that applies to the review of the policies?

3. What remedies should be granted?

IV. Standard of review

[28] The parties agree that the standard of reasonableness should apply to the Court's review of the Minister's decision to reject the applicant's application for benefits under the Program. The jurisprudence based on the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, is therefore applicable.

[29] However, there is disagreement as to whether the reasonableness of policies related to eligibility to receive benefits under the Program is justiciable. That disagreement is contrary to the issue of how those policies are administered, for which the jurisdiction of this Court is recognized.

[30] According to a recent Federal Court of Appeal decision in *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 (CanLII [*Hupacasath*], the Court is of the view that the Minister's policies are justiciable. The exact parameters of the standard of reasonableness in that context must still be determined, as the policies must be "egregious" for the Court to intervene. The Court finds that the standard set out in *Hupacasath* is that of "egregious unreasonableness". The Court's interpretation of the term "egregious" for the

purposes of the review of the policies on which the *ex gratia* payment program is based in this case will be discussed below.

V. Discussion

A. *The reasonableness of the Minister's eligibility policy is subject to judicial review.*

[31] The respondent submits that the reasonableness of the Minister's policies setting forth the eligibility criteria for participation in the Program is reviewable. The respondent refers to the recent findings by this Court in *Fontaine v. Canada (Attorney General)*, 2017 FC 431 [*Fontaine*]. The decision was related to the review of quite similar observations regarding the Program. Madam Justice Strickland retained the Minister's arguments, stating the following at paragraphs 38, 39 and 41 of her reasons:

> [38] Moreover as noted above, the Applicant attacks the eligibility criteria themselves. The Applicant does not assert that the Administrator unreasonably applied the criteria, rather that it erred by not expanding criteria 2 for new applicants to include opinion evidence, rather than documentary proof of maternal ingestion of thalidomide, or by not creating a new criteria in that regard. In my view, the Administrator had no authority to do so in this circumstance and it reasonably applied the proof submitted by the Applicant to the eligibility criterion.
>
> [39] Nor does this Court have jurisdiction to assess the reasonableness of the existing criteria or to impose different or new criteria. This is because the Program, which includes the criteria, constitutes a policy decision by the Minister and is not subject to judicial review. As stated by the Federal Court of Appeal in *Dixon*, it is well-established that the courts have no power to review policy considerations which motivate Cabinet decisions. Absent a jurisdictional error or constitutional challenge, where Cabinet acts pursuant to a valid delegation of authority from Parliament, it is accountable only to Parliament - and through Parliament to the Canadian public - for its decisions (*Dixon* at para 17).

> […]
>
> [41] More recently, in *Stemmler v Canada (Attorney General)*, 2016 FC 1299 (CanLII), Justice Gascon held that:
>
> > [71] That said, I agree with the Attorney General that, irrespective of what the *ex gratia* payment ended up being in this case, the legal and policy instruments governing such payments are not the subject of this judicial review. As stated by this Court in *MacPhail*, the judicial review of the CDS Decision "does not and cannot encompass questions as to whether the TB's policy decision is fair or reasonable or whether the policy's impact upon the Applicant was just or unjust" (*MacPhail* at para 10). The subject of judicial review is the reasonableness of the CDS's disposition of Cpl. Stemmler's grievance. This Court does not have the power or authority to decide whether the *ex gratia* payment of $25,000 was just or unjust.
>
> [Emphasis added.]

[32] The applicant submits that the decisions cited above do not take into consideration the case recently reviewed by the Federal Court of Appeal in *Hupacasath*, specifically at paragraphs 65 to 67 of the reasons by Stratas J.:

> [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": *Reference Re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraph 70. Usually when a judicial review of executive action is brought, the courts are institutionally capable of assessing whether or not the executive has acted reasonably, i.e., within a range of acceptability and defensibility, and that assessment is the proper role of the courts within the constitutional separation of powers: *Crevier v. A.G. (Québec) et al.*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190. 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. For example, it is hard to conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way. See generally *Operation Dismantle*, *supra* at pages 459-460 and 465; *Canada (Auditor General)*, 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49 at pages 90-91; Reference Re Canada Assistance Plan, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525 at page 545; Black, supra at paragraphs 50-51.
>
> These cases show that the category of non-justiciable cases is very small. Even in judicial reviews of subordinate legislation motivated by economic considerations and other difficult public interest concerns, courts will still assess the acceptability and defensibility of government decision-making, often granting the decision-maker a very large margin of appreciation. For that reason, it is often said that in such cases an applicant must establish an "egregious" case: see, e.g., *Thorne's Hardware v. Canada*, 1983 CanLII 20 (SCC), [1983] 1 S.C.R. 106 at page 111, *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 (CanLII), [2013] 3 S.C.R. 810 at paragraph 28. But the matter is still justiciable.

[33] As the Court understands *Hupacasath* in its application to this case, the controversy is related to the issue of whether the exercise of executive power is not justiciable because it raises "concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis". The Court is of the view that the exclusion rule set forth in *Hupacasath* does not apply in this case. The question is whether the case arising from the categoric restriction regarding the admissible proof required by the Minister's policies to show that thalidomide was the cause of the malformations was unreasonably egregious.

[34] With respect, the Court does not agree that the findings in *Fontaine* and in the other jurisprudence mentioned above apply in this case. Those cases seem to have been supplanted and broadened by the decision in *Hupacasath*, such that nothing prevents the Court from reviewing the reasonableness of the standard of proof imposed by the policies that prevent the applicant from benefiting from the Program. The Court must therefore consider the applicant's submissions regarding the Policy's programs.

[35] The Court is nonetheless somewhat surprised at the tact that the applicant has shown. She does not question the reasonableness of the second criterion, but instead challenges the application of that criterion by Crawford. Paragraphs 62 and 64 of the applicant's submissions set out her main argument as follows:

> [TRANSLATION]
>
> 62. It is important to note that the applicant is not asking this Court to rule on the reasonableness of the criterion for proof. Ms. Briand is instead challenging the application of the criterion to her application.
>
> […]
>
> 64. We note that the applicant's main argument is that Crawford acted unreasonably in interpreting the criterion for proof in a way that excludes the documentary proof submitted by Ms. Briand, which is serious, precise and consistent enough to allow for an inference that she is a thalidomide survivor. However, if this Court finds that Crawford's interpretation of the criterion for proof is reasonable, Crawford acted unreasonably in blindly applying that criterion to Ms. Briand's application without considering the specific applicable circumstances and the file of proof submitted.
>
> [Emphasis added.]

[36] The Court is of the view that there was no need for the applicant to mention the decision in *Hupacasath*, if the goal was simply to challenge the application of the second criterion to her situation. The easiest way to express the distinction between the policies and a review of their application may be to refer to *Stemmler v Canada (Attorney General)*, 2016 FC 1299, at paragraphs 68, 70 and 71, which read as follows:

> [68] As stated by Guy Régimbald in *Canadian Administrative Law*, Markham: LexisNexis, 2008 at 182-188, there are several grounds of review of a discretionary administrative decision: "[a discretionary decision] cannot be conducted in bad faith, arbitrarily or dishonesty [it] may also be quashed if the decision maker has considered irrelevant grounds in the decision-making process, or made the decision for a purpose other than that delegated by the enabling statute". Conversely, the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. None of this transpires from the Decision.
>
> […]
>
> [70] I acknowledge that a decision on whether or not to grant an *ex gratia* payment can be subject to judicial review (*Schavernoch v Canada (Foreign Claims Commission)*, 1982 CanLII 191 (SCC), [1982] 1 SCR 1092 at 1102; *Huard v Canada (Attorney General)*, 2007 FC 195 (CanLII) at para 81; *Kastner v Canada (Attorney General)*, 2004 FC 773 (CanLII) at para 23; *Schrier v Canada (Deputy Attorney General)*, [1996] FCJ No 246 (FCTD) at para 10). Here, the CDS Decision to grant the *ex gratia* payment is consistent with a reasonable interpretation of the Order and the TB Conditions, based on the evidence on the record, and meets the applicable standard of reasonableness.
>
> [71] That said, I agree with the Attorney General that, irrespective of what the *ex gratia* payment ended up being in this case, the legal and policy instruments governing such payments are not the subject of this judicial review. As stated by this Court in *MacPhail*, the judicial review of the CDS Decision "does not and cannot encompass questions as to whether the TB's policy decision is fair or reasonable or whether the policy's impact upon the Applicant was just or unjust" (*MacPhail* at para 10). The subject of judicial review is the reasonableness of the CDS's disposition of Cpl. Stemmler's grievance. This Court does not have the power or

> authority to decide whether the *ex gratia* payment of $25,000 was just or unjust.
>
> [Emphasis added.]

[37] The Court agrees with the summary of the law provided at paragraphs 68 and 70. It is the findings expressed in paragraph 71 that the Court feels, with respect, may be incompatible with the law as it is described in *Hupacasath*. Moreover, possibly contrary to the view of the applicant, the Court finds that the policies used to assess the proof of the applicant's eligibility were created by the Minister and imposed by Crawford. Thus, the issue in this case, unlike the reasoning set out in *MacPhail v Canada (Attorney General)*, 2016 FC 153 (*MacPhail*), the judicial review of this case cannot "encompass questions as to whether the [President of the] TB's policy decision was fair or reasonable or whether the policy's impact upon the Applicant was just or unjust", if it is found that it is unreasonable to the point of being egregious to require setting aside the decision.

B. *Application of the standard of egregiousness to the decision-making process*

(1) A proposed two-stage process for assessing the egregiousness of the decision-making process

[38] The Court fully understands why the applicant prefers for the Court to apply the standard of reasonableness to its review of the decisions by Crawford in applying the policies. The standard of proof is that of reasonableness compared to the requirement to prove [TRANSLATION] "an egregious case" of unreasonable policy.

[39] Although the LexisNexis database shows the use of the English word “egregious” (“flagrant” in French) in hundreds of Canadian decisions, there does not seem to be any jurisprudence that is useful in verifying whether a decision-making process is unreasonable to the point of being egregious. There is also no indication that the work was applied to a policy-based decision-making process. Online dictionaries propose a wide range of different synonyms and definitions for this word, including: blatant, conspicuous, flagrant” (Merriam-Webster); “outstandingly bad, shocking - from Latin egregious ‘illustrious’, literally ‘standing out from the flock” (Oxford Dictionaries); “outstanding for undesirable qualities; remarkably bad; flagrant” (Collins American Dictionary).

[40] Although the definitions help illustrate the meaning of the word, more seems to be needed when there is emphasis on a decision-making process for the implementation of a policy. To this end, two considerations are proposed. The first is based on the dictionary definitions of exceptional circumstances, while the second is related to the decision-making process created by the policy. Thus, an egregious decision, at least in a case like the one at hand, should arise from convincing facts, related to the unfortunate personal circumstances, prejudice or repercussions suffered by the applicant as a result of the decision—i.e. a situation that is literally “standing out from the flock”. This decision is based on an in-depth assessment of the facts that reveals that the applicant’s situation is egregiously exceptional to the point of tending to be shocking.

[41] The second consideration is related to the decision-making process, the result of which is remarkably bad. It is proposed that the egregiousness must be assessed in context, by comparing similar decision-making processes regarding the same [TRANSLATION] “difficult” issues or facts

as a reference when assessing egregiousness. The twofold analysis must show an unreasonable aberrant case assessed using comparable standards. The result should be shocking to the mythical informed Canadian's conscience as being an egregiously unfair policy when applied in a decision-making process that has an impact on the applicant.

(2) The exceptionally unfortunate circumstances faced by the applicant as a result of the policies

[42] If we follow the analytical process mentioned above, the first task consists of assessing the scope of the exceptionally unfortunate circumstances faced by the applicant as a result of the policies. It could be noted that the expression "victims of thalidomide" is used in the order, while applicants in this category are generally referred to as "thalidomide survivors" in the policies. A euphemism is useful, for example, when someone does not want to be perceived as a victim. The Court is of the view that, although the people affected by thalidomide are survivors, they should be recognized as victims. This does not at all take away from how the applicant survived her disabilities and overcame them to lead a productive life and contribute to Canadian society in an exemplary manner. Thalidomide is nonetheless the cause of a class of victims, people who suffered the destructive or harmful effects of an act or mandate, within the common meaning of the term. The case of victims of thalidomide is already exceptional due to the consequences that they suffered because of the drug, but it is not the specific circumstances of the applicant that make the policies egregiously unreasonable in their application to her situation.

[43] It is instead the second stroke of bad luck that Ms. Briand suffered, this time due to the unforeseen fire, loss and ravages of time that destroyed the documentary evidence contained in

archived medical records. The fact that she was placed in a situation of being unable to establish her eligibility is what sets her circumstances apart as being truly exceptional. Moreover, given that this excessive bad luck stems solely from the fact that the policies do not adhere to regular standards of proof so that the applicant can establish that thalidomide is the source of her problems, her egregious circumstances are seen in the same way in the egregious nature of the policies.

[44] It is from the perspective of this combined effect of exceptional circumstances in the bad luck suffered by the applicant that the Court disagrees in particular with the respondent's attempt to justify the untenable restrictions imposed by policies regarding proof. The Minister observed the following at paragraph 46 of his factum:

> [TRANSLATION]
>
> The goal is to preserve financial assistance for thalidomide survivors by avoiding providing financial assistance to people who submit spontaneous or otherwise unexplainable malformations similar to those caused by thalidomide.

[45] The policies are not unreasonable because they aim to ensure that the benefits to which they apply are only paid to thalidomide victims. However, in terms of the general effect on the class, that effect is unreasonably unfair when thalidomide victims are excluded. This is not only because they cannot join the program, but also because applicants who are lucky enough to be able to obtain medical documentation could benefit from a larger piece of the cake given the absence of applicants like the applicant in this case if she is a thalidomide victim. In other words, the policies do not meet the objectives of the order because some thalidomide victims are

excluded from the Program due to the excessive restrictions imposed in terms of what constitutes acceptable proof of malformations.

[46] The policies are also unfair toward the applicant due to the perception that she is submitting a false application to receive compensation to which she is not entitled. That is not the case here. Her case is exceptional in that she cannot establish her right to entitlement under the policies, which only allow for direct medical proof in the form of archive documents. That prevents the consideration of any other evidence likely to demonstrate on a balance of probabilities that she was a victim of thalidomide.

[47] The Court is of the view that the respondent's justification of the policies probably does not accurately reflect the reaction that thalidomide victims would have to a person in the applicant's situation. It is hard to imagine that they would not agree that the applicant, who has malformations similar to their own, but who does not have the required documentary proof because it was destroyed under accidental circumstances, should not be able to establish eligibility under regular rules of evidence. Indeed, a person who has had malformations their entire life due to thalidomide would probably respond by giving the applicant the benefit of the doubt. That means that the applicant could demonstrate that she was a victim of thalidomide by applying the ordinary principles of evidence, but without having to prove that there is a serious possibility that thalidomide was the cause of her condition, i.e. without proving that it is the likely or probable cause. In reality, without medical proof in the form of archive documents, the task of proving that thalidomide was likely the cause of the malformations, even proving that the drug was a probable cause, is an insurmountable challenge due to the time that has passed.

(3) The policies are unreasonable in how they apply to the applicant.

[48] The Court begins its analysis of the decision-making process by explaining its finding that the policies are unreasonable. This is because the unreasonableness is the first step in the analysis. Once the unreasonableness is established, consideration can be given to what makes the process egregiously unreasonable, as a reflection of the policies. The Court also offers some guidance if its finding that the issue is related to the unreasonableness of the policies, as submitted by the applicant, not how the polices are applied to the applicant, proves to be incorrect.

[49] The closest comparison of the unreasonableness of the process regarding proof in this case is a factual situation recently considered by the Court of Appeal for Ontario in *Gehl v. Canada (Attorney General)*, 2017, ONCA 319 [*Gehl*]. It was mentioned, but not applied, in the decision in *Fontaine*. The case was related to refusal by the Registrar for Aboriginal Affairs and Northern Development Canada (the "Registrar") of an application submitted by Mr. Gehl to register as an "Indian" under the *Indian Act*, R.S.C. 1985, c. I-5 [The *Indian Act*].

[50] The registration was refused in *Gehl* because the only evidence offered was circumstantial evidence of the Indian status of an ancestor whose true identity was unknown (and impossible to know). That evidence did not meet the strict registration requirements under the Proof of Paternity Policy [the registration policy] developed by the Registrar. The decision in *Gehl* stands out because it was not related to the exercise of an order made under an *ex gratia*

Crown prerogative. The policy was evaluated based on the intent of the provisions of the *Indian Act*.

[51] It is nonetheless relevant because it supports the conclusion that requiring categorical proof that is inaccessible as a requirement for eligibility is unreasonable. When the references to the *Indian Act* in the excerpts from the majority reasons cited above are replaced by the general wording of the order describing an eligible applicant as a person born in Canada and whose mother received thalidomide during the first trimester of her pregnancy, the similarity is clear between the finding of unreasonableness in *Gehl* and that of the policies.

> [72] The wrong in the Registrar's decision is caused by the application of a categorical evidentiary rule that works in an exclusionary manner to deny registration and status to an entitled individual who cannot identify a relevant ancestor by name. It is the demand for evidence of specific identity when, in some circumstances, only circumstantial evidence of Indian status of an ancestor whose actual identity is not known (and is not knowable) is available.
>
> [73] The application of this rule – by which the Registrar refused Dr. Gehl's application – is unreasonable because it is at odds with the purpose of s. 6 of the *Indian Act*, which is to provide for the registration of persons who are entitled to registration. It potentially denies the benefit of registration to some persons whom the Act [the order] entitles to registration – as the Registrar acknowledged on cross-examination – solely because of their inability to satisfy an unreasonable evidential demand not mandated by the Act [here again, replace with the Order]. The demand for evidence of a specific identity is unreasonable because it is a demand for evidence which is not only superfluous, but now, through the passage of time, unobtainable in this instance.
>
> [74] The circumstantial evidence advanced by Dr. Gehl is capable of supporting an inference that her paternal grandfather was of aboriginal ancestry: his baptismal certificate indicates her father was born on the reserve; his godparents were members of the reserve community; he resided on the reserve during his

> childhood; there is no record of his being denied participation in the activities of the community.
>
> [75] In the circumstances of an historical claim such as this one, it is sufficient for the claimant to provide some evidence capable of giving rise to the inference that an unknown father may have had status, which constitutes sufficient proof of paternity for the purposes of the legislation, in the absence of any evidence to the contrary. We would grant the remedy sought on this basis alone.
>
> [Emphasis added.]

[52] The minimum standard for a fact proven by presumptive or circumstantial evidence has the same probative value as a fact proven by direct evidence. In both cases, whether direct evidence or presumptive evidence, the evidence must establish the likelihood that the fact is true. To illustrate this point, *Gehl* clearly sets out the principle that a decision is unreasonable if it excludes circumstantial evidence by admitting only direct evidence, when none is available due to the passage of time.

> (4) The applicant's circumstantial evidence can support an inference that her mother probably took thalidomide during her first trimester.

[53] The Court finds that the evidence submitted by the applicant is sufficient to establish that her mother probably used thalidomide in the first trimester of her pregnancy and that it is therefore sufficient to meet the requirements of the order (but not those of the policies).

[54] First, the applicant provided evidence, which contributes to the probative value, that her mother always told her that she had used thalidomide. That evidence is also corroborated to a certain degree by the applicant's two aunts, and by Dr. Simoneau when he found that the applicant's malformations were probably attributable to her mother's use of thalidomide,

particularly as his finding is based in part on the probable period in which the drug was used. Although the evidence individually is not sufficient, together it supports a conclusion that there is a significant persuasive value that resembles a finding that falls within a range of possible and acceptable outcomes.

[55] The Court finds, however, that it is the evidence from the independent witness, Emma Chouinard, on her own behalf, that is sufficient to establish in a very persuasive manner that the applicant's mother probably used thalidomide during the first trimester of her pregnancy. That affidavit must be assessed in the context of the applicant's description of her attempts to find someone in the Baie-Comeau area who could support her mother's version that Dr. Simard gave thalidomide to pregnant women who were suffering from nausea in the fall of 1958. Ms. Chouinard is in that class of witnesses.

[56] Although her affidavit does not provide her date of birth, as she was relating facts that took place 58 years before the date of the affidavit, and being a mother herself, she is apparently approaching or has already reached her 80th birthday. This may be witness profiling by the Court, but it is of the view that testimonies from independent seniors tend to be persuasive based on the values and knowledge that they have acquired through their long experience, although such a conclusion is certainly generally supported by observing the testimonies.

[57] Regardless, the evidence from Ms. Chouinard has an objective point of reference, as her daughter was born on May 22, 1959, some 43 days before the applicant's birth on July 3, 1959. She stated under oath that she suffered from nausea and that Dr. Simard offered her test samples

of a new medication to reduce nausea. That evidence is important, as it contracts the alleged date intervals used as parameters at Crawford, according to which thalidomide samples were first offered in Canada in 1959 and that authorization to widely market the product was not granted until April 1, 1961.

[58] The problem that the Court sees in the date interval parameters established by the policies (a claim that is questionable in itself, as seen in the pre-hearing order an in the reasons by Leblanc J.) is that they do not consider the precise issue of whether samples were offered by other countries before the manufacturer introduced them in Canada. In this regard, the Court can take judicial notice of the undisputed fact that thalidomide was approved in July 1956 for over-the-counter sale without a prescription in Germany and in most European countries and that, as the drug was an effective treatment for reducing nausea, it became popular among pregnant women.

[59] However, the Court is particularly uncomfortable regarding the source of the evidence on which the parameters are based regarding the date of birth of thalidomide victims. The Minister relied on information provided in a letter from the supplier of the thalidomide drug that caused malformations to many Canadians (there was also a second supplier). In the Court's view, regarding the probative value of the evidence, if a choice must be made between an element based on evidence provided by the supplier of the drug in question, which may be the worst pharmaceutical disaster of modern times, and evidence provided by an independent witness that directly relates memorable events that she experienced in 1958, the Court prefers that of the independent witness. That does not mean that the Court would not retain the sworn testimony by

the supplier if it were corroborated by that of the manufacturer (assuming different testimonies) or that it would eliminate the possibility that over-the-counter thalidomide, which had a reputation of reducing nausea and that was first introduced on the European market about two years earlier, may or may not have entered Canada or the United states from external sources due to the drug's popularity.

[60] The Court also finds that the objective corroborating facts described in Ms. Chouinard's affidavit are very persuasive. She indicated that she had decided not to take the medication offered by Dr. Simard because her sister-in-law, Zoel Martin, who lived in the United States, had given birth to a child with malformations at about the same time. The idea of using any substance that could be harmful to her pregnancy raised fears in her mind.

[61] The Court notes that this is an excellent example of evidence of a coincidence that persuasively corroborates evidence from an individual. Coincidence, generally defined as a remarkable concurrence of events or circumstances without apparent causal connection, can prejudice a witness's evidence and can support it. If the witness's significant personal interest combines with the alleged random events and cannot objectively corroborated, the evidence tends to damage credibility, simply because it is remarkable that the events occurred together. Ms. Chouinard has no apparent personal interest. The birth of her sister's child with malformations in the fall of 1958 can be objectively and effectively established through medical documents. It is one thing to invent a story about Dr. Simard, but it is quite another to link the story to the concrete and exceptional coincidence of a parent giving birth to a child with malformations at about the same time, to provide a logical explanation for the witness's actions.

[62] Ms. Chouinard also described her happiness at avoiding having her own child experience such tragic consequences. She also corroborated her own testimony with hearsay from discussions with another woman in Baie-Comeau that thalidomide was accessible in the fall of 1958.

[63] The Court acknowledges that Ms. Chouinard's affidavit could have given more details and that the applicant could possibly have followed regarding that evidence of the malformations of her sister-in-law's child. However, the review of the approach used by Crawford to help applicants shows that it was very dynamic in inviting applicants to provide additional evidence in the hope of supporting their application. If Crawford had not been prevented from reviewing presumptive evidence, the Court finds that Crawford would have followed up if they were not convinced of the probative value of Ms. Chouinard's evidence. It is the Court's view, however, that they are not required to do so.

[64] In conclusion, the Court finds that the evidence provided by the applicant shows that it is probable that her mother used thalidomide during the first trimester and that it is therefore likely the cause of the applicant's malformations. The applicant would therefore meet the requirements for participation in the program under the order, but not those of the policies.

(5) The policies are egregiously unreasonable due to the burden of proof that they impose and that categorically eliminates certain applicants who could meet their requirements under normal standards of proof.

a) *The standard of proof imposed by the policies is egregious in relation to normal Canadian legal standards.*

[65] According to the original version of the policies, the applicant had to provide independent, historical, written and direct medical proof that thalidomide was prescribed or administered to the applicant's mother during the first trimester of her pregnancy in order to receive benefits under the Program. This is a standard that requires almost certain proof of a fact.

[66] Although the proof required by the policies could be found to be a business record, and therefore an exception to the hearsay rule, independent and historical medical records would nonetheless constitute proof with the greatest probative value required to establish a fact under Canadian law. The modern framework for medical documentation has always been strict and complies with the most stringent standards in Canada. Medical staff who enter data are well trained to maintain accurate and comprehensive medical records, without any bias or personal interest that would compromise the validity of the data contained in the medical records.

[67] On a scale of probability from 1 to 100, the accuracy of facts contained in this type of medical record is probably 95 percent or more. Only in rare exceptional cases, consisting of errors and omissions, most of which would have the opposite effect of documenting the event, would reduce the probative value of such categorical evidence contained in medical records.

[68] It has already been mentioned that the normal minimal standard of proof is that of [TRANSLATION] “probability” or [TRANSLATION] “likelihood”. That standard corresponds to 50 percent plus one, meaning that the decision-maker considers the fact established by the evidence as being more likely than unlikely, or more probable than improbable.

[69] The exception allegedly set out in the policies was granted to applicants under the thalidomide system if no archive records were accessible. It allowed [TRANSLATION] “proof of maternal ingestion in the form of a sworn statement (affidavit) from persons with direct knowledge of the event that may be acceptable, e.g. a statement by a physician that he/she prescribed the drug to the individual’s mother”. That exception did not apply to [TRANSLATION] “a statement by a non-medical professional (e.g. mother/father, neighbour or friend)”, which statement [TRANSLATION] “does not constitute documentary evidence”.

[70] The notice given in the exception means that only health professionals can provide an affidavit, which must be limited to a direct testimony, i.e. the actual prescription or administration related to the use of the drug by the mother, or his/her observation, and cannot be based on circumstantial inferences. The Court finds that amending the authorization of the source of the evidence to allow the direct observation of an event rather than an archived medical record would have very little effect on the probative value of the evidence, reducing it by about 10 or 15 percent. That largely exceeds the standard of probability for proving a fact, or even the standard of reasonable doubt (clearly a standard of mixed fact and law) used in criminal law.

[71] It is also clear that such an exception could not serve much purpose for applicants in 2015 and 2016. The drug was administered about 55 to 58 years before that. The average age of practicing physicians is over 30, meaning that it is not very likely that the deponents for the events are still alive today, if they even had any memory of the events.

b) *Refugee claimants: the comparator for the case of thalidomide victims*

[72] The Court has held that one means of demonstrating the egregiousness of a decision-making process resulting from a policy is to compare it to the process from a comparator that is based on similar circumstances. In this case, the most important circumstance to establish egregiousness is the lack of proof, due to circumstances beyond the applicant's control, that prevents proof of an important fact under a normal standard of probability.

[73] A circumstance somewhat comparable to the lack of proof of a fact or mixed element of fact and law is seen in the cases of refugees who apply for permanent residency in Canada under section 96 of the *Immigration and Refugee Protection Act* (SC 2001, c. 27), while claiming to be victims of persecution. According to one of the conditions for obtaining refugee status under that provision, refugees must show that they have a well-founded fear of persecution based on their personal situation in the country of origin that they are fleeing: see *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689, at pages 721 to 726, more specifically at page 723.

[74] The situation of refugees is comparable to that faced by the applicant because refugees are often unable to provide probative evidence regarding the risk of persecution that they face. This can be explained by the fact that they have left their country of origin to flee their

persecutors, or their persecutors may be the only source of the evidence they need to establish their subjective fear. It is therefore a case of a lack of proof in circumstances beyond the refugee's control. Those circumstances provide the comparator to be applied in evaluating comparative rules and standards of proof applicable to refugees and to thalidomide victims submitting an application in cases where both are facing an obstacle because they do not have the probative evidence usually required to prove their claim.

[75] Although it is difficult to establish a direct comparison between the two due to differences in the content of the evidence and the legally applicable criteria, two points stand out. First, in the applicant's case, the type of evidence permitted to prove that thalidomide caused her malformations is limited to direct medical documentation of probative value that approaches certainty. Under refugee law, the situation is quite the contrary. The courts have adopted rules that offer more latitude in admitting and assessing a refugee's evidence than what is applied in most other decision-making processes in Canada. To begin, there is no comparable limit regarding the type of acceptable evidence, and certainly no limit that is close to imposing restrictions that would make archived documentary evidence from an independent source the only admissible evidence. A sworn statement provided by a refugee claimant regarding the truth of certain allegations creates a presumption that those allegations are true unless there be a reason to doubt their truthfulness: see *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, [1979] FCJ No. 248, at paragraph 5. Similarly, refugees are only required to prove a serious possibility, rather than a probability, that they have a well-founded fear of persecution based on the evidence submitted.

[76] In mentioning the rules of evidence under refugee law, the Court is not suggesting that they are not at all suitable. In fact, they were designed in response to the particular problem often faced by refugees because they do not have access to the evidence required to be able to prove their claim. Accordingly, the rules were changed to reasonably and fairly take into consideration the exceptional circumstances faced by a refugee. The Court is of the view that refugee law is a good example of the adoption of policies by the Court to introduce a certain flexibility in the discovery process that is needed under the circumstances to ensure that refugee law works in light of the factual realities faced by refugees due to the inability to obtain more probative evidence that demonstrates their risk of persecution.

[77] From a comparative standpoint, although the situations are clearly very different, the applicant's circumstances are just as convincing in terms of the reasonable requirement that circumstantial evidence be admitted to prove that she is a victim of thalidomide. If refugees can file all types of evidence and testify based on a presumption that their testimony is true unless their is evidence that they are not credible, and if their well-founded fear need only be established based on a standard of serious possibility, it is certainly egregious to require that the applicant prove her claim based on a quasi-certain standard of proof that is not recognized and that is clearly stricter than any normal reasonable standard applied in any decision-making process in Canada.

[78] Imposing limits on the type of evidence admitted to prove that thalidomide is the proof of malformations is more than simply unreasonable. The applicant's exceptionally unfortunate situation in life is considerably aggravated by a decision-making process that is egregiously

unreasonable compared to the regular standards of proof applied in Canada, particularly if we compare that process to refugee law in terms of its adaptation to refugee claimants who are facing a somewhat similar obstacle in terms of evidence.

[79] Accordingly, the decision will be set aside, and the applicant will be awarded a remedy that is suitable in light of all circumstances.

VI. Recourse

[80] The applicant asks that the Court declare that she is a victim of thalidomide and issue a writ of *mandamus* ordering that Crawford pay her the financial support set out under the Program.

[81] The Court is prepared to grant the desired declaration. However, it is not of the view that a *mandamus* order is needed. In this regard, it refers to *Gehl*, at paragraph 54 of the majority reasons (as the minority reasons say the same). The Court gave an example of a suitable means of deciding a case involving similar facts. It found as follows that it wold be "pointless" to refer the matter back to the administrative decision-maker rather than grant the applicant a declaration that would decide the matter in his or her favour:

> [54] Ordinarily, in a proceeding of this nature, a court will not substitute its decision for that of an administrative decision-maker, but rather will remit the matter back to the administrative decision-maker for further consideration. However there is an exception where doing so would be "pointless" as there is only one possible outcome in view of the court's decision: *Giguère v. Chambre des Notaires du Quebec*, 2004 SCC 1 (CanLII), [2004] 1 S.C.R. 3, at para. 66. n my view, this case falls within that category. Dr. Gehl

> presented some evidence from which it could be inferred that her paternal grandfather had status. There is no evidence to the contrary. As the motion judge suggested, requiring more from Dr. Gehl than the evidence she has provided and a statutory declaration that she has no basis for believing that her paternal grandfather would not have been entitled to registration goes beyond what, on a reasonable interpretation, the Act requires. Accordingly, it is appropriate for this court to grant Dr. Gehl a declaration that she is entitled to be registered pursuant to s. 6(2) of the Act as the child of one parent with full status.

[82] In *D'Errico v Canada (Attorney General)*, 2014 FCA 95, the Federal Court of Appeal similarly found that the Court can set out the terms of the decision in certain cases where the outcome of the case on merits can only lead to one result, when the "outcome of the case on the merits is a foregone conclusion". The Court also noted that the passage of time requires that some matters must be decided as soon as possible: see paragraph 16 and *Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342, at paragraph 120. The Court finds that it would thus be pointless given the passage of time in this case to refer the matter back to Crawford for further consideration. Accordingly, the Court will declare that the applicant meets the eligibility conditions under the second criterion.

[83] The applicant is awarded her costs, subject to an agreement, or following the presentation of submissions by the parties.

JUDGMENT in T-1584-16

THE COURT ORDERS AND ADJUDGES THAT:

1. The decision is set aside and is referred back to Crawford in accordance with the following declaration:

2. The Court declares that:

    a. the policies are egregiously unreasonable regarding the second eligibility criterion, unless they are interpreted to allow the admission of circumstantial evidence likely to prove the probability that the applicant's malformations were the result of her mother's use of thalidomide during the first trimester of her pregnancy;

    b. the applicant has demonstrated that her mother used Kevadon during the first trimester of her pregnancy and that she has suffered malformations from birth that correspond to the specific clinical syndrome linked to malformations caused by thalidomide, as described in the order.

3. Costs are awarded to the applicant. If the parties cannot agree on the costs related to this application, they can present brief written submissions to the Court.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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