Federal Court  Cour fédérale

Date: 20210824

Docket: T-1499-16

Citation: 2021 FC 675

Ottawa, Ontario, August 24, 2021

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

BRUCE WENHAM

Applicant

and

**ATTORNEY GENERAL OF CANADA,
EPIQ CLASS ACTION SERVICES CANADA
INC**

Respondents

AMENDED ORDER AND REASONS

I. Introduction

[1] This is a motion under Rule 385 of the *Federal Courts Rules*, SOR/98-106, for an order declaring the Respondents (Canada and Epiq Class Action Services Canada Inc [Epiq]) to be in breach of Article 4.02(e) of the Settlement Agreement approved by this Court on May 8, 2020. The provision requires reasons for a decision.

The motion further requests:

- An order requiring the Administrator of the Canadian Thalidomide Survivors Support Program [CTSSP] to provide lawful reasons upon denying the application of any Class Member at Step 2 of the CTSSP application process, including on:

    - all of the possible answers to the questions listed under the valiDATE Analysis document;

    - what the "probable" standard under the valiDATE algorithm means as a standard of proof; and

    - how the informational inputs to the valiDATE algorithm are weighed in determining whether an applicant is given a "probable" finding.

- An order requiring the Respondents to report to this Court, forthwith, on:

    - all of the possible answers to the questions listed under the valiDATE Analysis document;

    - what the "probable" standard under the valiDATE algorithm means as a standard of proof; and

    - how the informational inputs to the valiDATE algorithm are weighed in determining whether an applicant is given a "probable" finding.

- An order tolling the limitation period under s 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7, for Class Members who have had their applications denied under Step 2 of the CTSSP application process, until such time as the relief sought.

- An order requiring the Administrator to report the information in the Appendix to the Notice of Motion to Class Counsel forthwith, and on a periodic basis going forward which information related to other Class Members and the status of their respective applications.

- Costs of this motion.

[2] The primary relief sought – there being no underlying decision at issue – is a declaration that there is a breach of Article 4.02(e) in not providing reasons for decision and further requiring "lawful reasons".

In essence, the Applicant is attacking the quality and adequacy of reasons given at any step in this process (particularly at Step 2 of the CTSSP process).

[3] Initially there was an issue whether this motion was premature because the Settlement Agreement had technically not become operative despite all sides implementing it and making decisions and payments under it. The issue was that some Class Members had sought leave to appeal the Settlement Approval Order. The Settlement Agreement did not come into force until the end of all appeals or applicable appeal periods.

[4] The motion was heard under reserve of that prematurity issue. Since the hearing of the motion, leave to appeal has been dismissed and the operative provisions are effective. That prematurity issue has now been concluded, all arguments having been made, the Court can render judgment without further hearings.

[5] Further, the parties reached agreement on the information related to Class Members described earlier. The sole issue remaining is the alleged breach of Article 4.02(e) of the Settlement Agreement.

II. Background

[6] The background to the Settlement Agreement is described in this Court's Reasons for Settlement Approval of May 8, 2020. The Court noted that the Settlement clarified and provided enhanced procedural safeguards and other benefits to Class Members under CTSSP.

[7] At paragraph 45 of the May 8 Reasons, the Court summarized the key terms of Settlement:

> [45] The key terms of Settlement, as seen by the parties, include:
>
> (a) procedural fairness safeguards with respect to the CTSSP application process, including:
>
> (i) confirmation that the Administrator will use a balance of probability standard in its preliminary assessment at Stage 1 [a standard which was unclear from the OIC creating the CTSSP];
>
> (ii) at Stage 2, those who do not receive a "probable" finding by the Diagnostic Algorithm determining eligibility will be given opportunity to provide more information for the consideration by the Administrator before their application is denied;
>
> (iii) where a final decision is made to deny an application at any step of the three-step process, the Administrator will provide:
>
> (1) reasons for the denial;
>
> (2) an opportunity to provide additional information or submissions in writing for reconsideration; and
>
> (3) the right to seek reconsideration upon presentation of new evidence, so long as such applications are received prior to June 3, 2024; and
>
> (iv) Class Members whose applications are denied at the third stage described in subparagraph 3(7) of the OIC, after recommendation by the Multi-disciplinary Committee, shall be entitled to provide written submissions and/or an oral hearing with the Third Party Administrator and at least one representative of the Multi-disciplinary Committee. Oral hearings shall be conducted by teleconference or videoconference or, in person at the applicant's own expense, if they so request; and
>
> (b) that the Representative Applicant or such other Class Members as may be designated, would be invited to

provide input with respect to the attributes, knowledge, experience and expertise of the members of the Multi-disciplinary Committee involved in Stage 3;

(c) the review of class member applications to the CTSSP in priority to others;

(d) Class Members who are found eligible, shall receive their annual payments retroactive to June 3, 2019; regardless of when they submit their application during the application period; and

(e) payment of the lump sum payment to Class Members' estates if they pass away after being determined to be eligible to the CTSSP but before the payment issues;

(f) an honorarium payment of $10,000 to the Applicant;

(g) a discontinuance of the class proceeding; and

(h) the Settlement is without admission of liability.

[8] The particular Article of the Settlement Agreement at issue reads:

4.02 Process for determining Eligibility for the Canada Thalidomide Survivors Support Program

Canada agrees to take all necessary steps to ensure that the process established by the Third Party Administrator to determine eligibility pursuant to subparagraph 3(1)(c) of the OIC, is consistent with the following parameters, provided that in so doing, the discretion of the Third Party Administrator to act pursuant to the terms of the OIC is not fettered in any way:

(a) the Third Party Administrator will determine whether a person is eligible under the Program by using the three-step process set out in subparagraph 3(5) of the OIC;

(b) the Third-party administrator will use a balance of probability standard in its preliminary assessment to determine whether the nature of the person's congenital malformations are consistent with known characteristics of congenital malformations linked to thalidomide;

> (c) the Diagnostic Algorithm referred to in subparagraphs 3(5) and 3(6) of the OIC that is intended to be used at the second stage of the process as a diagnostic tool by the Third Party Administrator, is known as the Diagnostic Algorithm for Thalidomide Embryopathy also referred to as (DATE); and it shall be considered by the Multi-disciplinary Committee referred to in the OIC in determining a person's eligibility under the Program pursuant to subparagraph 3(1)(c) of the OIC;
>
> (d) in the event the Diagnostic Algorithm results in a finding by the algorithm other than "probable", the Third Party Administrator shall provide the applicant with reasonable opportunities to present more information before it denies the application on the basis that the information does not produce a finding of "probable"; and
>
> **(e) where a final decision is made to deny an application at any step of the three-step process, the Third Party Administrator shall advise an applicant of the reasons for the denial and shall afford the person an opportunity to provide additional information or submissions in writing for reconsideration.**
>
> (Emphasis added by the Court)

[9] The Applicant claims that the Respondents are breaching the Settlement Agreement by providing decision letters at Step 2 of the CTSSP application process that constitute no reasons or wholly inadequate reasons. The complaint is that the Step 2 decision letters simply refer to the output of a diagnostic algorithm with no indication of the standard of proof used by the algorithm, what the range of possible answers are that feed into the algorithm or how the algorithm weighs those answers. The Applicant says that the reasons are only conclusions and that the chain of reasoning behind the algorithm is opaque.

[10] The Applicant further contends that recipients of such letters have no idea what factors led to the denial of their application rendering the right to reasons meaningless.

III. Analysis

[11] The Applicant challenges the adequacy and sufficiency of the reasons in its submissions that the reasons are not proper reasons. It contends that there are many aspects of the Step 2 letter which are unexplained. The Applicant, as seen by its claim for relief, wants more information as to the reasons for a negative Step 2 rejection letter.

[12] The Applicant is correct that the requirement for reasons is important, that it informs the right to reconsideration and review, and that the reasons must be real reasons. However, the Court does not agree that the Step 2 rejection letter is so devoid of substance as to not be reasons at all. They may be poor reasons, or even flimsy reasons (as alleged), but they are reasons.

[13] There is nothing in Article 4.02(e) that addresses the quality of the reasons to be provided. The Applicant effectively contends that the reasons must be of the nature and quality to survive a judicial review - "justification, intelligibility and transparency" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

[14] On the evidence, the Step 2 rejection letter is not so devoid of substance as to not be reasons at all. Mr. Wenham himself, who received a Step 2 rejection letter, was able to exercise successfully his right to reconsideration. The problems which the Applicant identifies do not appear to be so generic as to affect all Class Members in the same way, if at all.

[15] There being no specific words of Article 4.02 supporting the Applicant's argument as to the quality of the decision, the Applicant wishes to read such qualifications into the Article. Canada argues that if that is what was intended, then the Applicant should have negotiated that aspect in the Settlement negotiations.

[16] I agree with Canada that such an expansive interpretation of the words "reasons for decision" would have had to be negotiated. This is particularly the case where the use of the algorithm in the decision making process was referred to in s 3 of the Order-in-Council setting up the CTSSP and in Article 4 of the Settlement Agreement. There was no requirement negotiated for broader disclosure or statement as to the adequacy or quality of any reasons.

[17] The interpretation urged by the Applicant does not arise either specifically or by necessary implication. A decision may be faulty, and the reasons may be unsustainable, but that does not mean that there is no decision or that there are no reasons for decision.

[18] The provision requiring reasons accomplishes a number of goals. It fixed in place the basis for a decision – good or bad. It gave a Member a basis for reconsideration and review. It addressed a potential argument that a decision was not justiciable.

[19] The Applicant's position would create, under the Settlement Agreement, a parallel right to what is a judicial review of the reasonableness of a decision. It would also elevate the issue of adequacy of reasons to an independent stand-alone status contrary to the existing principles in administrative law.

[20] The Court cannot read into the Settlement Agreement such scope to the words “reasons for decision” as the Applicant urges. It is evident that there is no consensus between the parties on what was intended in the Articles nor was the quality of reasons apparently addressed in negotiations. There is no evidence of mutuality to support the Applicant’s interpretation of Article 4.02.

[21] Examined as to the true nature of the Applicant’s complaint, it is an attack on a decision rendered under the program; not an attack on the Settlement Agreement itself. It should therefore be treated as such and subject to review under administrative law relief.

[22] While it might be more efficient to have a single judicial review of a decision based on the algorithm covering all Class Members, the Court cannot convert a personal right to judicial review to a common collective right. The Court is confident that Class Counsel is adept at finding an individual case which would raise the issue of the “reasons”, their reasonableness and the use of the algorithm. As this Court may well hear such a proceeding, nothing more will be said at this time.

IV. Conclusion

[23] For these reasons, the Applicant’s motion is dismissed without costs and without prejudice to any Class Member’s right to seek further and other relief by way of judicial review or otherwise.

AMENDED ORDER in T-1499-16

THIS COURT ORDERS that the Applicant's motion is dismissed without costs and without prejudice to any Class Member's right to seek further and other relief by way of judicial review or otherwise.

This Order of dismissal of the Applicant's motion does not apply to the agreement to disclose certain information, as referred to in paragraph 5 of the Reasons, which agreement is approved.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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