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HEALTH AND WELFARE

Application for judicial review seeking to set aside date of birth criterion under *Canadian Thalidomide Survivors Support Program Order*, P.C. 2019-0271 (2019 Order) on ground of unreasonableness — Applicant born with numerous birth defects corresponding to *in utero* exposure to thalidomide — Three government programs created in 1991, 2015, 2019 to offer financial support to thalidomide survivors — Applicant not appearing on government registry of thalidomide victims, never reached out-of-court settlement agreement with pharmaceutical company with regard to his health condition — Canadian Thalidomide Survivors Support Program (CTSSP) established by 2019 Order — Person eligible for program if they meet one of three conditions stated in 2019 Order: (a) eligible under 1991 Assistance Plan or 2015 Program, (b) listed on government registry of thalidomide victims, or (c) determined by third party administrator to be eligible — Third condition of CTSSP relevant in this case — Eligibility for CTSSP determined on basis of probability that person's birth defects result of maternal use of thalidomide in first trimester of pregnancy — For third party administrator to find that person eligible under third condition of CTSSP, 2019 Order set out three-step process to determine eligibility, including preliminary assessment by third party administrator that it is likely that person's congenital malformations result from maternal ingestion of thalidomide in first trimester of pregnancy — With regard to preliminary assessment, applicant needed to show, *inter alia*, that his date of birth fell within period beginning on December 3, 1957, ending on December 12, 1967 — Applicant found to be ineligible for CTSSP because born in 1969 — Main issue whether Governor in Council's decision to adopt date of birth criterion reasonable — Date of birth criterion under 2019 Order, s. 3(5)(a)(i) unreasonable — Date of December 21, 1967, providing five-year grace period after thalidomide withdrawn from Canadian market on March 2, 1962 — Considering that medication still available, particularly as samples, certain logic in government's decision to include grace period after date medication withdrawn from market — Issue whether cutoff date of December 21, 1967, five years after official withdrawal of thalidomide from Canadian market, reasonable, considering legal, factual constraints — Medication reintroduced to Canadian market progressively, subjected to strict controls starting in 1963 — Date of December 21, 1967, not taking into consideration that Department of Health had good reasons to believe that mothers might still be taking thalidomide after Department of Health had officially ordered withdrawal of medication from Canadian market — Considering that mothers continued to use medication after beginning of 1962, that product certainly remained available on Canadian market after that date, and that shelf life of product at time unknown, if government indeed chose an algorithm based on probabilities, time limit should be consistent with principles underlying that algorithm — Cutoff date of December 21, 1967, not allowing this objective to be achieved — Governor in Council relied on unfounded generalization — This constituting clear logical fallacy — No evidence in record of period after which medication's teratogenic effects sufficiently attenuated, no longer risk — As result, reference to five-year shelf life for modern thalidomide could not reasonably help establish appropriate grace period after official withdrawal date of product from Canadian market — Choice of temporal limits not political decision but decision based on factual considerations — In this case, choice of cutoff date not reasonable — Evidence indicated that cutoff date not justified with regard to factual constraints — Date of birth criterion under 2019 Order, s. 3(5)(a)(i) set aside, third party administrator of CTSSP ordered not to consider it — Application allowed.

RICHARD V. CANADA (ATTORNEY GENERAL) (T-1321-21, 2024 FC 657, Pamel J., reasons for

judgment dated April 29, 2024, 43 pp.)