Date: 20070220

Docket: 06-T-13

Citation: 2007 FC 195

Montréal, Quebec, the 20th day of February 2007

Present: the Honourable Mr. Justice Martineau

BETWEEN:

JANINE HUARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The motion at bar is seeking an extension of the usual 30-day deadline for making an application for judicial review of three administrative decisions of a federal board.

I. PROCEDURAL BACKGROUND

[2] The decisions at issue were rendered pursuant to the *AMI - Depatterned Persons Assistance Order*, P.C. 1992-2302, November 16, 1992 (the Order).

[3] The Order authorized the Minister of Justice (the Minister) to make an *ex gratia* payment of $100,000 to a "depatterned person" meeting the criteria set out in the Order. This benefit was denied the applicant by Marc Gervais (the manager or the federal board) in 1993 (the initial decision). At that time, he was the director of the Allan Memorial Institute Depatterned Persons Assistance Plan (the Plan).

[4] The manager concluded at that time that the medical treatments which the applicant had received at the Allan Memorial Institute (AMI) between 1950 and 1965 did not meet the conditions stated in the Order for compensation. In 1993 and 1994, he subsequently twice refused to review his initial decision.

[5] The application at bar for an extension of time to file an application for judicial review was filed in the Court on February 15, 2006.

[6] A few weeks previously, the applicant, on December 29, 2005, had begun an action in the nature of an application for judicial review against the same decisions of the federal board (docket T-2299-05). In that action, the applicant was also proposing to act as representative of a group of former patients of Dr. Ewen Cameron, whose applications for compensation under the Order were also denied by the federal board.

[7] On January 11, 2006, the respondent filed a motion to strike the applicant's action on the ground that an application for judicial review must be filed by a notice of application, not by an action.

[8] On June 12, 2006, I was designated as judge responsible for the management of this proceeding and of proceedings relating to the parallel action mentioned above.

[9] In the case at bar, it is clear that the applicant's action cannot be pursued as a class action unless the Court orders that it be filed as an action pursuant to subsection 18.4(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended (the FCA). Accordingly, a motion to convert the application for judicial review to an action is required. However, before a judge of the Court can consider any motion for conversion by the applicant, an application for judicial review must first be validly filed in the Court: hence the motion for an extension of time. Counsel for the parties at bar were agreed here that the respondent's motion to strike in case T-2299-05 should be held in abeyance pending the Court's decision on the instant motion for an extension.

[10] A hearing was held in the case at bar on January 10, 2007. The motion for an extension is granted for the reasons that follow.

[11] The facts alleged by the applicant in her affidavit were not disputed by the respondent. However, the issue of whether the particular treatments to which the applicant was subjected at the AMI between 1950 and 1965 met the criteria in the Order is a mixed question of fact and law which was vigorously argued by the parties and which will have to be decided on the merits by the judge who hears the application for judicial review.

[12] I have the great advantage of having reviewed the file of the federal board which was filed by the respondent with his reply record and which also included a copy of the medical opinions entered in the Registry of the Court by the applicant Gail Kastner in case T-1755-02. Ms. Kastner

received a favourable decision by the Federal Court in 2004. The Court accordingly quashed the decision of the federal board in 1994 pursuant to the Order and held that Ms. Kastner was entitled to an *ex gratia* payment of $100,000 (*Kastner v. Canada (Attorney General),* 2004 FC 773).

[13] The applicant submitted that although the deadline in question is very long, the respondent here had suffered no hardship. It was further submitted that the case at bar disclosed an arguable case and that it was in the interests of justice to grant the motion at bar. Accordingly, counsel for the applicant firmly maintained that the decision rendered by the Court in *Kastner* in 2004 was a leading case. The Court should apply the same reasoning as in *Kastner*. I will return to the significance to be attached to that decision below.

[14] In passing, the parties also submitted a copy of the motion record filed by Ms. Kastner in the Court in 2002 seeking leave to file an application for judicial review some eight years after the negative decision by the federal board (case 02-T-51). Blais J., who was persuaded of the merits of the motion for an extension by Ms. Kastner based on the written representations submitted by her, granted the motion on October 2, 2002. I interpret the absence of any opposition to Ms. Kastner's motion for an extension by the respondent as an implicit admission that the long delay in question caused the respondent no hardship.

[15] With the consent of the parties, I also reviewed after the hearing a document titled *Opinion of George Cooper, Q.C., Regarding Canadian Government Funding of the Allan Memorial Institute in the 1950's and 1960's* (the Cooper report), as well as certain appendices to that report. This document is essential for understanding the historical background leading up to the adoption of the Order and the motivation of the Government of Canada in promulgating the said Order in 1992. I

also refer to the content of the Cooper report regarding the particular therapy that was used by Dr. Cameron between 1950 and 1965. I note in passing that, although counsel for the applicant submitted the English version of this opinion, it is also available in French *(Opinion de M. George Cooper, c.r. au sujet du financement par le gouvernement canadien de l'institut Allan Memorial au cours des années 1950 et 1960).* Any reference to the Cooper report concerns the pages of the English version.

[16] Although not all of the arguments put forward by counsel are mentioned in these reasons, including the written representations and additional authorities or other documents which counsel submitted to the Court after the hearing, I also took them into account in exercising my discretion.

[17] Finally, I should like to emphasize very strongly, so that it is fully understood by all who may read these reasons, that there are unusual features in the case at bar, in view of the special facts and the very nature of the fundamental rights in question. In all respects, therefore, my decision to extend the usual 30-day deadline for filing an application for judicial review 12 years after the federal board released its last decision must be understood in light of the very special circumstances set out below and the humanitarian and remedial nature of the Order.

II. DEPATTERNING AND PSYCHIC SATURATION TREATMENTS

[18] The AMI is an institution affiliated with McGill University and is part of the Royal Victoria Hospital in Montréal. Dr. Cameron, now deceased, was the director of the AMI. He was a

well-known psychiatrist. In particular, between 1950 and 1965, Dr. Cameron treated several patients suffering from depression, schizophrenia and other mental problems. The applicant was his patient in this period. The following information is taken from the Cooper report.

[19] In the 1950s and 1960s, electroconvulsive therapy (electroshock treatments) and the insulin coma were still recommended procedures for treating depression and certain neuroses in various psychiatric centres in Canada and abroad. Some psychiatrists also noted that persons suffering from epileptic seizures or an insulin-induced coma did not develop mental problems. If the same type of convulsion was artificially instigated in neurotic or depressive patients, the "brain pathways" would be broken up and the patients could be cured. That was the fundamental idea behind the use of electroconvulsive therapy and insulin therapy (Cooper report, p. 14).

[20] Between 1950 and 1965, however, Dr. Cameron went much further than other physicians with experimentation and use of these methods, ultimately developing a therapy consisting of depatterning and/or psychic driving treatments, whether or not combined with electroconvulsive therapy. Additionally, narcotherapy was used by Dr. Cameron to induce a prolonged state of artificial sleep in the patient to prepare the latter mentally for either of the two treatment phases previously described (depatterning and repatterning).

[21] Dr. Cameron considered that mental illness was the result of an [TRANSLATION] "incorrect" response to the patient's environment over the years. First, Dr. Cameron's therapy involved "depatterning" the brain of the neurotic or depressive patient. To do this, he or she was first put into a prolonged state of artificial sleep: various sedatives were used. After a number of days the

"massive electroshock" stage could begin. The patient, who was kept in a prolonged state of artificial sleep, was then subjected to several electric shock sessions. Additionally, the frequency and strength of the electric shocks was greater than that of the usual electroconvulsive therapy treatment (Cooper report, p. 15). The phrase [TRANSLATION] "regressive electroshock treatments" was also used to describe this stage of the treatment, since Dr. Cameron's aim was to cause the mental state of the patient in question to regress through massive electric shocks.

[22] After a number of days of prolonged sleep and massive electroshocks, the patient's mental state more or less became that of a child. However, it appears this was actually an "image", to describe the severe state of depatterning sought by Dr. Cameron, who himself referred to three levels of depatterning:

> In the first stage of disturbance of the space-time image, there are marked memory deficits but it is possible for the individual to maintain a space-time image. In others words, he knows where he is, how long he has been there and how he got there. In the second stage, the patient has lost his space-time image, but clearly feels that there should be one. He feels anxious and concerned because he cannot tell where he is and how he got there. In the third stage, there is not only a loss of the space-time image but loss of all feeling that should be present. During this stage the patient may show a variety of other phenomena, such as loss of a second language or all knowledge of his marital status. In more advanced forms, he may be unable to walk without support, to feed himself, and he may show double incontinence. At this stage all schizophrenic symptomatology is absent. His communications are brief and rarely spontaneous; his replies to questions are in no way conditioned by recollections of the past or by anticipations of the future. He is completely free from all emotional disturbance save for a customary mild euphoria. He lives, as it were, in a very narrow segment of time and space. All aspects of his memorial function are severely disturbed. He cannot well record what is going on around him. He cannot retrieve data from the past. Recognition or cue memory is seriously interfered with and his retention span is extremely limited.

(Appendix 15 of Cooper report, p. 67, as cited in Cooper report, at p. 21.)

[23] The disadvantage or the advantage, depending on the point of view taken, is that, in the long term, massive electroshock treatment erases large parts of the patient's memory. It should also be noted here that, while massive electroshock treatment was habitually used by Dr. Cameron to depattern a patient, he could also make use of "sensory isolation". In the latter case, a patient was placed in situations of sensory isolation for several days. Its purpose was the same, to cause the patient's mental state to [TRANSLATION] "regress" to that of a child. That said, for depressive patients, "depatterning" was not an end in itself, as it was subsequently used to "repattern" their brains.

[24] A depatterned patient who began to resume contact with reality in the days following his or her "depatterning" could suffer considerable anxiety. The depatterned patient's brain gradually reorganized itself, passing through the third stage, the second stage and, finally, the first stage of depatterning. Various sedatives and barbiturates were administered during the period of "reorganization" of the brain: "During this period, the patient would undergo considerable anxiety; to control this, the drugs chlorpromazine (Largactil) and sodium amytal were administered. The purpose of this procedure, in the case of psycho-neurotic patients, was to prepare them for a course of 'psychic driving'" (Cooper report, at pp. 17-18)

[25] The second stage of the overall therapy administered by Dr. Cameron was "repatterning". Briefly, the purpose was to "repattern" the patient's brain so as to inculcate the "correct" thought patterns. Starting this time with the idea that if, following depatterning treatment, the patient

regressed to the mental state of a child, Dr. Cameron then believed that the patient could be treated by "re-mothering". However, the "kindly" hospital environment desired by Dr. Cameron could completely [TRANSLATION] "hostile" for patients who had been subjected to psychic driving for days (Cooper report, pp.15-16).

[26] "Psychic driving" consisted of the following: prerecorded "negative" messages were played continuously thousands of times in the ears of a psycho-neurotic patient so as to confront him or her with, for example, the patient's weaknesses or mediocrity. After a certain time, the same process was resumed, but this time playing "positive" messages. The purpose of this verbal conditioning was to lead the patient to adopt the desired attitude or behaviour. The content of the messages played to the patient during the psychic driving sessions was chosen by the psychiatrist from material which he had himself assembled ("heteropsychic driving") or on the basis of therapy sessions he conducted with the patient when the latter could be under the influence of drugs which had caused inhibitions to disappear (here one thinks of sodium amytal) (Cooper report, p. 20).

[27] These psychic driving sessions at the AMI could in some cases last up to 16 hours a day. In order to ensure that the patient subject to this treatment continued to be "receptive", he or she was given injections of Curare and beeswax. During the therapy, hallucinogenic drugs might also be used (LSD-25 and mescaline), as well as amphetamines and massives doses of barbiturates (Cooper report, pp. 20 and 26). Moreover, it appeared that the LSD, mescaline, amphetamines and sodium amytal were not used just in psychic driving sessions (Cooper report, p. 26).

[28] Dr. Cameron's complete depatterning process was developed in 1955 and was then the subject of a scientific publication. However, the therapy used before 1955 apparently included most of the depatterning characteristics described above, in particular, artificial sleep and electric shocks.

III. PLAN ADMINISTRATORS' FILE ON APPLICANT

[29] The applicant Janine Huard is now 79 years old. In her 20s and early 30s, the applicant was hospitalized at the AMI three times between 1950 and 1965 for extended periods of time, in addition to being treated on an ambulatory basis during the same time period. The applicant suffered from anxiety, fatigue and depression at the time. She had also lost weight.

[30] In the affidavit she submitted in support of the motion at bar for an extension, the applicant stated that, between April 4, 1951 and February 22, 1962, she received massive electric shock treatments, prolonged artificial sleep treatments and psychic driving treatments, while she was given massive doses of all kinds of drugs which prevented her from giving voluntary consent to the various treatments she received at the AMI, while Dr. Cameron was her attending physician.

[31] The applicant was not cross-examined by the respondent on the allegations contained in her affidavit. At the hearing, the respondent's representative told the Court that he was not disputing the fact that the electric shocks were administered to the applicant nor that she was the subject of various experiments by Dr. Cameron between 1950 and 1965 (*inter alia* psychic driving and narcotherapy). However, the number and the intensity of the electric shocks administered to the applicant between 1950 and 1965 was the subject of vigorous debate between the parties. The respondent submitted that the description of these treatments by the federal board was reasonable.

Although certain treatments administered to the applicant may seem horrible, they were "normal" at the time. Accordingly, counsel for the respondent submitted *inter alia* that the psychic driving to which the applicant was subjected, as well as the sensory isolation also mentioned in the Cooper report, were not "depatterning treatment" within the meaning of the Order, which of course the applicant disputed. I will return to the validity of these submissions below.

[32] In his reply record to this motion the respondent filed a copy of the documents contained in the Plan administrators' file on the applicant. In particular, there is the application for compensation duly signed by the applicant, who further consented to the administrators of the Plan and Blue Cross directly contacting her physicians and the AMI for any further information, which it would appear they never did.

[33] Although the applicant's medical file obtained from the Royal Victoria Hospital in Montréal is nearly 300 pages long, there is unfortunately very little medical information on the particular treatments undergone by the applicant in any of the three periods she was treated by Dr. Cameron.

[34] For some reason which was not explained to the Court, more than nine-tenths of the extensive medical file forwarded by the Royal Victoria Hospital in Montréal on February 18, 1993 (respondent's motion record, Exhibit A of affidavit of France Bétournay, at p. 228) covers periods subsequent to 1965 to which the Order does not apply, namely the admission of the applicant to the AMI for the period from November 21, 1966 to March 10, 1967 (the fourth admission), as well as clinical visits in the 1960s and 1970s.

[35] That said, the available medical information contained in the federal board's file (though this was not the hospital's complete file) very largely corroborates the general allegations made by the applicant in her affidavit: electroconvulsive therapy treatments (electric shocks or ECT); insulin therapy (somnolent insulin in her case); use of barbiturates, antidepressants, sedatives and other drugs, such as Curare; sleep and/or half-sleep cure (narcotherapy); psychic driving.

[36] The applicant's first admission to the AMI was prior to 1955. We know only that the applicant spent an extended period of 51 days there, from April 4 to May 24, 1951. There is nothing in the medical record that could provide the Court with any information about her day-to-day treatment. However, it can be seen that she had an X-ray, an electrocardiogram and blood tests.

[37] On her admission on April 4, 1951, the applicant appears to have been seen by Dr. Thelma Gordon. It appears that the applicant was admitted for weight loss and anxiety problems. Apparently, the treatment recommended was psychotherapy and the taking of insulin (somnolent insulin). There is no mention in the medical record of electric shock treatments during this first admission.

[38] That said, it appears that the applicant was treated by Dr. Cameron during her first visit to the AMI. In a letter dated May 28, 1951, and written by Dr. Cameron after the applicant's release was obtained, the following somewhat brief statements are made: "The patient was put on somnolent insulin, fesofor, and psychotherapy; she was investigated in the G.I. clinic in the O.P.D. and their findings were negative with respect to organic factors. She was also referred to the Extension Department. It was felt that the primary dynamic is that her home is a broken one and that

her relationship to the mother has been complex. In the view of the low red cell count the patient was referred to the Division of Hematology and it was felt that she had a secondary anemia. This was considered to be due to her vomiting" (respondent's motion record, Exhibit A of affidavit of France Bétournay, at pp. 249-250).

[39] The second extended admission of the applicant to the AMI occurred on March 26, 1958, and at this stage I am prepared to accept that Dr. Cameron also treated the applicant as she alleged in her affidavit. A period of some 45 days was mentioned here, the applicant being released on May 9, 1958. There is no notation or daily medical document of any kind whatever for this entire second period of admission in the Plan administrators' records, which raises serious doubts as to what actually happened during that period.

[40] However, there is to be found a letter from Dr. Azima, subsequent to the second extended visit and dated June 14, 1958 (respondent's motion record, Exhibit A of affidavit of France Bétournay, p. 26). The latter mentioned that, during the said visit, the applicant took a new antidepressant, G2235 (imipramine) and insulin (somnolent insulin). Dr. Azima also mentioned that the applicant had been subject to [TRANSLATION] "exploratory psychotherapy", without indicating whether the applicant was subject to psychic driving sessions during it. Once again, there is no reference to the administration of electric shocks, prolonged artificial sleep treatments or psychic driving sessions in the letter of June 14, 1958. However, according to the letter from Dr. Jonathan F. Meakins, Registrar of the Royal Victoria Hospital on February 18, 1993, electric shocks were in fact administered to the applicant during this second extended visit: "we have records of ECT programs of <u>1958</u>" [emphasis added] (respondent's motion record, p. 228). Accordingly, at this stage, I am

prepared to accept that the applicant could also have been subjected to electric shocks during her second visit to the AMI in 1958.

[41] According to the medical records in the possession of the Plan administrators, the applicant was also treated at the AMI on an ambulatory basis in 1959, 1960 and 1961. According to this medical record, the applicant received a minimum of 8 electric shocks in 1959 and 9 further electric shocks in 1960. That makes at least 17 electric shocks. It is not clear from reading the decision of the federal board that this medical evidence was considered by the manager (the latter speaks of 11 electric shocks, without indicating exactly the period being referred to).

[42] The progress notes in the medical records of the Plan administrators are in a fragmentary state. Additionally, their content has been edited or altered by the hospital or a third person. Complete medical documents have not been reproduced. Based on this incomplete medical evidence, it is clear that the applicant received a minimum of eight electric shocks (ECT) in 1959, as I already noted in the previous paragraph. Additionally, she was put on G22355 (imipramine) (notes of February 19, 1959, respondent's motion record, Exhibit A of France Bétournay, at p. 296). She was also given Tofranil, Largactil and Atarax (notes of April 9 and July 28, 1959, respondent's motion record, Exhibit A of affidavit of France Bétournay, at pp. 299-300). In passing, according to the Cooper report (at page 17), chlorpromazine (Largactil) is a drug used by Dr. Cameron at the time to control the anxiety of a "depatterned" patient.

[43] Further, on an ambulatory basis at the AMI once again, on November 22, 1960, the applicant began receiving Offner electric shocks at the rate of three per week and taking sodium

amytal (notes of November 22, 1960). At this stage, I do not know what "Offner" electric shocks are and whether they are more or less powerful than the "Page-Russell" electric shocks referred to by the Court in *Kastner, supra*, and in the medical expert opinions filed by Ms. Kastner in case T-1755-02. On November 28, 1960, the applicant received her fourth electric shock; on November 29, 1960, her fifth; the date of the sixth is not indicated; her seventh on December 5, 1960; her eighth on December 9, 1960; and her ninth on December 16, 1960. The applicant was also given sodium amytal, which is one of the drugs that can be administered in preparation for psychic driving treatments or during it (pages 17, 20 and 26 of the Cooper report).

[44] During the period following the electric shocks of November and December 1960, the applicant took various drugs (respondent's motion record, at pp. 307 and 309-311). The notes of December 29, 1960, indicate "Because she feels quite tense, I have changed her medication, she is now receiving tofranil 50 mgs. q.i.d. trilafon 4 mgs. q.i.d. and sodium amytal 200 mgs. q.h.s.". Then, the notes of January 12 indicate: "Last time she was here I substituted equinal for stelazine she was taking but this made no difference. So I have now given her tofranil 50 mgs. q.i.d., librium 20 mgs. q.i.d.., tuinal 200 mgs. q.h.s. and in addition she is to receive Vitamin B12, 100 micrograms i.m. twice weekly for one month" (see pp. 311-312 of respondent's motion record). On April 7, 1961, there is a progress note by Dr. Cameron mentioning that the applicant will have no further insulin treatment, but will be kept on Tofranil, Librium and sodium amytal.

[45] The applicant's third period of extended admission to the AMI was relatively long. It ran from October 30, 1961 to February 22, 1962, that is, a total of 116 days. Unfortunately, for reasons

that were not explained, the medical records of the Plan administrators on this crucial period are seriously deficient.

[46] However, the only two available notes from Dr. Cameron, dated January 22 and 30, 1962, confirmed that, throughout January 1962, the applicant was in fact subjected to psychic driving treatments and given sedatives and various drugs in massive doses (sodium amytal, Largactil and Chloralol in particular) (respondent's motion record, pp. 23-24).

[47] On January 22, 1962, the applicant had already had 16 days of "negative driving". However, Dr. Cameron was not satisfied with the results obtained as, he wrote, the applicant "listens very poorly, this thing (sic) at the most 2 to 5 hours … We have not yet tried her with Curare but this will be done, if necessary" (Dr. Cameron's notes of January 22, 1962, respondent's motion record, at p. 23). Curare is a paralyzing drug which at the time was also used by Dr. Cameron in psychic driving treatments to keep the patient in as receptive a state as possible.

[48] On January 30, 1962, Dr. Cameron noted that the applicant had already had 17 days of "negative driving". She had also had "positive driving" sessions, but the exact number of days was omitted or erased from Dr. Cameron's note. However, the latter did note some improvement. Speaking of the applicant: "She is listening rather better now, especially since she has been put on heavy sedation and also since she has been listening to her driving downstairs in the Day Hospital East" (Dr. Cameron's notes of January 30, 1962, respondent's motion record, Exhibit A of affidavit of France Bétournay, at p. 24). I note here that, according to the medical evidence in the record, it is

apparently in this area (the Day Hospital East) that the applicant had already been given electric shocks on an ambulatory basis in 1959 and 1960.

[49] The applicant continued to be subjected to psychic driving treatments after January 30, 1962 ("bedside notes" of January 31, 1962). For some as yet unexplained reason, the "bedside notes" in the records of the Plan administrators for the applicant's third extended period of admission cover only the days of January 24 and 31, 1962, and February 1, 1962, but we find in one of them that the applicant continued to be depressive and made the following objection: "I just can't listen to that tape any longer, it makes me so depressed" ("bedside notes" of February 1, 1962, respondent's motion record, Exhibit A of affidavit of France Bétournay, at p. 29).

[50] The applicant stated in her affidavit that, as a result of the treatments she received at the AMI, she suffered losses of memory, and she explained that, even now, her memory is deficient, which was not contradicted by the medical evidence in the Plan administrators' record. The applicant related that, following her [TRANSLATION] "release" (I assume this was her release of 1962), her mother came to live with her, her husband and her four children. The applicant stated that, at that time, she was completely and entirely dependent on her mother and could not stay alone: [TRANSLATION] "If my mother left me alone, even for a short time, I was distraught and found myself in a state of panic. I often slept with my mother in order to feel safe".

[51] Dr. Cameron ceased treating the applicant after 1965. The applicant went back to the AMI for an extended visit, her fourth, between November 21, 1966 and March 10, 1967. In the meantime, the applicant continued to visit the AMI for psychotherapy. At the time of her fourth

admission, she received some 10 electric shocks. At page 83 of the respondent's motion record, in the notes of Dr. Pivnicki dated January 17, 1967, it states: "She seems to be slightly depressed still. She had her 10th ECT this morning, and will have another at the end of this week." It further appeared that she did not receive the eleventh electric shock mentioned, since Dr. Pivnicki's notes dated January 24, 1967 state: "On Friday evening, the day when the pt did not receive an ECT which she seemed to be expecting . . .". However, at this stage, it is not possible to determine whether the most recent electric shocks were less powerful, equivalent to or more powerful than those the applicant received in 1958, 1959 and 1960 (and perhaps 1961). For several days, the applicant was also in a state of prolonged semi-sleep. The medical record in the possession of the Plan administrators also corroborates the fact that, at that time, to some extent the applicant was behaving like a child ("she was behaving like a child", Dr. Pivnicki's notes dated February 21, 1967, respondent's motion record, p. 71; "she behaved in a childish obstinate way", Dr. Pivnicki's notes dated January 31, 1967, respondent's motion record, p. 78).

IV. AMERICAN ACTION

[52] In her affidavit, the applicant explained that it was not until spring 1980 that she learned through an article in a newspaper that the treatments given by Dr. Cameron had been [TRANSLATION] "experimental". Like eight other patients of Dr. Cameron (including the wife of a federal member of parliament), she became a co-plaintiff in an action for damages against the Government of the United States.

[53] The plaintiffs alleged that the Central Intelligence Agency (CIA) financed certain experiments by Dr. Cameron, and this was later confirmed by Mr. Cooper in his report. The CIA in

fact used certain [TRANSLATION] "front" agencies to finance the experiments in question. The plaintiffs' complaints related specifically to use of the following treatment methods: prolonged sleep, massive electroshock treatments, psychic driving and use of hallucinogenic drugs. At the hearing of this motion, it was stated that the court costs of the plaintiffs at that time were borne entirely by the Government of Canada.

[54] Paragraphs 30 to 32 of the American action concerned the particular case of the applicant:

> 30. Plaintiff, Mrs. Jeanine (sic) Huard, began visiting the Allen (sic) Memorial Institute as an out-patient in 1958 seeking psychiatric therapy to help her overcome recurring depressions. Mrs. Huard became a Cameron patient and remained under his care until 1962. During her time as a Cameron patient, Mrs. Huard became an unwitting subject of CIA-funded brainwashing experiments. Until 1961, Mrs. Huard was given Page-Russell electroconvulsive treatments daily or every second day, in addition to a variety of drugs. In September 1961, Mrs. Huard was admitted to the Allen (sic) Memorial Institute as a Cameron patient and, until March 1962, Cameron had her listen to psychic driving tapes for seven hours each day.
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> 31. At no time while she was a Cameron patient was Mrs. Huard told that she was participating in experiments rather than therapy, that such experiments were being financed by the CIA for nonmedical purposes, that such experiments would be unlikely to yield therapeutic benefits, or that such experiments involved the use of dangerous drugs and hazardous techniques that could result in permanent physical and psychological injury.
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> 32. As a result of her participation in the CIA-financed experiments, Mrs. Huard was denied needed therapy which she sought and for which she paid, cannot sleep without drugs, is afflicted with migraine headaches, and suffers from impaired mental health.

[55] I note that, at paragraph 30, of the American action the applicant specifically alleged that up to 1961 she received Page-Russell electric shocks every day or every other day. The U.S. action was

eventually settled out of court. In fact, on November 21, 1988, the applicant received the sum of US$66,562.50 as compensation from the U.S. government. The applicant never brought a civil action in Canada. Of course, any right of action against Dr. Cameron, the Royal Victoria Hospital and the Government of Canada, assuming that such an action could have been contemplated by the applicant at that time, is now prescribed (*Kastner v. Royal Hospital*, [2002] Q.J. No. 568 (Que. C.A.) (QL), affirming [2000] Q.J. No. 1060 (Que. S.C.) (QL)).

V. COOPER REPORT

[56] It is not in dispute in the case at bar that some of the research and experiments involving psychic driving used in combination with drugs, prolonged sleep, massive electroshock treatments and/or sensory isolation conducted by Dr. Cameron and his team at the AMI between 1950 and 1965 (and also involving the CIA at that time) were carried out with the aid of grants from federal departments.

[57] Mention was made in particular of the following two research projects: (1) project No. 604-5-14 (1950-1954), titled "Support for a Behavioural Laboratory"; project No. 604-5-432 (1961-1964), titled "Study of Factors which Promote or Retard Personality Change in Individuals Exposed to Prolonged Repetition of Verbal Signals" (appendices 28 and 29 of Cooper report).

[58] The second study mentioned in the preceding paragraph (Dr. Cameron was co-author) was published in 1965. Counsel for the applicant submitted a copy to this Court together with another article co-signed by Dr. Cameron dealing with psychic driving, which had already been published in 1958 ("Effect of Repeated Verbal Stimulation upon a Flexor-Extensor Relationship").

[59] In the study titled "The Effects of Long-Term Repetition of Verbal Signals" published in 1965, the authors noted:

> Studies in the effects of prolonged verbal repetition upon human behaviour have been carried out at the Allan Memorial Institute since 1953. At that time it was reported by Cameron that exposure of the individual to prolonged repetition will produce a desired change in behaviour and that the nature of this change will bear a relation to the content of the verbal sign. The signals which were used in the experiments at that time consisted of statements made by the patient in the course of psychotherapy.
>
> This observation led to further experimentation and in 1955 it was found that behaviourial changes could also be brought about by using verbal signals constructed on the basis of knowledge of the patient's dynamics. In the case of individuals with marked symptom formation, changes could be brought about more readily when the individual was exposed to repetition after either prolonged sleep or E.C.T.

[60] On or about February 26, 1986, the Department of Justice mandated Georges Cooper to prepare an opinion on the potential legal or moral responsibility of the Government of Canada as a result of the awarding of grants to finance the research activities carried out by Dr. Cameron at the AMI between 1950 and 1965. In a report dated May 1986, which runs to over 130 pages (without the 53 appendices to the report), Mr. Cooper sets out in great detail the various therapeutic or experimental methods used by Dr. Cameron.

[61] Mr. Cooper concludes that depatterning and psychic driving are failures, not only from the standpoint of their effectiveness as therapeutic techniques, but also because they are unjustifiable forms of assault on the human brain. Such assaults were not justifiable even by the standards of the time and in light of the rudimentary scientific and medical knowledge existing at that time as

compared with the present day. Nevertheless, the Cooper report declines any legal or moral responsibility of the Government of Canada for the financing of Dr. Cameron's activities at the AMI, but attaches to the report a memorandum on compensation in the absence of legal or moral responsibility (appendix 53 of the Cooper report) which counsel for the parties also submitted to the Court after the hearing.

[62] In this memorandum, Mr. Cooper notes that, if the Government of Canada ever decides to compensate the nine plaintiffs in the action brought against the U.S. Government, it would constitute a precedent for other patients of Dr. Cameron who also suffered depatterning and/or psychic driving treatments:

> The most important problem is the fact that a precedent will be created by any decision to compensate. That this is not merely a theoretical consideration may be demonstrated by posing some of the questions that are likely to arise in the wake of a decision to compensate. If the nine U.S. plaintiffs are to be offered compensation, could the other patients of Dr. Cameron be refused, and if so, on what ground? What about patients of other doctors at the Allan who underwent depatterning and/or psychic driving treatments? Would those other claimants be under the same or different requirements as to proof of the treatment undergone and/or damages suffered as the nine U.S. plaintiffs? Would all other "victims" of medical experiment or novel medical treatments be likewise entitled to compensation, and on the same requirements as to proof, etc? If not, why not?

[63] Starting with the principle that any compensation that might be paid by the Crown to the plaintiffs or to other patients of Dr. Cameron is in the nature of general damages, that is, covering suffering and injury to self-respect, Mr. Cooper proposed an *ex gratia* payment of a lump sum of $100,000. Accordingly, the awarding of such a sum should not discourage public financing of medical research in future:

> As a final consideration on this point, it is well to remind oneself again of the precedent value of any *ex gratia* compensation payment for medical misadventure. Unless some limit is set, funding for future medical research would be rendered more uncertain than it would be in the absence of a maximum limit. And if that limit is kept at a relatively modest level (such as $100,000 in 1978 dollars), the "chilling effect" would presumably be kept to a minimum.

[64] In closing, the Cooper report, relying on the opinions of various expert witnesses, supports a conclusion here that Dr. Cameron's theory and methods are today completely discredited in scientific circles. Further, the respondent did not dispute the fact that the administration of full or substantial depatterning and/or psychic driving treatment described above could occasion permanent damage to the patient's memory and other mental faculties.

[65] Once again, in my opinion, there is no doubt that, even by the standards of the time, the depatterning and/or psychic driving treatments described above were an unwarranted trespass to the person. It can also be assumed that Dr. Cameron's patients were in a condition of vulnerability and could not give [TRANSLATION] "informed" consent to the administration of the depatterning and/or psychic driving treatments described above. There is no evidence in the record to indicate that Dr. Cameron explained the experimental nature of his [TRANSLATION] "therapy" to the applicant, and at this stage I accept the general allegation by the applicant in her affidavit that, at that time, she could not give informed consent to the administration of such treatments.

VI. ORDER RESPECTING *EX GRATIA* PAYMENTS TO PERSONS DEPATTERNED AT THE ALLAN MEMORIAL INSTITUTE

[66] On November 16, 1992, the Order leading to the case at bar was promulgated. It authorized the Minister to make an *ex gratia* payment of $100,000 to a depatterned person who met the criteria set out in the Order. We must therefore consider what those criteria were.

[67] According to the Order, every application for compensation had to be submitted to the Minister before January 1, 1994 by the depatterned person or by a person acting on his or her behalf (section 4 of Order). A "depatterned person" within the meaning of the Order is a "person who received full or substantial depatterning treatment at the Allan Memorial Institute in Montreal between 1950 and 1965 as a patient of Dr. Ewen Cameron".

[68] The phrase "depatterning treatment" is also defined in the Order as "prolonged sleep followed by massive electroshock treatments, reducing the patient's mind to a childlike state" (section 2 of Order).

[69] Additionally, the Minister is only authorized to make an *ex gratia* payment of $100,000 if the depatterned person is a permanent resident of Canada and is alive at the time of the payment, if he or she has signed a waiver protecting Her Majesty in right of Canada and the Royal Victoria Hospital against court action and, if applicable, has withdrawn any court action against Her Majesty in right of Canada (section 3 of Order).

[70] In practice, as stated in the information guide prepared by the Department of Justice, the application for compensation and supporting documents are first examined by an examining

physician of the Allan Memorial Institute Depatterned Persons Assistance Plan (the Plan), here a physician of the Ontario Blue Cross. The latter may ask the applicant for further information. The Department of Justice committee then studies the application and the examining physician's recommendation. It is up to the Minister of Justice to decide on each case. The decision is communicated to the person in question by the Plan's manager (in the case at bar, Marc Gervais).

[71] In the case at bar, the parties did not agree on the scope of the phrase "full or substantial depatterning treatment". The applicant submitted in this connection that the federal board's decisions were unreasonable, which the respondent of course disputed. At this stage, it is only necessary to determine whether the applicant has an "arguable case". I conclude that she does. At the same time, it is not necessary to consider now the validity of arguments relating to the *Canadian Charter of Rights and Freedoms*. The Court only needs to note that, in her individual case, the applicant has *prima facie* sound arguments in administrative law which can eventually be made to the judge hearing the case on the merits (see paragraphs 98 to 105, *infra*). However, let us return for the moment to the process leading to the administrative decisions by the federal board disputed here by the applicant.

VII. COMPENSATION APPLICATION AND IMPUGNED DECISIONS

[72] On or about December 2, 1992, the applicant submitted a compensation application pursuant to the Order and filed her medical record or did whatever was necessary so that the administrators of the Plan and Blue Cross could directly obtain copies through the Royal Victoria Hospital.

[73] On April 16, 1993 the applicant's application for compensation was dismissed by the manager, on the ground that the treatments she received did not meet the compensation criteria in the Order. This decision by the manager was communicated to the applicant after the Department of Justice committee approved the recommendation to dismiss made by the Blue Cross examining physician. Essentially, the manager considered that the applicant was not entitled to receive an *ex gratia* payment because she had not been subject to "depatterning treatment" within the meaning of the Order.

[74] In this regard, the manager noted that the medical evidence in the record indicated [TRANSLATION] "instead that [the applicant] has been placed in a half-awake condition and received 11 electric shocks", which seems to the Court to be *prima facie* inaccurate in view of the medical evidence in the records of the Plan administrators. Further, in the manager's opinion this treatment [TRANSLATION] "did not constitute 'massive electroshock treatments', an essential component of patient depatterning", and the applicant vigorously disputed this. Further, the manager also relied on the fact that the applicant's medical record [TRANSLATION] "also did not indicate that these treatments reduced [her] mind to a childlike state", which seems to the Court to be *prima facie* inaccurate, if not questionable, based on the evidence in the Plan administrators' record.

[75] On or about April 29, 1993, the applicant applied for review of this decision. She argued that her medical record indicated that over 30 electric shocks had been administered to her, which seems *prima facie* to be correct (if we include electric shocks administered in the fourth period of extended admission, which is not covered by the Order). She also drew the manager's attention to the fact that she had to undergo psychic driving treatments and was given Curare, in addition to

being given a "gas mask" and made to swallow [TRANSLATION] "astronomical doses of medication". Her application for review was dismissed by the manager on May 12, 1993. In his decision, the latter wrote that he [TRANSLATION] "did not disagree with the description of the medical treatment which [the applicant] underwent at the Allan Memorial Institute". However, he reiterated that [TRANSLATION] "the treatment did not constitute depatterning treatment".

[76] On September 21, 1993, Alan Stein, one of the applicant's current counsel, made representations to the members of the Justice Review Committee and asked that the manager's decision of May 12, 1993 be reviewed. On or about January 13, 1994, despite additional information and representations submitted by counsel for the applicant, the manager once again affirmed his initial decision to dismiss the applicant's compensation application based on the fact that the Order criteria had not been met.

VIII. WHETHER FEDERAL BOARD'S DECISION MAY BE QUESTIONED

[77] I begin by observing here that every person is inviolable and is entitled to the integrity of his or her person. Except in the cases provided for by law, no one may interfere with a person without his or her free and enlightened consent. In the same way, no person may be made to undergo care of any nature, whether for examination, specimen taking, removal of tissue, treatment, or any other act, except with his or her consent. This is what is expressly recognized by articles 10 and 11 of the *Civil Code of Quebec*, S.Q. 1990, c-64, but these principles have always existed, if not legally then at least morally.

[78] The fact that victims of medical acts or medical errors no longer have any civil remedy against the perpetrators of unjustified acts against their person and their dignity does not remove the indelible marks left on the minds of those individuals. Certain public acts of recognition by society, symbolic though they may be, are sometimes necessary to heal the still painful wounds caused to victims of such medical acts.

[79] Accordingly, for humanitarian reasons,the Government of Canada has already paid *ex gratia* compensation in the past, without the admission of any liability, to victims of medical, institutional or other errors in the health field. For example, *Mercier-Néron v. Canada (Minister of National Health and Welfare)*, [1995] F.C.J. No. 1024 (F.C.T.D.) (QL), dealt with the establishment in 1991 of a federal program to compensate victims of thalidomide in which eligible victims shared among themselves an allowance of $7,500,000 invested in the progam in question (see the *HIV-Infected Persons and Thalidomide Victims Association Order*, P.C. 1990-4/872, as amended).

[80] The source of the *ex gratia* payments made by the Crown lies either in the latter's legal and consititutional status as a physical and moral person, or in the royal prerogative. Non-payment of *ex gratia* payments does not as such make the Crown liable and, therefore, does not create a basis for an action for damages against the Crown, unless of course the payment of such monies has become binding and compulsory as a result of statute or regulation (*Byer v. Canada*, 2002 FCA 430, affirming 2002 FCTD 518).

[81] When the Crown exercises a power pursuant to the royal prerogative which is triable, the exercise of that power may be considered by the courts by an application for judicial review (Peter Hogg, *Constitutional Law of Canada*, Toronto, loose-leaf, Carswell, 2005, at pp. 1-15 to 1-17), and

it is not in dispute that, in the case at bar, the decision on the awarding of an *ex gratia* payment might be the subject of an application for judicial review (*Schavernoch v. Canada (Foreign Claims Commission)*, [1982] 1 S.C.R. 1092; *Schrier v. Canada (Deputy Attorney General)*, [1996] F.C.J. No. 246 (T.D.) (QL); *Mercier-Néron*, *supra*; *Kastner*, *supra*).

[82] Additionally, this Court has already considered the legality of administrative decisions made pursuant to the Order: *Schrier*, *supra*; *Kastner, supra*. In both cases, the Court had to determine whether the manager who had rejected an application for compensation had made a decision consistent with a reasonable interpretation of the Order, based on the evidence in the records of the Plan administrators.

[83] In *Schrier*, *supra*, Yvon Pinard J. noted that the wording of the Order should be considered as a whole in its ordinary and grammatical meaning, consistent with the spirit of the Order and the intent of the Government of Canada. He concluded that it was not unreasonable for the manager to conclude that the applicant Schrier's compensation application should be dismissed. At the time, the latter was a fetus in his mother's belly when she was treated by Dr. Cameron: "it is only common sense that he could not have then received any treatment which could have had the effect of reducing his mind to a childlike state, which is a state a fetus has not yet even reached".

[84] I note that the Court's decision in *Kastner* was rendered on June 4, 2004, and that Ms. Kastner was represented by Mr. Stein, one of the applicant's current counsel (the other being Julius Grey).

[85] In *Kastner*, my colleague Michel Beaudry J. decided to allow Ms. Kastner's application for judicial review. According to the medical evidence in the Plan administrators' records, Ms. Kastner was hospitalized at the AMI in 1953 and received 43 electric shocks, 4 of which were Page-Russell electric shocks, which are six times more severe than an ordinary electric shock, representing a total of 63 electric shocks. However, she was not subjected to psychic driving treatments.

[86] According to Beaudry J. the manager, and subsequently the Minister's delegate, asked the wrong question when they asked "whether Ms. Kastner had received the full treatment available after 1955". In the opinion of Beaudry J., the question should rather have been "whether she was <u>substantially</u> depatterned" (emphasis added) (*Kastner*, *supra*, at paragraph 40). As he was satisfied that information in the medical record and the affidavits established that Ms. Kastner "was in a childlike state during and shortly after undergoing the treatment, even though that state did not persist indefinitely", Beaudry J. concluded that the decision in question was unreasonable and that Ms. Kastner was entitled under the Order to an *ex gratia* payment of $100,000. Accordingly, he referred the matter back to the Minister.

[87] Counsel submitted no argument that *Schrier* and *Kastner* were wrongly decided or based on erroneous principles of law or that the Court failed to take into account legislation, regulations or precedents which were applicable or relevant. Unless significant facts exist as a result of which the case at bar may be distinguished, therefore, these are precedents which by judicial comity may eventually be applied by other judges of the same Court (see, for example, *Bell v. Cessna Aircraft Co.* (1983), 149 D.L.R. (3d) 509, at p. 511 (B.C.C.A.); *Glaxo Group Ltd. v. Canada (Minister of National Health and Welfare)*, [1995] F.C.J. No. 1430; *Janssen Pharmaceutica Inc. v. Apotex Inc.*

(1997), 72 C.P.R. (3d) 179, at paragraph 2 (F.C.A.); *Kremikovtzi Trade v. Phoenix Bulk Carriers*, 2006 FCA 1; *Ahani v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1005, at paragraphs 4-8 (F.C.T.D.); *Aventis Pharma Inc. v. Apotex Inc.*, 2005 FC 1283; *Baldeo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 79).

[88] For my part, I note that, in *Kastner*, Beaudry J. undertook a pragmatic and functional analysis of the jurisdiction of the manager (or the Minister's delegate) under the Order. Unless the question is purely one of law or jurisdiction, the decision of the federal board in question will have to be considered on the merits by the standard of reasonableness *simpliciter*, and that is the standard which I have considered in determining below whether the applicant has a reasonable chance of having the decisions in question by the manager quashed.

[89] I also conclude from the decisions by the Court in *Schrier* and *Kastner* that the manager must interpret the definitions of "depatterned person" and "depatterning treatment" found in section 2 of the Order in their general sense and give a meaning to the words used in the definitions which is consistent with the spirit and purpose of the Order and with the intention of the Government of Canada. Of course, any interpretation that conflicts with common sense must be avoided. It is also important to reject any purely literal interpretation of the wording of the Order the effect of which is to conflict with the humanitarian and remedial purpose of the Order.

[90] As Beaudry J. noted in *Kastner, supra*, at paragraph 46, "the words used in the Order are very large". The expressions "prolonged sleep" and "massive electroshock treatments" are not defined in the Order and must be given a liberal interpretation consistent with the remedial purpose

of the Order. The content of the Cooper report and what Dr. Cameron himself wrote in his publications also assist in understanding concepts which may seem a bit unclear when we read the definition of "depatterning treatment" found in section 2 of the Order. The Cooper report also indicates the particular background preceding and, needless to say, conditioning promulgation of the Order some years later.

IX. MATERIAL CONSIDERED IN EXERCISING JUDICIAL DISCRETION

[91] The applicant is asking the Court, pursuant to subsection 18.1(2) of the FCA, to allow her to file an application for judicial review over 12 years after the 30-year deadline has expired following the release of the most recent decision by the federal board to the applicant.

[92] The criteria governing obtaining an extension of time are mentioned in *Grewal v. Minister of Employment and Immigration*, [1985] 2 F.C. 263, at 277 and 282 (F.C.A.). Accordingly, the motions judge considers the intent of the applicant to file the application for judicial review, the extent of the time and the reasons why the applicant did not act earlier, whether any hardship will result to the opposing party from the delay, whether the applicant's case is arguable, and all the special factors relating to the case.

[93] However, none of the factors indicated in *Grewal* affects the discretion of the judge, who decides on the relative weight to be given to each factor in accordance with the particular circumstances of the case (*Jakutavicius v. Canada (Attorney General)*, 2004 FCA 289, at paragraphs 15-17; *Stanfield v. Canada*, 2005 FCA 107, at paragraphs 3 and 4; *James Richardson International Ltd. v. Canada*, 2006 FCA 180, at paragraph 33).

[94] Accordingly, an extension of time may be granted by the judge even if one of the aforementioned criteria is not met, when the ends of justice require it (*Grewal*, *supra*, at pp. 278–279; *Canada* (*Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, at paragraph 33 (C.A.)). That is the case here.

[95] Subsection 18.1(2) of the FCA does not limit the Court's discretion, and the mere lapse of time, even where the delay in question is quite long, is not as such a sufficient reason for dismissing an application for an extension of time where there is no hardship: "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay – *Grewal, supra*, at p. 282, *per* Marceau J.A.

[96] In the case at bar, I consider that if the motion at bar for an extension is not granted, a great injustice would be caused to the applicant who, despite the length of the delay in question, is entitled to have the impugned decisions reviewed on their merits.

[97] First, I note that the applicant showed courage and determination in standing up against the Government of the United States and the CIA. The U.S. action brought by the plaintiffs in the 1980s undoubtedly prompted the Government of Canada to look more closely at its own potential legal and moral responsibility, although this is not as such a determining factor. The actions of the applicant and the other plaintiffs (at least one action was begun in Quebec by one of the plaintiffs) ultimately produced positive results, although there are other factors (including the Cooper report and pressures from the victims or the general public). The Government of Canada promulgated the

order in 1992: it has to be interpreted and applied by the federal board in question in light of its humanitarian nature and remedial purpose.

[98] To begin with, it is clear that the three decisions of the manager made successively on April 16, 1993, May 12, 1993, and January 13, 1994, form a whole, at least as regards the primary argument put forward by the applicant, namely that the finding that the applicant was not covered by the definition of a "depatterned person" in the Order is vitiated by an error of fact and law or is otherwise unreasonable in the circumstances.

[99] Second, without wishing in any way to bind the judge who will eventually hear the application for judicial review, the very elaborate nature of the submissions made on either side and the evidence entered in the Court record allow me at this stage to weigh the validity of the applicant's case, and hence the importance I attach to this factor in exercising my discretion.

[100] Counsel for the applicant argued that the administration of psychic driving treatments to the applicant by Dr. Cameron in January 1962 reasonably suggests that the applicant had previously undergone treatments of prolonged sleep and/or depatterning and/or sensory isolation (in November and December 1961): in that case, the applicant has a reasonable chance of persuading a judge who hears the matter on the merits that the decisions in question are unreasonable and must be set aside by the Court. I agree with this proposition.

[101] The applicant relied *inter alia* on the following comment by Mr. Cooper in his report: "Following a course of sensory deprivation, or of sleep and shock therapy, or both, the patient would then undergo the 'psychic driving' procedure" (Cooper report, at p. 19).

[102] Further, the following note is to be found in the Plan administrators' record:

> Jeannine Huard
>
> - BC rec'd
>
> - Med evidence submitted does not indicate departening (sic) but does state negative driving + use of drugs.
>
> - It appears as though psychic driving followed either sensory deprivation or depatterning pp19
>
> Request info from Allan Memorial

[103] *Prima facie* the applicant's argument has a reasonable chance of success.

[104] Relying on what Beaudry J. held in *Kastner, supra*, the applicant may reasonably maintain that the manager here asked the wrong question by not considering whether being subject to psychic driving sessions made the existence of a "depatterning treatment" within the meaning of the Order more likely than its non-existence.

[105] Of course, without deciding the point, the applicant undoubtedly may reasonably maintain also that the administrators of the Plan should have ensured, before making a final decision, that the applicant's complete medical record was provided by the hospital and that, if a complete record was not obtained, explanations were at least sought from the hospital, which does not appear to have been the case here (and this would be contrary to a rule of procedural fairness).

[106] It is true that the applicant's intention to seek judicial review of the decisions in question was not always maintained and, in my opinion, no legal barrier existed to the bringing of the proceedings at bar. However, this is not sufficient as such in the case at bar for me to dismiss the

instant motion for an extension in the exercise of my discretion. Here I must consider all the circumstances and the applicant's explanations as a whole.

[107] Speaking of the reasons she did not act sooner, the applicant explained in her affidavit: [TRANSLATION] "I always thought that I was entitled to compensation, but after the two actions I took [the two actions which the plaintiff took in 1993 with the manager and the departmental committee seeking review of the initial decision, including contacting her member of parliament], I was discouraged and I thought I couldn't do anything more; especially when my financial situation did not allow me to hire counsel or to do any research". Accordingly, it was not until after having read the *Kastner* decision that she decided, in March 2005, to give her counsel [TRANSLATION] "instructions". At that time, the latter [TRANSLATION] "explained the difficulties and the need for lengthy research into facts and law in order to bring an action which he described as a class action". In view of the very special circumstances of the case which have already been mentioned in these reasons, the applicant's explanations appear to this Court to be convincing.

[108] I also accept that the existence of some hardship may be presumed from the passage of a lengthy period of time. However, that presumption is not irrebuttable and may be rebutted by consideration of the facts in the record, which is the case here. I also entirely concur with counsel for the applicant that it is the nature of the hardship which the respondent might possibly suffer that should be considered here.

[109] The allegations of potential hardship made by the respondent are not based on the extent of the difficulties the respondent might eventually incur with regard to evidence, such as when relevant

documents have been destroyed and witnesses have died or their memories become feeble because the facts in question occurred too long ago. The fact that the manager who made the impugned decisions is currently engaged in other duties also is not a conclusive point, any more than the administrative hardships which the Department of Justice might eventually suffer through the setting aside of the impugned decisions. It is the Order itself which establishes the right claimed by the applicant in the case at bar. The Order has not been revoked, and it is the Minister himself who is ultimately responsible for the making of a $100,000 *ex gratia* payment, in cases where the conditions of the Order have been met.

[110] In principle, it should be recalled, without deciding the question here, that evidence which the manager did not have before him is not admissible in a judicial review proceeding to determine the reasonableness of his decision (*Kastner, supra*, at paragraph 16). In the case at bar, the record available to the Plan administrators and Blue Cross for making the impugned decisions has already been filed by the respondent in his reply record.

[111] I also cannot assume at this stage that hardship will be caused to the respondent if the application for judicial review is subsequently transformed into a class action. The respondent may undoubtedly at the proper time argue that this is one of many factors that should be considered by the Court in dismissing a subsequent motion for conversion, if the applicant ever files a motion for her application for judicial review to be transformed into a class action. For the moment, the Court must consider whether the applicant's application for an extension should be allowed in the interests of justice, and not consider the chances that her application for judicial review could eventually be

transformed to a class action. Moreover, no valid motion to this effect has been submitted to the Court.

[112] In short, exercise of the discretion to grant or deny an application for an extension rests essentially on considerations of the public interest and sound judicial administration, which is illustrated by the fact that the deadline for challenging a decision of a federal board is usually 30 days, and this is very short (*Grenier v. Canada*, 2005 FCA 348; *Tremblay v. Canada*, 2006 FCA 90). However, this situation is undoubtedly an unusual one in which the interests of justice require that an extension be granted.

[113] In conclusion, the arguable nature of the applicant's case in the case at bar seems to the Court to be conclusive. Not only does the applicant here have serious questions for the Court to decide, but in my opinion, based on the evidence in the record and the submissions made by counsel, the applicant also has a reasonable chance in administrative law of having the manager's decision set aside on the ground that it is vitiated by an error of fact and law or is otherwise unreasonable in the circumstances. Further, I am also taking into account here the fact that the applicant has not always had a consistent intention of pursuing her claim. However, the Court must also consider the lack of any real hardship to the respondent, the reasonable explanations given by the applicant, the special nature of the fundamental rights in question, and the historical background leading to adoption of the Order pursuant to which the impugned decisions were made. Considering all the factors mentioned in *Grewal*, the remedial purpose and humanitarian nature of the Order, and the very special circumstances of the case at bar, this in my humble opinion is a case in which the

interests of justice require the Court to extend the deadline for filing an application for judicial review.

ORDER

THE COURT ALLOWS THE MOTION AND ORDERS:

1. The deadline for filing the application for judicial review is extended to this date;
2. The applicant's notice of application for judicial review will be served and filed in the Court within 30 days of this order;
3. Costs in the cause.

"Luc Martineau"
Judge

Certified true translation
Mavis Cavanaugh

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	06-T-13
STYLE OF CAUSE:	JANINE HUARD -and- ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 10, 2007
REASONS FOR ORDER AND ORDER BY:	Martineau J.
DATED:	February 20, 2007

APPEARANCES:

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Frédéric Paquin André Lespérance	FOR THE RESPONDENT

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