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SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000065-983

DATE: March 29, 2010

BY: THE HONOURABLE DANIEL H. TINGLEY, J.S.C

IN THE MATTER OF TWO APPEALS FILED PURSUANT TO THE RULES FOR APPEALS UNDER THE PRE-1986/POST-1990 HEPATITIS C SETTLEMENT AGREEMENT APPROVED ON JUNE 7th, 2007 IN GUY DESJARDINS ET AL c. LE PROCUREUR GÉNÉRAL DU CANADA ET AL, S.C.M. 500-06-000065-983

BETWEEN :

CLAIMANT FILES : 07-08808 and 07-08809
Claimants/Appellants

and

THE ADMINISTRATOR
Respondent

JUDGMENT

(In appeal from two Decisions of the Appeals officer released February 16, 2009)

[1] These are appeals from two decisions of an Appeals officer appointed pursuant to the terms of the Rules for Appeal comprised in the abovementioned Pre-1986/Post-1990 Hepatitis-C Settlement Agreement (Agreement). The Personal representative of the estates of two deceased brothers (Claimants) made claims for compensation

pursuant to the Agreement which were denied by the Administrator charged with overseeing the distribution of compensation payments. The Claimants appealed the Administrator's decisions to an Appeals officer who dismissed them, thus confirming the Administrator's denial.

[2] The Agreement is pan-Canadian in scope, as was a prior agreement (the 1986-1990 Agreement) concluded to compensate persons who were infected with Hepatitis C in Canada between 1986 and 1990. Under the terms of the Agreement, persons who were infected with Hepatitis C in Canada through a blood or specified blood product transfusion prior to January 1st, 1986 or from July 2nd, 1990 to September 28, 1998 are entitled to varying degrees of compensation. One difference between otherwise similar agreements is that the Agreement compensates infected persons in certain cases according to disease levels whereas the 1986-1990 Agreement did not.

[3] The claims made by the Personal representative for her two deceased brothers – one died in 1987, the other in 1989 – under the Agreement were denied as she had previously made the same claims pursuant to the 1986-1990 Agreement for which compensation had been received of approximately \$129,000 in each case.

STANDARD OF REVIEW

[4] The Rules for Appeal comprised in the Agreement stipulate that the Court shall only interfere with a decision of an Appeals officer:

- "a. on a matter of law;
- b. where an Appeals officer has exceeded his or her jurisdiction; or
- c. where the decision of the Appeals officer is patently unreasonable."

[5] The "patently unreasonable" standard of review has since been modified to a standard of "reasonableness simpliciter" as explained in the recent judgment of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*.¹

REASONS FOR APPEALS

[6] While acknowledging that the deceased brother's estates received compensation under the 1986-1990 Agreement, their Personal representative submits that they are class members of the [Pre 1986/Post 1990 Hepatitis C] Agreement because the 1986-1990 Agreement did not compensate for "disease level", reiterating that as the Agreement pays according to "disease level this time", the 1986-1990 Agreement is irrelevant.

¹ (2008) 1 S.C.R., 190, especially at paragraphs [45] to [47] inclusive.

[7] The Personal representative adds that the decisions of the Appeals officer are unreasonable as well as wrong in law, referring to an attachment letter she wrote to the Court on February 27, 2009. This letter focuses on a comparison between the Agreement and the 1986-1990 Agreement concluded in respect of persons who were infected with Hepatitis C in Canada between 1986 and 1990. The Personal representative concludes that she finds the 1986-1990 Agreement:

"[...] to not be fair, and all those who just got 120,000 per person should be entitled to at least receive the difference from one settlement to the other one, and this is why legally we believe that [the deceased persons' estates] should get the difference of 105,000 [...] and by the way this is not double dipping as your administrator has said we're trying to do, not true."

CLASS MEMBERS UNDER THE AGREEMENT

[8] Only Class Members as defined under the Agreement can receive compensation from Canada pursuant to its terms.² Class membership is a threshold requirement.

[9] Reading together the definitions in the Agreement of the expressions "Class Members", "HCV Infected Class Member", "HCV Personal Representative", "Primarily-Infected Class Member" and "Primarily-Infected Hemophiliac", it is evident that neither the Personal representative nor her deceased brothers qualify as "Class Members" under the Agreement, as they were all class members under the 1986-1990 Agreement.³ Class Members under the 1986-1990 Agreement are expressly excluded from class membership under the Agreement.

[10] The Agreement is the law affecting the rights of the Claimants to receive compensation from Canada. As a threshold requirement, they had to establish they were "Class Members". They cannot, as they have already received compensation from Canada under the terms of the 1986-1990 Agreement.

DUTIES OF THE ADMINISTRATOR

[11] The duties and responsibilities of the Administrator to administer the Compensation Plan include those mentioned in paragraphs (a) to (l) inclusive of Article Eight of the Agreement. Nowhere in the Agreement or in any Approval Orders of the Court does the Administer have the right or power to ignore, waive or refuse to apply any of the provisions of the Agreement on grounds of fairness or otherwise.

² See Articles Two, Three, Four and Seven of the Agreement.

³ As noted in the decisions of the Appeals officer (at paragraphs 7, 8 and 9) and the Administrator ("Since you or the HCV Infected Class Member is a Class Member of the 1986-1990 Hepatitis C Settlement Agreement, your claim must be rejected as it does not meet the criteria for class membership under the [Agreement].")

[12] The Administrator is bound to observe, apply and enforce the terms of the Agreement, providing in essence that all claims whatsoever relating to or arising from the infection of persons with Hepatitis C through the blood system during the Class Period "are to be settled on the terms set out in this Agreement."⁴

THE FAIRNESS ISSUE

[13] The Personal representative takes issue with the fairness of the 1986-1990 Agreement as its Compensation Plan does not appear to her to be as generous as the Plan provided in the Agreement. It should not be forgotten that the Compensation Plan of the Agreement was crafted almost a decade after the execution of the 1986-1990 Agreement.

[14] The relative unfairness of the Compensation Plan in the 1986-1990 Agreement in relation to the Plan in the Agreement is not something that either the Administrator or the Court can remedy for the reasons mentioned above.

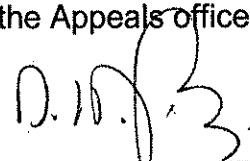
[15] However, an analysis of the Plan in the Agreement leads to the inescapable conclusion that the "disease level" of each of the complainants would have had no impact on the amount of compensation payable to them, assuming they were Class Members. They would have been eligible for compensation under paragraph 3.02 of the Agreement by the payment of a fixed amount as therein determined, with indexation. This was also the case under the 1986-1990 Agreement.

CONCLUSION

[16] The Agreement was modeled on its predecessor, the 1986-1990 Agreement, designed to extend coverage to persons infected with Hepatitis C in Canada prior to and after the infection period contemplated in the 1986-1990 Agreement. The Claimants were infected prior to and during the period contemplated in the 1986-1990 Agreement. Both agreements provided for the compensation of deceased persons in the same manner. There is nothing in this that is either "unfair" or "irrelevant".

[17] **FOR ALL OF THESE REASONS, THE COURT:**

[18] **DISMISSES** the Appeals from the decisions of the Appeals officer.



DANIEL H. TINGLEY, J.S.C

⁴ As set out in the "Therefore" clause preceding Article One of the Agreement.