

**IN THE MATTER OF AN APPEAL PURSUANT TO THE HEPATITIS C
PRE-1986/POST-1990 CLASS ACTION SETTLEMENT AGREEMENT
(McCarthy, et al. v. Canadian Red Cross Society
Court File No. 98-CV-143334)**

BETWEEN

Claimant File 07-01880

- and -

The Administrator

(On an appeal of the decision of D. McGillis, Q.C., released on June 11, 2010)

Reasons for Decision

WINKLER C.J.O.:

Nature of the Appeal

1. This is an appeal of a decision of an Appeals Officer appointed pursuant to the terms of the Settlement Agreement in the pre-1986/post-1990 Hepatitis C litigation. The Claimant made a claim for compensation pursuant to the Agreement which was denied by the Administrator charged with overseeing the distribution of the settlement monies. The Claimant appealed the denial to an Appeals Officer, who upheld the decision of the Administrator and denied the appeal.

Background

2. The Settlement Agreement is Pan-Canadian in scope. Under the Agreement, persons infected with Hepatitis C in Canada through a blood or specified blood product transfusion prior to January 1, 1986 and from July 2, 1990 to September 28, 1998 are entitled to varying degrees of compensation.

Standard of Review

3. Paragraph 30 of the *Rules for Appeals* document that was court approved pursuant to the Settlement Agreement sets out the following standard of review:

The Court shall interfere with an Appeals Officer only:

- a. on a matter of law;
- b. where an Appeals Officer has exceeded his or her jurisdiction; or

- c. where the decision of an Appeals Officer is patently unreasonable.

4. Subsequent to the court approval of the *Rules for Appeals*, the Supreme Court of Canada released its decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, in which the court held that the standard of review of patent unreasonableness shall no longer be applied on judicial reviews. As a result of this decision, the standard of review on judicial reviews must be either reasonableness *simpliciter* or correctness.

5. Although appeals under the Settlement Agreement do not constitute judicial reviews, the standard of review set out in paragraph 30 of the *Rules for Appeals* is similar to the standard of review that had been applied in judicial review cases prior to the *Dunsmuir* decision. In light of the *Dunsmuir* decision, it is now appropriate to apply a standard of reasonableness *simpliciter* rather than patent unreasonableness when assessing the decisions of Appeals Officers, notwithstanding the wording of paragraph 3(c) of the *Rules for Appeals*.

Facts

6. The Claimant was diagnosed with Hepatitis C in April 1994. On the evidence, there are two possible sources through which the Claimant could have contracted the disease: a blood transfusion or non-prescription intravenous drug use.

7. In May 1979, the claimant was injured in a dirt biking accident. His spleen was ruptured and his kidney badly damaged. During surgery, he received five units of blood. A traceback was performed on all five units. Although two of the units tested negative for the HCV antibody, unfortunately, the remaining three units were untraceable.

8. The Claimant has also admitted to using non-prescription intravenous (“IV”) drugs. In 1975, at the age of 18, he twice injected speed using intravenous needles. He asserts that the needles were previously unused and that his experience with IV drugs is limited to these two occasions.

9. After the Claimant’s initial claim for compensation, a medical specialist provided the Administrator with an opinion, which focused on how the Claimant was likely exposed to HCV. In a letter dated October 14, 2009, the medical specialist stated the following:

I have reviewed the file of the above named claimant as requested...The difficulty in assessing the likelihood of infection is that from a time perspective it is impossible to ascertain whether he was more than likely infected in 1975 [through IV drugs] or 1979 [through a blood transfusion].

After reviewing both possible sources of infection, the medical expert continued:

I would have to conclude that there would be a similar risk to acquiring hepatitis C from either one of these two risk exposures. Unfortunately, there is no additional

information that enables me for example to look at liver function tests at the time of his admission to hospital in 1979 to see if his liver functions were elevated prior to his obtaining a blood transfusion... In conclusion, both periods are possible exposure points but I am unable to state that one point is much more likely than the other.

10. This medical opinion became the basis for the Administrator's decision to deny the Claimant's claim for compensation. In its final decision, under the heading "Reasons for Decision", the Administrator stated:

In your original application you advised that you had used Non-prescription intravenous drugs. The Medical Expert was unable to determine when you were more likely infected. The Administrator has reviewed the entire claim including the opinion of the medical specialist as directed by the Courts. The medical evidence on file does not support that on a balance of probabilities you were infected for the first time with Hepatitis C from your Blood transfusions in 1979. Based on this conclusion your claim must be rejected.

11. In his appeal – in response to the Administrator's final decision, as well as the medical opinion on which it relied – the Claimant provided additional medical records to the Appeals Officer. Specifically, the Claimant provided a series of blood tests, which were administered between 1977 and 1979 in relation to the Claimant's possible exposure to mononucleosis. These various blood tests are potentially significant because they were carried out in close proximity to the Claimant's blood transfusion. The Claimant's blood tests can be grouped into two periods of time: a) those conducted after the Claimant's use of intravenous drugs but before his blood transfusion; and b) those conducted after his blood transfusion.

12. The Appeals Officer gave careful consideration to the newly disclosed evidence. However, in the end, she did not find the results of these tests persuasive. At paragraph 38 of her decision, she stated the following:

The laboratory records delivered on appeal do not provide any information concerning the two factors that would have assisted the medical specialist in providing a more definitive response concerning the likelihood of the source of the Hepatitis C infection in the Claimant.

13. Instead, the Appeals Officer chose to rely upon the evidence of the medical specialist, as the Administrator had before. At paragraph 28, she stated the following:

... the medical specialist concluded in the opinion reproduced at paragraph 13 that the Claimant had a "similar risk" of acquiring Hepatitis C from either his non-prescription intravenous drug use in 1975 or his blood transfusion in 1979. The Claimant did not deliver any evidence that would contradict the conclusion of the medical specialist or establish that he had "more likely" contracted Hepatitis C from the blood transfusion. In the circumstances, he has not established on the balance of probabilities that he "[...] was infected for the first time with HCV by blood in Canada during the Class Period", as required by subsection 2.01(3) of the *Settlement Agreement*. The Administrator therefore did not commit an error in denying the application for compensation.

14. Based upon this analysis, the Appeals Officer upheld the Administrator's decision and denied the Claimant's claim for compensation.

Analysis

15. The Claimant seeks compensation under the Settlement Agreement as a Primarily-Infected Class Person. In light of his history of intravenous drug use, section 2.01(3) of the Settlement Agreement must be applied. The Claimant therefore bears the burden of establishing, on the balance of probabilities, that he was infected with HCV for the first time by receiving blood in Canada during the Class Period.

16. The Claimant relies upon the results of his 1978-79 blood tests, as well as his relative good health prior to, and poor health following, his blood transfusion.

17. According to the Claimant, he experienced good health prior to his blood transfusion, and it was only after his transfusion that his health began to deteriorate. The Appeals Officer viewed this assertion skeptically. Indeed, she placed significant emphasis on the fact that the Claimant had been tested for mononucleosis before his blood transfusion, which she believed evidenced his declining health. At paragraph 39 of her decision, she stated the following:

Essentially, the Claimant indicated that he was always in good health until he was diagnosed with mononucleosis after his blood transfusion in 1979. However, the laboratory record dated February 2, 1978 indicates that he was tested for mononucleosis in 1978, over one year prior to his blood transfusion. Although the test was negative, it nevertheless demonstrates that the Claimant was experiencing health problems that led a physician to order a blood test for mononucleosis more than one year before the blood transfusion.

18. However, the Claimant, in his Request for Appeal, provided a reasonable explanation for these various mononucleosis tests – an explanation that was not available to the Appeals Officer at the time of her decision. In 1978, the Claimant voluntarily underwent testing because a family member had been diagnosed with mononucleosis. In other words, he preemptively underwent testing because of a possible exposure to the virus, not because his health was declining. Conversely, in 1979, after he began to exhibit symptoms associated with mononucleosis – including fatigue, fever, decreased appetite – his physician ordered several blood tests. Notably, the symptoms of mononucleosis are similar to those exhibited during the acute stage of HCV,¹ a fact which adds further credibility to the Claimant's version of events.

19. Furthermore, there are the actual results from the 1978-79 blood tests. A blood test provides information about the cells in an individual's blood. Abnormal elevations of certain cells – for example, white blood cells or the enzymes alanine transaminase (ALT, historically known as SGPT) or aspartate transaminase (AST, historically known as

¹ The existence of HCV had not yet been discovered, which would explain why the Claimant was not diagnosed with the disease at the time.

SGOT) – are indicia of hepatic stress. While by no means conclusive, such indicia could demonstrate that an individual was experiencing problems with their liver.

20. As noted above, the Claimant's blood tests fall into one of two periods of time: after his use of intravenous drugs but before his blood transfusion; and after his blood transfusion. With respect to the former, the Claimant did not exhibit any signs of hepatic stress. Conversely, with respect to the latter, the SGOT and SGPT counts were well outside of their normal range, an indication the Claimant was experiencing problems with his liver.

21. The information outlined above was not available to the medical specialist at the time of his analysis. In my view, this information – particularly the 1978-79 blood tests when compared against each other – address what the medical specialist described as a lack of information concerning the Claimant's liver function both before and after his transfusion. The 1978-79 blood tests reasonably demonstrate that the Claimant experienced hepatic stress after his blood transfusion but not prior to it. The Claimant also appears to have experienced relative good health prior to his transfusion and declining health following it. It is therefore reasonable to conclude that the medical specialist's opinion would have been different had this information been provided to him.

22. In consideration of the foregoing, it is my view that the Claimant has established, on the balance of probabilities, that he was infected with HCV for the first time through a blood transfusion.

Result

23. The appeal is granted. The Claimant is entitled to compensation under the Settlement Agreement on the basis that he is a Primarily Infected Class Member. The claimant's claim is hereby remitted to the Administrator, who shall determine the amount of compensation payable to the claimant, and shall make the appropriate payments.



Winkler C.J.O.

Released:

April 1, 2011