

**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 08-14351

- and -

The Administrator

(On an appeal of the decision of D. McGillis, Q.C., released on January 4, 2011)

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 Settlement 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.

Facts

3. The Claimant is an Ontario resident who is infected with the hepatitis C virus. At issue is whether the Claimant was infected for the first time as a result of receiving blood in Canada.

4. In the Blood Transfusion History Form submitted as part of his application under the Settlement Agreement, the Claimant indicated that he received three units of blood in May 1977 as a result of a motor vehicle accident which occurred at that time. The Claimant does not refer to any other blood transfusions on this form.

5. The Claimant's medical records confirm that he did in fact receive three units of blood on May 21, 1977. Canadian Blood Services successfully completed Tracebacks in relation to two of these units, the donors of which were found not to be HCV positive. The Traceback could not be completed in regard to the third unit of transfused blood, as the donor could not be located. As such, there is no way to know whether the donor of the third transfused unit was infected with the hepatitis C virus.

6. According to a letter sent by the Claimant to the Administrator dated July 10, 2009, the Claimant also has a history of non-prescription intravenous drug use ("IV drug use"). The Claimant admitted to four "isolated incidents" of IV drug use in 1976, stating that in each incident he used only new, sterile and unshared needles.

7. The Settlement Agreement, at s. 2.01, provides as follows:

- (1) A person claiming to be a Primarily-Infected Class Member must deliver to the Administrator an application form prescribed by the Administrator together with:

[...]

- (c) a statutory declaration of the claimant including a declaration

- (i) that he or she has never used non-prescription intravenous drugs [...]

- (2) [...]

- (3) Notwithstanding the provisions of Section 2.01(1)(c), if a claimant cannot comply with the provisions of Section 2.01(1)(c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the Administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by Blood in Canada during the Class Period.

8. Pursuant to the Settlement Agreement, a court-approved protocol outlines the procedure to be applied where, among other things, a claimant has admitted a history of IV drug use. The protocol contains the following provisions:

3. If a Traceback is not required to be conducted under the Traceback Protocol or the claim is not rejected under the Traceback Protocol, the Administrator shall:
 - a. obtain such additional information and records pursuant to section 2.03 of the Settlement Agreement as the Administrator in its complete

discretion considers necessary to inform its decision; and

- b. obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV infection and the disease history of the HCV Infected Class Member is more consistent with infection at the time of the receipt of Blood or the secondary infection or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.
4. The Administrator shall weigh the totality of evidence obtained including the evidence obtained from the additional investigations required by the provisions of this Protocol and determine whether, on a balance of probabilities, the HCV Infected Class Member meets the eligibility criteria of the Settlement Agreement. The burden to prove eligibility is on the claimant. The Administrator shall assist the claimant by advising what types of evidence will be useful in meeting the burden of proof in accordance with this Protocol.
 5. In weighing the evidence in accordance with the provisions of this Protocol, the Administrator must be satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision. If the Administrator is not satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision, the Administrator shall reject the claim.
 6. Examples of the evidence the Administrator may require to inform its decision include the following:
 - a. [...]
 - b. the medical and clinical records from any or all hospitalizations and treating physicians for the HCV Infected Class Member for such time frame as the Administrator considers relevant;
 - c. [...]
 - d. an affidavit from the HCV Infected Class Member and a person who knew the HCV Infected Class Member at the time he/she used non-prescription

intravenous drugs describing:

- i. whether the drug paraphernalia used was sterile;
 - ii. whether the HCV Infected Class Member shared needles; and
 - iii. the best estimate of the number occasions and time period during which the HCV Infected Class Member used non-prescription intravenous drugs;
- e. [...]
- f. an affidavit or interview of any person the Administrator believes may have knowledge about the non-prescription intravenous drug use or disease history of the HCV Infected Class Member.

9. Pursuant to s. 6 of the protocol, the Administrator requested additional information from the Claimant by letter dated October 20, 2009. The additional information requested consisted of a sworn affidavit and medical records outlining the HCV infection history of the Claimant.

10. The medical records submitted by the Claimant at this point consisted of his full medical chart and a laboratory report confirming positive tests for the hepatitis B and Hepatitis C antibodies.

11. Included in the medical chart was a letter from the Claimant's family physician dated February 7, 2008 which noted that the Claimant had admitted to IV drug use in 1976 using only new, sterile needles. This letter was written at the request of the Claimant in support of his application for compensation under the Settlement Agreement.

12. The Claimant subsequently provided an affidavit sworn by him on November 16, 2009, which stated that the four incidents of IV drug use occurred over the course of a single weekend in December 1976, and that he had never used "any drug paraphernalia that was not sterile." Again, the Claimant stated that he used only sterile needles from an unopened package and did not share needles at any time.

13. The Claimant also provided a complete set of his medical records for the previous five decades.

14. As contemplated by the protocol, the Administrator provided the Claimant's file to Dr. Gary E. Garber, a specialist in infectious diseases, on February 8, 2010. The covering letter from the Administrator requested that Dr. Garber review the Claimant's claim file and "provide an opinion to the Administrator." The opinion sought was clearly

intended to be the opinion called for in s. 3(b) of the protocol, which requires an opinion “as to whether the HCV infection and the disease history of the HCV Infected Class Member is more consistent with infection at the time of the receipt of Blood or the secondary infection or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.”

15. Dr. Garber’s opinion was provided to the Administrator by letter dated July 29, 2010, which stated that “on the balance of probabilities either of these exposures [i.e. transfusion or IV drug use] could have led to an infection with hepatitis C.” Dr. Garber’s opinion letter also included the following notation:

The claimant states that he only used sterile needles. Interestingly there was not an awful lot of publicity on the importance of sharing needles as a source of hepatitis in the 1970s.

16. The Administrator denied the Claimant’s application for compensation by letter dated August 13, 2010. The crucial paragraph of that letter is set out below:

In your original application both you and your Treating Physician advised that you had used Non-prescription intravenous drugs. The Administrator has reviewed the entire claim including the opinion of the medical specialist [Dr. Garber] as directed by the Courts. The Medical expert opined that it was impossible to differentiate whether you were infected through your injection drug use in 1976 or a single untraced blood unit that you received in 1977. Therefore 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 1977. Based on this conclusion your claim must be rejected.

17. The Claimant requested a review of the Administrator’s decision on August 17, 2010. In a letter accompanying his ‘Request for Review Form’, the Claimant noted that he had provided a sworn affidavit to the effect that the IV drug use had exclusively involved sterile, unshared new needles. The Claimant also submitted additional documentation in support of his claim, including a Canada Communicable Disease Report on the prevention and control of hepatitis C and a letter dated September 9, 2010 from his specialist in gastroenterology.

18. The September 9, 2010 letter indicated that the cause of the Claimant’s infection was difficult to determine, and that he would agree with statements contained in the Canada Communicable Disease Report to the effect that blood transfusions carry a higher risk of infection than IV drug use, in light of the respective volumes of contact of each possible method of infection.

19. The Administrator, having reviewed the Claimant’s additional submissions, rejected the application on October 22, 2010. The Administrator provided the reasons for rejection to the Claimant, which included the following paragraph:

As noted in paragraph 5 above the claimant has commented several times on the details of Dr. Garber's opinion. The Court Approved Protocol for Non-prescription intravenous drug use states that the Administrator must obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to **whether the HCV infection and the disease history of the HCV Infected Class Member is more consistent with infection at the time of the receipt of Blood or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.** It must be noted the dates of non-prescription intravenous drug use were in the same time period as the Class period transfusions and therefore Dr. Garber could not determine this. The Administrator relies only upon the Doctor's opinion regarding the HCV Disease history based on the medical evidence provided. (Emphasis added.)

20. The Claimant executed an election to continue his appeal on October 27, 2010.

21. The Administrator's decision was upheld by an Appeals Officer in a decision dated October 27, 2009. In furtherance of his appeal, the Claimant submitted a letter dated November 28, 2010 which set out the evidence which he felt assisted him in satisfying the burden placed upon him by s. 2.01(3) of the Settlement Agreement. First among this evidence was the following:

There are no inconsistencies between my sworn affidavit and my medical records in their totality as submitted. My file evidence supports that I was first infected with Hepatitis C by a Blood transfusion, as the Administrator cannot provide evidence I was not infected by a Blood transfusion. Furthermore, the Administrator has chosen to subjectively dismiss the credibility of my sworn affidavit, with no documented evidence presented to warrant this, in fact, more evidence pointing toward the integrity of my application and the records and doctor's letters contained therein. It then stands to reason, on the balance of probabilities, that the likelihood of my being infected by the Blood transfusion is greater than through a sterile needle, as confirmed in my affidavit.

22. The Claimant also made reference to several articles which suggest that blood transfusions carry a higher risk of transmitting hepatitis C than IV drug use.

23. The decision in the Appeal was delivered by letter to the Claimant on January 5, 2011. The Appeal Officer presented a thorough review of the evidence before her, concluding that the Claimant had not discharged the onus to demonstrate that the infection was more likely caused by the transfusion than the IV drug use.

24. The Appeal Officer assigned no weight to the letter written by the Claimant's family physician, noting that the letter merely repeated information which had been

provided to the physician by the Claimant without independent verification.

25. The Appeal Officer also discounted the value of the opinion of the Claimant's specialist in gastroenterology, noting that the specialist's agreement with the general principle expressed in the articles provided to him by the Claimant did not alter the specialist's underlying opinion that the cause of the Claimant's infection would be 'very difficult' to determine.

26. In reaching her decision, the Appeal Officer considered the Claimant's position that his affidavit evidence had been dismissed without consideration. At paragraph 56, the Appeal Officer noted the following:

In the opinion [of Dr. Garber], the medical specialist cast doubt on the statement of the Claimant that he had only used sterile needles, noting that there was not much publicity in the 1970's concerning the importance of needle-sharing as a source of hepatitis.

27. In addressing the Claimant's submission as to the credibility of his affidavit evidence, the Appeal Officer referred to the excerpt above, writing at paragraph 60:

In the submissions on appeal, [the Claimant] stated that the Administrator had "chosen to subjectively dismiss the credibility" of his sworn affidavit with "no documented evidence" to support it. As noted in paragraph 56, the medical specialist gave reasons for rejecting the affidavit evidence of the Claimant concerning his use of sterile needles and sterile paraphernalia.

28. Based on this finding, the Appeal Officer ultimately held that the Administrator had not erred in denying the application, in that the evidence did not establish on a balance of probabilities that the Claimant had become HCV positive as a result of the transfusion rather than the IV drug use.

29. The Claimant submitted a Request to Appeal form dated January 21, 2011, listing numerous points of law and unreasonableness upon which he contested the Appeal Officer's decision. Several of the arguments as to the unreasonableness of the decisions are set out below:

1. It is my sworn evidence that in my lifetime I have used intravenous drugs on only one occasion during a 36-48 hour period in December of 1976, and that at the time I used four new, previously-unopened, sterile, unshared needles. There is no contrary evidence to undermine my credibility.
2. I have never used any drug paraphernalia that was not sterile and I have never shared needles with other non-prescription intravenous drug users.

Standard of Review

30. 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.

31. 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.

32. 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*.

Analysis

33. In my view, the Appeal Officer properly considered all of the evidence that was before her on the appeal. She may have given the evidence of the medical specialist greater weight but she was entitled to do so. Further, her decisions sets out clearly her reasons for having done so.

34. Where a claimant has a history of IV drug use, regardless of how limited, he or she bears the burden of establishing, on a balance of probabilities, that the hepatitis C infection was not contracted through the IV drug use. That burden does not shift under the agreement. Neither the Administrator nor the Appeal Officer have to establish that the IV drug use was the more likely cause of the infection.

35. The medical evidence on this crucial point is inconclusive, and the Claimant's affidavit evidence as to the circumstances of his IV drug use, without more, cannot establish, on the balance of probabilities, that a blood transfusion of a single untraceable unit of blood is the more likely route of infection.

36. In consideration of the foregoing, I find that the decision of the Appeal Officer was not unreasonable. Where the totality of the medical evidence is inconclusive, a Claimant's uncorroborated affidavit evidence is insufficient to meet the burden of proof required.

Result

37. For the reasons set out above, I find that the decision of the Appeal Officer was not unreasonable. The appeal is dismissed.

38. The Claimant is not entitled to compensation, having failed to discharge the burden of proof imposed upon him by s. 2.01(3) of the Settlement Agreement.



Winkler C.J.O.

Released: July 26, 2011