

**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 Files 08-14662, 08-13831 and 07-10252

- and -

The Administrator

**(On an appeal of the decisions of D. McGillis, Q.C., released on March 16, 2009,
March 16, 2009 and March 24, 2009)**

Reasons for Decision

WINKLER C.J.O.:

Nature of the Appeals

1. The appellants have each appealed decisions of an Appeals Officer appointed pursuant to the terms of the Settlement Agreement in the pre-1986/post-1990 Hepatitis C litigation. I have addressed all three appeals in this single decision because they each involve similar facts and raise an identical issue regarding the interpretation of the Settlement Agreement. That issue is whether the estates of those included in the class as a Family Member under the agreement have a right to claim compensation notwithstanding the death of the Family Member.

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.

Facts

3. The three appeals each involve claims by personal representatives of the estates of deceased Family Members, as defined under the Settlement Agreement. In each case, the personal representative is seeking compensation under section 4 of the Settlement Agreement on the basis of the deceased's status as a Family Member.

4. The following are the pertinent facts specific to each appeal:

Appeal Respecting Claimant File 08-14662

5. This appeal involves a claim by the executrix of the estate of a deceased spouse of an HCV Infected Person. The deceased passed away in 2000.

6. The claim was denied by the Administrator in a decision dated January 16, 2009 on the basis that the estate of the deceased did not have status under the Settlement Agreement. This decision was upheld by an Appeals Officer in a decision dated March 16, 2009.

Appeal Respecting Claimant File 08-13831

7. This appeal also relates to a claim by an executrix of the estate of a deceased spouse of an HCV Infected Person. The deceased passed away on November 28, 2007.

8. The claim was denied by the Administrator in a decision dated November 2, 2008 on the basis that the estate of the deceased did not have status under the Settlement Agreement. The Administrator's decision was upheld by an Appeals Officer in a decision dated March 16, 2009.

Appeal Respecting Claimant File 07-10252

9. This appeal involves a claim by the executrix of the estate of the deceased child of an HCV Infected Person. The deceased passed away on August 31, 2007.

10. The claim was denied by the Administrator in a decision dated January 6, 2009 on the basis that the estate of the deceased did not have status under the Settlement Agreement. The Administrator's decision was upheld by an Appeals Officer in a decision dated March 24, 2009.

Standard of Review

11. Paragraph 30 of the *Rules for Appeals*, approved by the court 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.

12. 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.

13. Although an appeal under the Settlement Agreement is not a judicial review, the standard of review set out in paragraph 30 of the *Rules for Appeals* is similar to the standard of review applicable in judicial reviews 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

14. The issue to be determined in these appeals is whether compensation under the Settlement Agreement must be paid to the estate of a deceased person where that person, prior to his or her death, would have qualified as a Family Member, as defined in the Settlement Agreement. The claims underlying these appeals are advanced through the respective personal representatives.

15. As a starting point, the Settlement Agreement in some respects may be regarded as a contract. The right of a personal representative of the estate of a deceased person to enforce the contractual entitlements of the deceased was considered in *Poirier (Estate) v. Lawson* (1997), 143 D.L.R. (4th) 660 at para. 30 (N.B. C.A.). The court held that:

At common law, death does not terminate a contract or preclude an action for breach of contract, "unless the contract was based on personal considerations, skill or confidence". See G.H.L. Fridman, *The Law of Contract in Canada*, 3rd ed. (Toronto: Carswell, 1994) at page 690 which reads as follows:

3. Assignment by operation of law.

At common law there was a distinction between the effect of death of a party upon his rights and liabilities in respect of torts committed by or against him and the effect of the death of a party to a contract. Death terminated rights of action in tort, as well as liabilities. However, the death of either party did not interfere with the continuation of the contract or an action for breach of contract, unless the contract was based on personal considerations, skill or confidence. Any rights of action that accrued to a party or existed against him could be brought by or against his estate.

16. Notwithstanding that the rights of party to a contract may *simpliciter* survive his or her death, the contract in question is distinct in that it is a settlement pursuant to a certified class proceeding. As such, it requires court approval. Further, the reason that it must be approved by the court is that it affects the rights of non-party class members. Here, the settlement and approval process confers specific rights on class members.

17. In essence, the Settlement Agreement serves as a judgment distribution

mechanism. A global settlement fund has been negotiated by the representative plaintiffs. The manner in which that fund is apportioned amongst the class members is a product of compromise. This is an approach consistent with the established principle that the settlement doesn't have to afford perfect or complete compensation to each and every class member but rather, must be "fair, reasonable and in the best interests of the class" as a whole. Within that context, it is considered acceptable to draw reasonable distinctions between those within the class in regard to the entitlement to, or quantum of, compensation.

18. In this settlement, a distinction is clearly drawn with respect to the entitlement of deceased class members. Section 3 of the Settlement Agreement specifically addresses claims by the estates (Personal Representatives) of deceased HCV Infected Class Members. The entitlement to compensation for those claims is more restricted than that which is accessible by living HCV Infected Class Members. For example, Personal Representatives of HCV Infected Class Members who died prior to January 1, 1999 are only entitled to compensation where it can be established that the deceased's death was caused by hepatitis C and only if the deceased attained disease level 4 or greater prior to death. Living HCV Infected Class Members are, in contrast, entitled to compensation upon demonstrating proof of an infection with hepatitis C through the receipt of blood.

19. It is telling that the agreement is silent with respect to the estates of deceased Family Members. Given the complexity of the agreement, the clear intention to distribute compensation in accordance with specific terms and the inclusion of a provision dealing with, and limiting, estate claims, there can be no other conclusion than that the estates of deceased Family Members are not entitled to compensation.

Result

20. In my view, the Appeals Officer's decisions do not contain errors on matters of law, nor are they unreasonable or outside of the Appeals Officer's jurisdiction. Accordingly, the Appeals Officer's decisions are affirmed.


Winkler C.J.O.

Released: March 25, 2010