

**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 07-07327

- and -

The Administrator

(On an appeal of the decision of D. McGillis, Q.C., released on March 23, 2009)

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. This is a claim by the personal representative of a deceased person for compensation pursuant to section 3 of the Settlement Agreement. The personal representative asserts that the deceased was a Primarily-Infected Person, as defined under the Settlement Agreement.

7. The deceased tested positive for HCV antibodies on October 5, 1993. It is alleged that the deceased was infected with hepatitis C as a result of blood or blood products that he received in 1977 and 1985.

8. The deceased passed away on April 13, 1998. His death certificate indicates that the immediate cause of death was “metastatic brain cancer – primary site unknown”.

9. In a note dated October 4, 2001, the deceased’s physician, Dr. D. Leigh Carson, provided the following comments regarding the cause of the deceased’s death:

In regards to his cause of death: he died with metastatic cancer of the brain. The family declined a brain biopsy in 1998 when the patient was critically ill, therefore an exact diagnosis is not possible. An abdominal u/s prior to his death demonstrated a normal liver except for a cyst. Thus cancer of the liver is unlikely.

10. As part of his application for compensation under the Settlement Agreement, the personal representative arranged to have Dr. Carson complete a Treating Physician Form. Dr. Carson initially indicated on this form that the Claimant was at disease level one at the time of his death. Dr. Carson did not initially check off a “yes” or “no” box to indicate whether the Hepatitis C virus materially contributed to the deceased’s death, but instead wrote: “unknown - died from metastatic cancer to the brain primary site unknown”.

11. Dr. Carson later revised the comments that he made on the Treating Physician Form to indicate that the deceased had attained disease level three. He also checked off a box indicating that Hepatitis C materially contributed to the deceased's death, and provided the following comment:

The [deceased] died of metastatic brain cancer. Although the site of primary cancer was never identified, it is conceivable that it may have developed in the liver, secondary to his long standing Hepatitis C infection.

12. The personal representative's claim was denied by the Administrator in a decision dated July 29, 2008 on the basis that the deceased had not attained disease level four or higher and that there was insufficient evidence to establish that the deceased's death was caused by hepatitis C. The Administrator's decision was upheld by an Appeals Officer in a decision dated March 23, 2009.

Analysis

13. The deceased passed away prior to January 1, 1999. Accordingly, the personal representative's claim can only succeed if he can deliver the proof required pursuant to section 3.02 of the Settlement Agreement, including:

- 1) the proof required under section 2.01 of the Settlement Agreement (ie: proof that the deceased was infected with Hepatitis C and that he received blood in Canada during the Class Period);
- 2) proof that the deceased's death was caused by his HCV infection (section 3.01(d) of the Settlement Agreement); and
- 3) proof that the Claimant attained disease level four or higher (section 3.02(5) of the Settlement Agreement).


14. In my view, the personal representative has been unable to fulfill requirement #2. Taking the statement of Dr. Carson at its highest, that it was "conceivable" that the deceased's metastatic brain cancer, which caused his death, "may have developed in his liver, secondary to his longstanding hepatitis C infection" does not establish that it was more likely than not that the hepatitis C virus caused the deceased's death.

15. The personal representative has also been unable to fulfill requirement #3. Dr. Carson initially indicated that the deceased had attained only disease level one but later indicated that he had attained disease level three. There is no suggestion by Dr. Carson or any other medical professional that disease level four was attained.

Result

16. In my view, the Appeals Officer's decision does not contain errors on matters of

law, nor is it unreasonable or outside of the Appeals Officer's jurisdiction. Accordingly, the Appeals Officer's decision is affirmed.



Winkler C.J.O.

Released: March 25, 2010