

**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 07-04822**

**- and -**

**The Administrator**

**(On an appeal of the decision of D. McGillis, Q.C., released on April 9, 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 court approved *Rules for Appeals* document that was court approved pursuant to the Settlement 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.

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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 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 claim has been brought by the personal representative of a deceased person. The personal representative asserts that the deceased person qualified as a Primarily-Infected Class Member under the Settlement Agreement.

7. The hospital records indicate that the deceased person tested negative for the Hepatitis B antigen on December 13, 1978. Hospital records further indicate that the deceased person received blood transfusions on August 6 and 10, 1979 at two different hospitals. The Traceback report from Canadian Blood Services provides that Hepatitis C was ruled out in 14 of 24 units transfused at one hospital, but there were no records regarding 5 units of product transfused at the second hospital.

8. On December 14, 1979, the deceased person was admitted to hospital, presented with jaundice and was diagnosed with severe cirrhosis of the liver.

9. The deceased person died on January 14, 1980. The autopsy was performed on the date of death and the autopsy report indicated that the deceased had cirrhosis of the liver (post necrotic) with ascites. Deep jaundice of the skin was also noted.

10. A certified specialist in internal medicine and nephrology involved in, among other things, the investigation and management of patients with various liver diseases, including Hepatitis C, reviewed the deceased person's available medical information in 2008. The specialist prepared two letters on the basis of the information he reviewed.

11. In the first letter, the specialist concluded that the deceased person “suffered from advanced liver disease – cirrhosis, as noted on the autopsy examination, and its complications (esophageal varices, ascites and possibly splenomegaly), and some these [sic] were likely present in 1977”. He went on to conclude as follows:

“As the blood test for hepatitis C (anti-HCV) was not available at the time, it would be impossible to exclude the possibility of hepatitis C, as the cause of cirrhosis in this man. In 1980, the term hepatitis C was not coined and then it was classified as non-A, non-B hepatitis. I do not have the results of hepatic transaminase levels to review. Other causes of inflammatory hepatitis (autoimmune) can not [sic] be excluded based on the limited information available.

In conclusion, based on the above facts and to the best of my knowledge, the probability of an infectious or inflammatory hepatitis – whether viral or non-viral causing the cirrhosis is high and the likelihood of alcoholic or non-alcoholic liver disease is low. Toxic or ischemic liver disease was less likely as there was no evidence of necrosis.”

12. In a subsequent letter written to clarify his first letter, the specialist concluded as follows:

“I would like state [sic] and try to make it as clear as possible based on the limited information that Mr. Cosco, who died in January of 1980, had advanced liver disease, as documented by autopsy.

In all probability, the cause of advanced liver disease was infectious or inflammatory hepatitis likely of viral etiology. Hepatitis C as the cause of hepatic dysfunction, cirrhosis and terminal jaundice can not [sic] be excluded based on limited information, 28-years after death.

As hepatitis C testing was not available then, it would be impossible to exclude or establish a definitive diagnosis, however, associative information favours inflammatory pathology like hepatitis B or C.

The likelihood of hepatitis (B or C), as evidenced by inflammatory cell infiltration and absence of fatty metamorphosis on autopsy examination, is higher based on limited information. This may have been related to blood transfusion, as he had received during his lifetime. It is highly unlikely that the advanced liver disease and terminal jaundice were secondary to any other cause.”

13. I have reviewed and considered the Claimant’s submissions as set out in her Request for Appeal. The main points of those submissions are as follows.

14. The Claimant notes that the Traceback report reveals that 15 units of blood

received by the deceased person in August 1979 could not be tested to rule out Hepatitis C. In these circumstances, the Claimant submits that the “presumption” should be that the deceased was infected with Hepatitis C as a result of the blood transfusions.

15. The Claimant further submits that the specialist affirmed the likelihood of a diagnosis of either Hepatitis B or Hepatitis C. The Claimant asserts that blood donors were screened for Hepatitis B starting in the 1970’s; however, screening for Hepatitis C did not begin until the 1990’s. The Claimant argues that it is therefore reasonable to assume that the deceased person was infected with Hepatitis C from the blood transfusions.

### **Analysis**

16. First, the Claimant’s submission that blood was screened for Hepatitis B starting in the 1970s is supported by The Report of the Krever Commission. This information does not appear to have been provided to the Appeals Officer in the course of the appeal. The Report indicates that by 1972, a test for Hepatitis B was fully implemented in all blood centres operated by the Canadian Red Cross Society (*Final Report of the Commission of Inquiry on the Blood System in Canada* at page 616). Given the authoritative status of the Krever Report, judicial notice of this fact may be taken in accordance with the test established by the Supreme Court of Canada in *R. v. Williams*, [1998] 1 S.C.R. 1128 at paragraph 54.

17. The specialist concluded that the cirrhosis of the liver in the deceased person was likely caused by Hepatitis B or Hepatitis C. While I do not agree with the Claimant’s submission that there is a “presumption” that the deceased was infected with Hepatitis C, given the fact that blood products were then being screened for Hepatitis B, there is force to the Claimant’s submission that it is reasonable to conclude that the deceased person was more likely infected with Hepatitis C than Hepatitis B.

18. Given the passage of time, it is impossible to say with certainty whether the deceased person’s death was caused by Hepatitis C. However, considering the evidence in its totality and the submissions of the Claimant, it seems more likely than not that the deceased person’s death was caused or materially contributed to by Hepatitis C.

19. Further, as I stated in respect of another recent appeal, “this is a case where the principle that, with respect to class membership, if an error is to be made it should be on the side of inclusion rather than exclusion should be invoked. I am not convinced, in consideration of the totality of the evidence, that justice would be done were this claim to be rejected.”

### **Result**

20. The appeal is allowed. The Claimant is entitled to compensation under the Settlement Agreement on the basis that the deceased person qualified as 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 arrangements to pay out this amount.



Winkler C.J.O.

Released: Dec 21, 2009

