

**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 07-00826

- and -

The Administrator

(On an appeal of the decision of D. McGillis, Q.C., released on May 7, 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. The Claimant is an Ontario resident who is infected with hepatitis C. She is seeking compensation pursuant to the Settlement Agreement as a Primarily-Infected Person.

7. The Claimant asserts that she received blood in April 1985 at Branson Hospital (now North York General Hospital) in connection with a hysterectomy. According to the Claimant, she lost so much blood during the hysterectomy procedure that she thought she was “bleeding to death”.

8. The Claimant’s medical records include a letter from a Dr. E.J. Heathcote to the Claimant’s family physician dated December 1, 1997, which Dr. Heathcote indicates, among other things:

The past medical history is remarkable for the following: 1) Cervical cancer requiring hysterectomy in 1984. To the [Claimant's] knowledge, she was not transfused of blood during or after the surgery.

9. The Claimant relies on a letter from a liver clinic nurse to the Claimant’s family physician, dated August 12, 2005, which states, “As you know, [the Claimant] has chronic Hepatitis B likely infected from blood transfusions received back in the ‘80s.”

10. A traceback was performed by Canadian Blood Services pursuant to the terms of the Settlement Agreement. In its final traceback report, dated October 10, 2008, Canadian Blood Services indicated the following:

Hospital: North York General Hospital-Branson site, North York ON

Comments:

Timeframe searched 1957-2008

The Branson Hospital reported:
Patient record available; Not transfused.

11. There is no evidence that the Claimant has tattoos or has engaged in activities that could place her at risk of hepatitis C such as recreational drug use.

12. The Claimant's claim was denied by the Administrator in a decision dated November 2, 2008 on the basis that there was insufficient evidence that she received blood during the Class Period. The Administrator's decision was upheld by an Appeals Officer in a decision dated November 2, 2008.

Analysis

13. The Claimant has been unable to deliver medical records establishing that she received blood in Canada during the Class Period. Accordingly, the Claimant must rely on section 2.01(2) of the Settlement Agreement, which provides that Claimants can qualify for compensation without such evidence if they can instead deliver:

... corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the Claimant establishing on a balance of probabilities that he or she received blood in Canada during the Class Period.

14. The Claimant relies on a letter from a nurse dated August 12, 2005, which states, "As you know, she has chronic Hepatitis B likely infected from blood transfusions received back in the '80s." However, there is no indication as to why this nurse believed that the Claimant received blood back in the 1980s. Presumably, the nurse relied solely on information provided to her by the Claimant.

15. The letter from the nurse, on its own, is not sufficient to establish that the Claimant received blood in Canada during the Class Period, particularly in light of the results of the Traceback Procedure. Due to the absence of any other independent evidence of a blood transfusion, the Claimant's claim cannot succeed.

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: *CA 12/2010*