

**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 07-07291

- and -

The Administrator

(On an appeal of the decision of D. McGillis, Q.C., released on June 26, 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. The Claimant seeks compensation as a Primarily-Infected Person pursuant to the Settlement Agreement.

7. As part of her application under the Settlement Agreement, the Claimant completed a Blood Transfusion History form in which she asserted that she received four units of blood in April 1984 due to blood loss after childbirth. A traceback procedure performed by Canadian Blood Services confirmed the Claimant's assertion. However, Canadian Blood Services indicated that the donors of the four units of blood received by the Claimant each tested negative for HCV antibodies.

8. There is no evidence that the Claimant has engaged in activities that put her at a high risk of being infected with hepatitis C, such as drug use.

9. On August 5, 2008, the Administrator informed the Claimant that her claim would be rejected unless she could provide further evidence that she was infected for the first time with HCV by blood received in Canada during the Class Period. In response, the Claimant provided the Administrator with an excerpt from a booklet published by the Canadian Association of Hematology Nurses which states that "[a]pproximately 20% of people with acute hepatitis C will spontaneously recover."

10. The Administrator denied the Claimant's claim in a decision dated November 18, 2008.

11. The Claimant appealed the Administrator's decision to the Appeals Officer. In the "Request for Review" document submitted by the Claimant for the purpose of requesting the appeal, the Claimant indicated, among other things, that it was "possible

that records could have been mixed up at Canadian Blood Services or the hospital or any one of the 4 persons might not have been the actual donor of the blood [that she] received”.

12. On March 26, 2009, prior to the appeal, the Claimant delivered an affidavit from her employer, in which her employer indicated:

[The Claimant] stopped working for me for a short time commencing March, 1984 because she had a baby. I recall seeing her at our church in the early part of June, 1984 after the 11:00 o'clock Mass. I noticed, as did my wife, that she looked jaundiced and made a comment to her about it.

13. The decision of the Administrator was upheld by the Appeals Officer in a decision dated June 26, 2009.

14. Some time after the Appeals Officer's decision was released the Claimant submitted a letter from Dr. Shelia Middlebrook, dated October 13, 2009, which states:

I have recently accepted [the Claimant] as a patient in my practice. She is Hepatitis C positive and has no risk factors other than transfusions of 4 units of Red Blood Cells in April of 1984. In an affidavit signed by her employer ..., [the Claimant] was noted to have jaundice in June of 1984. This is consistent with the chronology of symptomatology of Hepatitis C whereby symptoms may appear from 2 weeks to several years post inoculation. Thus, in my medical opinion, her jaundice in June 1984 is compatible with an Hepatitis C infection as a result of blood transfusions received in April 1984.

Analysis

15. Since all of the donors of the blood received by a Claimant were found to have tested negative for HCV antibodies pursuant to a traceback procedure, the Claimant can only succeed if she can prove that, notwithstanding the results of the traceback procedure, she was “infected, for the first time, with HCV by receiving Blood in Canada during the Class Period...”: section 5.04 of the Settlement Agreement. Such proof must be established on a balance of probabilities.

16. The Claimant has suggested that one of the four blood donors may have been previously infected by hepatitis C, but then recovered prior to being tested. In support of this argument, the Claimant provided the Administrator with an excerpt from a booklet of the Canadian Association of Hematology Nurses that indicates that “[a]pproximately 20% of people with acute hepatitis C will spontaneously recover.”

17. The Claimant speculates that hospital records could have been mixed up or that the blood donors identified by Canadian Blood Services may not have been the actual donors. However, there is no evidence to support the Claimant's position on this point.

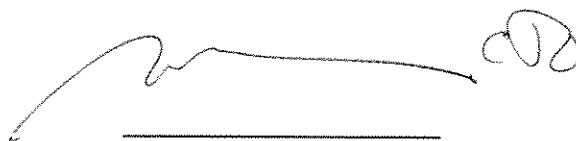
18. Neither the general statement about the progress of Hepatitis C nor the

Claimant's speculation regarding the hospital records is sufficient to rebut the cogent evidence that the units of blood she received were from donors who have tested negative for Hepatitis C infection. The affidavit from the Claimant's former employer regarding an observation about an episode of jaundice in June 1984 suffers from the same defect. It is a general statement that does not lead to the conclusion, either in itself or in consideration of the other evidence adduced by the Claimant, that she was infected with Hepatitis C through a blood transfusion in 1984.

19. Accordingly, the Claimant has been unable to establish, on the balance of probabilities, that she was infected with hepatitis C as a result of the receipt of blood during the Class Period.

Result

20. 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.

A handwritten signature in black ink, consisting of a long horizontal stroke with a small loop at the end, followed by a small circular mark.

Winkler C.J.O.

Released: March 25, 2010