

**IN THE MATER 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 07-08943

- and -

The Administrator

(On an appeal of the decision of D. McGillis, Q.C., released on November 28, 2008)

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 as a result of the receipt of blood or specified blood product 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*, which 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.

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 and Analysis

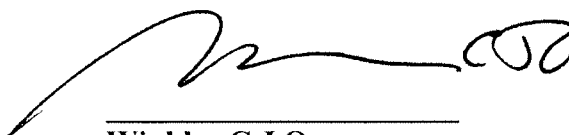
6. This claim has been brought by the personal representative of a deceased person. The personal representative asserts that the deceased person qualified as a Primarily-Infected Class Member under the Settlement Agreement.

7. The personal representative has also applied for and received compensation under the 1986-1990 Hepatitis C Settlement on the basis that the deceased qualified as a Primarily-Infected Hemophiliac.

8. Under Section 1.01 of the pre 1986/post-1990 Hepatitis C Settlement, the term "Primarily-Infected Class Member" expressly excludes people who were Primarily-Infected Hemophiliacs under the 1986-1990 Hepatitis Settlement. Accordingly, the Claimant's appeal cannot succeed.

Result

9. 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: April 7/09