

**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 07-01673

- and -

The Administrator

(On an appeal of the decision of D. McGillis, Q.C., released on October 6, 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 was diagnosed with hepatitis C on October 16, 1996. The Claimant seeks compensation pursuant to the Settlement Agreement as a Primarily-Infected Person.

7. A traceback procedure confirmed that the Claimant received blood during a surgery at St. Joseph's Hospital. However, this surgery did not take place until November 1996, which was after the Claimant had been diagnosed with hepatitis C.

8. In a letter dated November 18, 2008, the Administrator denied the Claimant's claim on the basis that the Claimant "... was not infected with HCV by receiving Blood in Canada during the Class Period".

9. On December 1, 2008, the Claimant delivered a request for a review of the Administrator's decision, in which she indicated, among other things, that she may have received blood during a surgery for the removal of her gall bladder in 1980 at St. Michael's hospital. The Claimant also supplied an amended Transfusion History Form, dated January 17, 2009, which referred to this possible transfusion.

10. In response, Fund Counsel asked the Administrator to arrange for a traceback procedure. In an updated traceback report dated January 21, 2009, Canadian Blood Services indicated:

Update 2009-01-21

Claimant supplied new form 5 Transfusion History and stated possible transfusions took place at St. Michael's Hospital, Toronto ON. CBS site 53 has no Donor records for 1980 so any units, if

discovered, could not be investigated.

CBS will not contact the hospital for a unit number search.

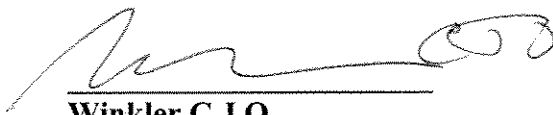
11. The Claimant has been unable to obtain any medical records to support her assertion that she may have received blood in 1980.
12. After receiving the above-mentioned information from Canadian Blood Services, the Administrator advised the Claimant that the status of her claim was unchanged.
13. The Administrator's decision was upheld by the Appeals Officer in a decision dated October 6, 2009.
14. In written submissions provided in support of her position in this motion, the Claimant wrote, "No evidence. However, I have no doubt in my mind that I contracted hepatitis as a result of the operation in 1980." She also noted that her hepatitis C infection has burdened her financially and taken a toll on her health and her family.

Analysis

15. In order to meet the definition of "Primarily Infected Person", as set out in section 1.01 of the Settlement Agreement, a Claimant must establish that he or she received Blood in Canada during the Class Period. However, a Claimant will be disqualified if "it is established on the balance of probabilities by the Administrator that such person was not infected for the first time with HCV by receiving Blood in Canada during the Class Period."
16. Canadian Blood Services has confirmed that the Claimant received blood in November 1996. However, the Claimant had already been diagnosed with hepatitis C prior to receiving this blood. In the absence of evidence of that the Plaintiff received infected blood in Canada prior to her diagnosis with Hepatitis C, there is no basis on which to interfere with the decision of the Appeals Officer.
17. Although the Claimant asserts that she may have received blood in 1980, this bare assertion is an insufficient evidentiary basis to establish the receipt of blood. Accordingly, the decision of the Appeal's Officer must stand.

Result

18. 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.

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Winkler C.J.O.

Released: March 25, 2010