

**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 07-00176**

**- and -**

**The Administrator**

**(On an appeal of the decision of D. McGillis, Q.C., released on October 13, 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 January 13, 2000. He is an Ontario resident and seeks compensation pursuant to the Settlement Agreement as a Primarily-Infected Person.

7. According to the medical report of a Gastroenterology and Internal Medicine Specialist, the Claimant was likely infected with Hepatitis C in the late 1960's. During this time period, based on the evidence, there are two possible and distinctly separate means by which the Claimant could have been infected with Hepatitis C: a blood transfusion or non-prescription intravenous drug use.

8. In 1968, the Claimant suffered severe lacerations to his head. He received three units of blood at Hamilton Civic Hospital during the two day period, November 30 and December 1. After he was diagnosed with Hepatitis C, a request was made to Canada Blood Services to conduct a traceback. However, records from 1968 have not survived and a traceback is therefore impossible.

9. From 1969 to 1971, the Claimant was incarcerated at Kingston Penitentiary. While incarcerated, the Claimant admits to taking non-prescription intravenous drugs (i.e., IV drugs) twice, in a forty-eight hour period. According to the Claimant, his wife smuggled into prison sterile, disposable, diabetic syringes. On both occasions he injected the drug tuinal, but claims he did not experience the intended effect and stopped using intravenous drugs thereafter. The Claimant insists that these two occasions were the only times he has used IV drugs. He further maintains that the needles were sterile, that he did not share them at the time nor has he ever shared drug paraphernalia.

10. When evaluating the Claimant's evidence regarding his drug use, the Appeals Officer found it lacked credibility. Her conclusion was based on the Progress Notes of the

Claimant's family physician, which she found to be inconsistent with the Claimant's sworn affidavit evidence. In the pertinent passage of her reasons, she states:

In these notes, the family physician wrote, among other things, that the Claimant had a history of "[illegible] / benzodiazepine [illegible] → oil → [illegible] syringe"; there was no mention of the intravenous drug use by the Claimant while incarcerated.

Approximately one year later in the entries recorded on February 15, 2000, shortly after the Claimant was diagnosed with Hepatitis C, the family physician made two separate notes: "IV drug use 1968-1970 when in Kingston Pen" and "previous hx [history] Alcohol + drug abuse". The entries made by the family physician in the Progress Notes were clearly based on information given to him by the Claimant during the two medical appointments or examinations. Significantly, the Progress Notes, for January 24, 1999 and February 15, 2000, when read together, demonstrate that the Claimant had a previous history of drug abuse that included the intravenous use of benzodiazepine oil (and possibly another drug) by syringe.

and later in her reasons she continues:

I have concluded that the evidence of the family physician, when considered in its totality, demonstrates that the Claimant used non-prescription intravenous drugs at times other than in his incarceration. As a result, the Claimant did not fully disclose the extent of his non-prescription intravenous drug use in his affidavit. His credibility is therefore seriously undermined, and his affidavit is entitled to little or no weight.

11. Subsequent to the decision of the Appeals Officer, the Claimant's family physician wrote a letter, in which he provided clarification and context for his Progress Notes. This letter was not available to the Appeals Officer at the time of her decision. The letter states:

The first note, dated January 4, 1999, was your first visit to see me as a new patient. The history of benzodiazepine and alcohol abuse refers to your past history not a current history at the time. The syringe referred to in the note is an EAR SYRINGE. You came to me about some ringing in your ears and we found that you were plugged with ear wax, asked you to put OIL in your ears and returned to have your EARS SYRINGED free of cerumen. (Emphasis added).

The note dated Feb. 15, 2000 was written by a University of Toronto family practice resident working with me at the time and the note states that you had a past history of IV drug use while in prison (Kingston Pen) It goes on to state that you had not used alcohol in the past 30 years. The note mentions the time frame, 1968 to 1970 but does not say that you used IV drugs for the entire time

that you were incarcerated, it merely states that the IV drug use had occurred while incarcerated and that you indicated that the period of time you were incarcerated was 1968 and 1970. The note does not state the frequency or duration of the drug use.

12. The Claimant maintains that his intravenous drug use occurred while he was incarcerated in 1969. However, in the General Information Form, the Claimant wrote, “68 – tuinols [*sic*] – a couple of times”. In the Claimant’s submissions in his Request for Appeal, he explained that he simply made a mistake as to the date of his incarceration when filling out the form. I accept the Claimant’s submissions on this point. I regard it as a minor mistake and not material to the issues raised on appeal.

### **Analysis**

13. In light of the Claimant’s history of non-prescription intravenous drug use, subsection 2.01(3) of the Settlement Agreement applies to the claim: the onus is on the Claimant to establish, on the balance of probabilities, that he was infected for the first time with HCV by receiving blood in Canada during the Class Period.

14. In order to satisfy subsection 2.01(3), the Claimant relies primarily on the following: i) the fact that he received three units of blood during a surgical procedure in 1968; ii) his assertion that he used non-prescription intravenous drugs twice, in a forty-eight hour period, with sterile needles that he did not share; and iii) his assertion that he has no other history of IV drug use and that he has never shared drug paraphernalia.

15. The Appeals Officer found inconsistencies between the Claimant’s evidence and the Progress Notes of the Claimant’s family physician. Based on these inconsistencies, the Appeals Officer concluded the Claimant’s evidence was not credible. However, the Appeals Officer did not have the benefit of the family physician’s clarifying letter, and was left to draw inferences from medical records that were incomplete or unclear. In light of this clarifying information, the issue of the Claimant’s credibility must be revisited. Looking at the Progress Notes and the physician’s clarifying letter together, there are no longer any inconsistencies between the Claimant’s evidence and the Progress Notes. Indeed, there is nothing that contradicts the Claimant’s evidence, including his position that the needles he used were sterile. Since the now resolved contradiction was the basis upon which the adverse credibility finding was made against the Claimant, that finding must be overturned.

16. There is no way to know whether the three units of blood that the Claimant received in 1968 were infected with Hepatitis C, since the traceback procedure was inconclusive. However, if the needles the Claimant used were sterile, a position which is now supported by the evidence, and the blood transfusions happened earlier in time and totaled three units of blood, it stands to reason that, on the balance of probabilities, the likelihood of the Claimant being infected through one of the blood transfusions is greater than through a sterile needle.

17. Furthermore, there is the report prepared for the Administrator by a medical specialist. In this report, the doctor assumed that the needles the Claimant used were from an unreliable source. Nevertheless, despite this assumption, when evaluating the two possible sources for the Claimant's infection with Hepatitis C, the specialist found that on the balance of probabilities, the probabilities were equal. Given the fact that the evidence indicates that the needles the Claimant used were sterile, and not from an unreliable source, the balance of probabilities must logically tip in the Claimant's favor.

18. In consideration of the foregoing, it is my view that the Claimant has established that he was infected with HCV for the first time through a blood transfusion.

### **Result**

19. The appeal is granted. The Claimant is entitled to compensation under the Settlement Agreement on the basis that he is 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 the appropriate payments.



Winkler C.J.O.

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