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 07-04384

- and -

The Administrator

(On an appeal of the decision of D. McGillis, Q.C., released on January 7, 2010)

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 unreasonabless 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 Heptitis C.

7. The Claimant applied for compensation pursuant to the Settlement Agreement in mid-2008. As part of her application she submitted two "Form 1" General Information Forms. On one form, the Claimant indicated that she was a Primarily-Infected Hemophiliac, and on the other form she indicated that she was a Secondarily-Infected Person.

8. On March 20, 2009, the Claimant delivered a letter to the Administrator in which she indicated:

> Having this killer disease of Hep C, I wrote that I was the secondarily infected person but I'm not. I am the primary carrier of Hep C. I believe I received it either, in jail during one of my many incarcerations, or by my many tattoos [*sic*] or one of my 5 ear holes. Sorry for the mistake. I take + hope you will dismiss any other names marked of the forms, no spouse, I am a primarily infected person. My memory is now turned into mental illness.

9. The original "Blood Transfusion History Forms" delivered by the Claimant contain no reference to any blood transfusions. Moreover, no medical records have been identified that establish that the Claimant received blood in Canada during the Class Period. There is also no evidence that the Claimant is a hemophiliac.

10. As part of her application under the Settlement Agreement, the Claimant submitted medical records to the Administrator including a letter from a specialist in hepatology, dated March 21, 2005, which stated, in part:

> With respect to risk factors for chronic liver disease she admits to heave

> drinking in the past but claims to have been abstinent completely for the last 4 ½ years. She has never been transfused, but was tattooed in her teens. She has used street drugs from age 16 until about 2 months ago and this includes something with the street label of ice, and speed.

11. The Claimant's claim was denied by the Administrator in a decision dated March 26, 2009 on the basis that there was no evidence that the Claimant received a blood transfusion during the Class Period. In reaching this decision, the Administrator did not consider whether the Claimant qualified as a secondarily-infected person.

12. The Administrator's decision was upheld by an Appeals Officer in a decision dated January 7, 2010. In her decision, the Appeals Officer also did not consider whether the Claimant qualified as a secondarily-infected person.

13. In written submissions dated January 22, 2010 that were made in support of her appeal to this court, the Claimant wrote, in part:

> My claim should not be dismissed on the basis of me, not being a primarily infected person, because I was a secondarily infected person. I had sexual relations with both [name withheld] and [name withheld], both of whom had Hepatitis C from transfusions.

14. Shortly after making these written submissions, the Claimant submitted a revised "Blood Transfusion History Form", dated January 29, 2010 in which she indicated that she had undergone an appendectomy between 1980-1982 and a tubal ligation between 1987-1988. Both procedures allegedly took place at Sarnia General Hospital. The section of the "Blood Transfusion History Form" that prompts Claimants to indicate the "Number of Units of Blood Transfused" was left blank.

15. In response, Canadian Blood Services was asked to conduct a traceback with respect to the periods between 1980-1982 and 1987-1988. In its final traceback report dated May 3, 2010, Canadian Blood Services indicated: "No record of any transfusions found although this person has had many, many admissions to both Sarnia hospital Sites (Sarnia General Hospital & Sarnia St. Joseph's Hospital").

16. The Claimant has not adduced any corroborating evidence (ie: medical records or the evidence of witnesses) that suggests that she received blood in 1980-1982, 1987-1988 or at any other time.

Analysis

17. There is no evidence to support the Claimant's assertion that she received blood in Canada during the Class Period. Accordingly, the Claimant does not qualify as a Primarily-Infected Person.

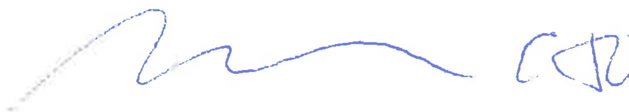
18. In light of the Claimant's letter of March 20, 2009, it does not appear that the Claimant asserted a claim for compensation as a secondarily-infected person before the Administrator or the Appeals Officer. However, the Claimant now asserts that she is a

Secondarily-Infected person.

19. Since the Administrator and the Appeals Officer did not consider whether the Claimant qualified as Secondarily-Infected Person, it would not be appropriate for me to consider this issue for the first time on appeal. If the Claimant would like to assert a claim as a Secondarily-Infected Person, she may re-apply to the Administrator. However, the Claimant should be aware that she cannot succeed as a Secondarily-Infected Person unless she can prove that she was infected with hepatitis C for the first time by her "Spouse" (as defined in 1.01 of the Settlement Agreement), and that this Spouse was a Primarily-Infected Person. The term "Spouse" includes, among other things, a person with whom the Claimant cohabited for at least two years.

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.



Winkler C.J.O.

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