

**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 07-04418

- and -

The Administrator

(On an appeal of the decision of D. McGillis, Q.C., released on December 8, 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 approved for Disease Level 1 benefits, but not for past loss income. The Claimant appealed the Administrator's decision 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

6. The Claimant was infected with Hepatitis C as a result of blood that he received in May 1971. The Claimant was approved by the Administrator for Disease Level 1 compensation under the Settlement Agreement.

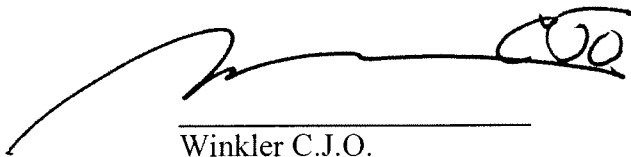
7. The Claimant appealed the decision of the Administrator on the basis that he was not awarded compensation for past lost income. The Administrator's decision was upheld by an Appeal's Officer. The Claimant is now appealing the decision of the Appeal's Officer.

Analysis

8. Section 2.05(1) of the Settlement Agreement only allows for compensation for past loss of income to HCV Infected Class Members "at Disease Level 4 or higher". The Claimant has not provided any evidence to establish that he meets the requirements for Disease Level 4. 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