

Legal update

Quebec Court of Appeal overturns minister's decision to remove Remicade from Quebec's List of Medications

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Life sciences and healthcare

The Quebec Court of Appeal has declared a decision by the Minister of Health and Social Services to “delist” Remicade from Quebec’s List of Medications (Quebec’s equivalent to a formulary) to be invalid and has ordered the minister to reinstate the drug on the list. Two takeaways from this decision: the minister’s decisions to list or delist individual drugs are administrative in nature and not regulatory, and a decision to delist may require the minister to respect certain minimum standards of procedural fairness, which the minister failed to do in this case.¹

Background

In February 2017, Quebec’s then Minister of Health and Social Services, Dr. Gaétan Barrette, published a notice removing Remicade from the List of Medications and declaring it would no longer be covered by the provincial drug insurance scheme (except in certain exceptional circumstances).

This followed the minister entering a product listing agreement with the manufacturer of Inflectra, a bio-similar drug to Remicade. The minister relied on authority granted to him under s. 60.0.4 of the *Act respecting prescription drug insurance*, which allows delisting a drug if a competing medication is the subject of a listing agreement. The minister gave Janssen no prior notice that such a decision was forthcoming and, on the facts of the case, Janssen had good reason to be surprised by the decision. Janssen applied for judicial review of the minister’s decision.

Fairness requirement

On January 16, 2019, the Court of Appeal declared that the minister had failed to respect the minimum requirements of procedural fairness that applied in the circumstances. The court held that in the factual context in which the minister made his decision, the principle of procedural fairness demanded: (i) giving Janssen sufficient notice that such a decision might be made; (ii) giving Janssen the opportunity to present its comments on the forthcoming decision; and (iii) providing Janssen with reasons for the decision.

Concluding that the minister’s failure to respect basic fairness requirements justified invalidating his decision, the court ordered that Remicade be reinstated on the List of Medications. The court gave no indication of whether the minister’s decision had been reasonable on its merits.

The court applied a duty of fairness on the basis that the decision to list or to delist a specific drug on the List of Medications is an administrative one, not a regulatory one, even though the publication of the List of Medications as a whole is regulatory in nature. Therefore, listing decisions made by a minister for specific drugs are subject to judicial review based on the standard applicable to administrative decisions, not on the standard of review applicable to regulations.

This decision is likely to broaden the potential basis for judicial review of ministerial decisions on listing and delisting drugs on the List of Medications, and should also require that, in the future, the minister take into account procedural fairness requirements when deciding whether to delist a drug. However, the content of this duty may vary depending on the factual context.

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Footnote

¹ *Janssen inc. c. Ministre de la Santé et des Services sociaux*, 2019 QCCA 39 (CanLII).

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