

**IN THE MATTER OF A REFERENCE PURSUANT TO THE HEPATITIS C
1986-1990 CLASS ACTION SETTLEMENT AGREEMENT
(Parsons v. The Canadian Red Cross et al.
Court File No. 98-CV-141369)**

BETWEEN

Claimant File 1000277

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Shelley L. Miller, Q.C.
released on April 28, 2006)**

Reasons for Decision

WINKLER C.J.O.:

Nature of the Motion

1. This is a motion to oppose confirmation of the decision of a referee appointed pursuant to the terms of the Settlement Agreement in the Hepatitis C litigation for the class period January 1, 1986 to July 1, 1990. 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 a referee in accordance with the process set out in the Agreement. The referee upheld the decision of the Administrator and denied the appeal. The Claimant now opposes confirmation of the referee's decision by this court.

Background

2. The Settlement Agreement is Pan-Canadian in scope and was approved by this court and also approved by courts in British Columbia and Quebec. (See *Parsons v. The Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. Sup. Ct.)). Under the Agreement, persons infected with Hepatitis C through a blood or specified blood product transfusion, within the period from January 1, 1986 to July 1, 1990, are entitled to varying degrees of compensation depending primarily on the progression of the Hepatitis C infection.

Facts

3. The Claimant is an Alberta resident who has applied for compensation pursuant to the transfused HCV Plan.

4. The Claimant's claim was denied by the Administrator on the basis that the Claimant failed to establish that he acquired HCV as a result of receiving blood in Canada during the Class Period. The decision of the Administrator was upheld by a referee.
5. There is no dispute that the Claimant is infected with the Hepatitis C virus ("HCV"). The only issue is whether the Claimant was infected as a result of receiving blood in Canada during the Class Period.
6. The Claimant was diagnosed with cancer in the spring of 1990 when he was five years old. The Claimant received three units of blood during the Class Period while undergoing cancer treatment.
7. After the conclusion of the Class Period, the Claimant received an additional eleven blood transfusions in Canada and about thirty blood transfusions in Florida.
8. The Claimant was tested for HCV antibodies in March, 1992. The results of the test were negative.
9. The donors of the three units of blood that the Claimant received during the Class Period have each tested negative for HCV antibodies. One of these three donors donated blood 59 times after the transfusion to the Claimant, and has repeatedly tested negative for HCV.
10. Ten of the eleven donors of the blood received by the Claimant in Canada outside of the Class Period have tested negative for HCV antibodies. The eleventh donor has refused to undergo testing.
11. There is no evidence that any of the donors of the blood that the Claimant received in Florida have been tested for HCV antibodies.
12. Counsel for the Claimant asserts that HCV antibody testing does not provide a reliable indication of whether an individual has been infected with HCV. In support of this assertion, counsel for the Claimant has adduced medical evidence that indicates that:
 - i) there is always a possibility of errors when conducting testing;
 - ii) in some cases, the HCV virus clears the bodies of individuals who had been infected with HCV, thereby causing their HCV antibodies to eventually become undetectable (this was referred to as "seroreversion"); and
 - iii) where an infected person's immune system is suppressed, HCV antibodies may be undetectable (this was referred to as "immunosuppression").
13. Counsel for the Claimant argues that the Claimant was immunosuppressed at

the time that he was tested for HCV antibodies in 1992 as a result of the chemotherapy treatment. Accordingly, counsel for the Claimant submits that the Claimant's 1992 negative HCV antibody test result is unreliable.

14. Counsel for the Claimant also places significant emphasis on test results that indicate that the Claimant's AST/ALT levels were somewhat elevated beginning in 1990. The doctors who testified in support of the Claimant indicated that, when analyzed with the benefit of hindsight, these results can be most likely attributed to HCV. However, the doctors accepted that there were other possible explanations for the elevated AST/ALT levels.

15. Further, it appears that a significant percentage of the AST tests taken in the first year (beginning in April, 1990), were within the normal range for that period. The Administrator relied on a letter from Dr. Diaz-Mitoma, in which the doctor stated:

If [the Claimant] was infected with Hepatitis C during May and June, 1990 ... there should have been an increase in liver enzymes before January 1991. The substantial increase in liver enzymes, necessary to assume that he was infected during this time, did not happen within one year after the blood transfusions given during the class period.

16. Since the Claimant acquired HCV at a young age, it is unlikely that he engaged in any activities that could have resulted in his infection, such as drug use or obtaining tattoos.

Standard of Review

17. In a prior decision in this class proceeding, the standard of review set out in *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. H.C., aff'd (1990), 39 C.P.C. (2d) 217 (C.A.) was adopted as the appropriate standard to be applied on motions by a rejected claimant to oppose confirmation of a referee's decision. In *Jordan*, Anderson J. stated that the reviewing court "ought not to interfere with the result unless there has been some error in principle demonstrated by the [referee's] reasons, some absence or excess of jurisdiction, or some patent misapprehension of the evidence."

Analysis

18. Article 3.04 of the Transfused HCV Plan provides as follows:

3.04(1) – Notwithstanding any other provision of this Agreement, if the results of a Traceback Procedure demonstrate that one of the donors or units of Blood received by a HCV-Infected Person or Opted-Out HCV Infected Person before 1 January 1986 is or was HCV antibody positive or that none of the donors or units of Blood received by a Primarily-Infected Person or Opted-Out Primarily

Infected Person during the Class Period is or was HCV antibody positive, subject to the provisions of Section 3.04(2), the Administrator must reject the Claim of such HCV Infected Person and all Claims pertaining to such HCV Infected Person or Opted-Out HCV Infected Person including Claims of Secondarily-Infected Persons, HCV Personal Representatives, Dependents and Family Members.

(2) A claimant may prove that the relevant Primarily-Infected Person or Opted-Out Primarily-Infected Person was infected, for the first time, with HCV by a Blood transfusion received in Canada during the Class Period or that the relevant Secondarily- Infected Person or Secondarily-Infected Person who opted out of the Class Action in which he or she would otherwise be a Class Member was infected for the first time with HCV by his or her Spouse who is a Primarily-Infected Person or Opted-Out Primarily-Infected Person or Parent who is a HCV Infected Person or Opted-Out HCV Person, notwithstanding the results of the Traceback Procedure. For greater certainty, the costs of obtaining evidence to refute the results of a Traceback Procedure must be paid by the claimant unless otherwise ordered by a Referee, Arbitrator or Court.

19. Due to this provision, the onus in this case is on the Claimant to prove, on the balance of possibilities, that he acquired HCV as a result of receiving blood during the Class Period.
20. I accept that HCV antibody tests can occasionally be incorrect or misleading. It is for this very reason that article 3.04(2) was included in the Transfused HCV plan. It is not enough, however, for the Claimant to simply establish that there is a possibility that HCV antibody tests can be incorrect or misleading. Rather, the Claimant must establish that it is more likely than not that he acquired HCV as a result of receiving blood during the Class Period.
21. To succeed, the Claimant must overcome the results of not one, but two, HCV antibody tests: i) the test that the Claimant received in 1992; and ii) at least one of the tests taken by the three donors of the blood that was transfused during the Class Period. Although I accept that the 1992 test should be given only limited weight due to the possibility of immunosuppression, the combination of the 1992 test and (more importantly) the tests taken by the donors impose a significant obstacle for the Claimant.
22. The ability of the Claimant to succeed is further limited by the fact that he received numerous transfusions outside of the Class Period, and that only some of the donors of the blood in question have been tested for HCV.
23. The most significant evidence adduced by the Claimant relates to his somewhat elevated AST/ALT levels. However, the Claimant's own doctors accept that there were

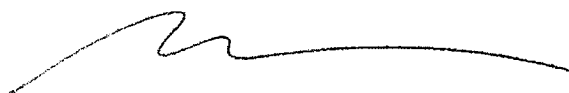
other possible explanations for these levels (albeit, they believe that HCV is the most likely explanation). Under the circumstances, the evidence regarding AST/ALT levels is insufficient to establish that the Claimant acquired HCV as a result of one of the three transfusions that he received during the Class Period.

24. Having reviewed the referee's decision thoroughly, as well as the extensive submissions of counsel and the materials provided on this motion, I am of the view that she applied the proper principles in reaching her decision. The claimant here was attempting to refute negative traceback results for all of the blood he received during the Class Period. In such circumstances, there is a high burden to be met. As noted by Justice Pitfield in a decision referred to by the referee as Case 53, "contradictory objective evidence would have to be very persuasive if the traceback result is to be refuted." After considering all of the evidence adduced, the referee did not find that there was persuasive, contradictory objective evidence capable of refuting the traceback results. In my view, she was entitled to reach that conclusion on the evidence before her.

25. The Claimant has endured a great deal, having been diagnosed with cancer at a young age, and then suffering from Hepatitis C. Nonetheless, the Settlement Agreement must be administered according to its terms. In order to obtain compensation under the Settlement, a claimant must be one of a specified group of individuals. Here, he has not established that he is a member of that group. Accordingly, I am unable to conclude that the referee's decision should not be confirmed.

Result

26. In my view, the referee committed no errors in principle, with respect to jurisdiction or by misapprehending the evidence before her. Accordingly, the referee's decision is confirmed.



Winkler C.J.O.

Released: October 17, 2007