

**IN THE MATER 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 1000733

- and -

The Administrator

(On a motion to oppose confirmation of the decision of Gerald J. Charney, released February 3, 2005)

Reasons for Decision

WINKLER R.S.J.:

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. This motion involves a claim by a personal representative on behalf of the estate of a deceased person.

4. The Administrator accepts that the deceased received one blood transfusion on September 7, 1988 and three blood transfusions on October 18, 1988. Pursuant to a traceback procedure, the donors of this blood all tested negative for HCV antibodies.
5. The personal representative alleges that the deceased received additional blood transfusions in 1988 but she has been unable to obtain any evidence of these additional transfusions.
6. The deceased suffered from cancer of the bladder with liver metastases. The deceased was never diagnosed with HCV.
7. The deceased passed away in October, 1988.
8. On November 14, 2002, the Administrator denied the personal representative's claim for compensation pursuant to the Transfused HCV Plan. The Administrator's decision was upheld by a referee in a decision dated February 3, 2005.
9. In submissions provided to the referee, the personal representative indicated that the deceased could not be tested for HCV because there were no HCV tests available at the time of his death.

Standard of Review

10. 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

11. To qualify for compensation pursuant to the Transfused HCV Plan, it is necessary to establish that the deceased was infected with HCV and that he acquired HCV as a result of blood transfusions received in Canada during the Class Period.
12. While it is entirely possible for hospital records to go missing, and it has been held in this process that negative inferences should not be drawn from missing records,

there remains on the claimant an onus to provide certain basic evidence to meet the requirement for compensation under the Settlement Agreement. In a case such as this, proving the proposition that there are missing records is not enough. There must be some evidence of HCV infection in the records that do exist.

13. In this case, there is no medical evidence to establish that the deceased was infected with HCV from a blood transfusion during the Class Period. Although the Claimant argues that there was no test for Hepatitis C at the time of the deceased's death, there is no evidence that the deceased was diagnosed with any other non-identifiable form of hepatitis in the period following the transfusions.

14. Without such evidence, the motion to oppose confirmation cannot succeed.

Result

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



Winkler R.S.J.

Released: May 19, 2006