

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-06-000016-960

DATE: December 15, 2004

PRESIDING JUDGE: THE HONORABLE NICOLE MORNEAU, SCJ

DOMINIQUE HONHON

Petitioner

V.

ATTORNEY GENERAL OF CANADA

AND

ATTORNEY GENERAL OF QUEBEC

AND

THE CANADIAN RED CROSS SOCIETY

Defendants

AND

CLAIMANT NO 1200309

APPELLANT

**JUDGMENT TO REEXAMINE A REFEREE'S DECISION
1986-1990 Hepatitis C Settlement Agreement
Transfused Plan**

[1] The Claimant is appealing the Referee's decision allowing to maintain the Administrator's decision to refuse him compensation, under the 1986-1990 Hepatitis C Settlement Agreement.

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[2] On June 12, 2000, the Appellant submitted a claim to the Administrator as a "Primarily-Infected Person" pursuant to the *Transfused HCV Plan (Schedule A)*.

[3] On June 26, 2002, the Administrator rejected the claim on the basis that all donors of the blood units received during the Class Period had tested anti-HCV negative.

[4] On July 4, 2002, the Claimant appealed this decision by way of a Request for Review before a Referee. His request having been rejected on January 8, 2004, the Claimant filed a Notice of contestation dispute and was called for hearing before the Superior Court on June 22, 2004.

[5] It is agreed that the Claimant received blood for the first time in 1987, during a femoral bypass surgery. He did not receive any other blood transfusion until his quintuple heart bypass surgery in 1996. In 1998, at 60 years of age, he is diagnosed HCV positive.

[6] His letter dated January 27, 2000 addressed to Hema-Quebec's Medical Director, Dr. Leduc, an hepato-gastroenterologist specialist, provided the following additional information:

Mr. ... is a chronic hepatitis C carrier which developed into a cirrhosis. He shows no other risk factors for this hepatitis C, except for the blood transfusion, that is, he has had no acupuncture, no dialysis, no tattoos and does not have any history of intravenous drug use.

While hospitalized at "Hospital .. # 1", on February 8, 1987, he received a blood transfusion during a femoral bypass surgery. The lot number is On reviewing his file at " Hospital... # 2", he also received blood transfusions, but these took place after 1991, at the time of his heart surgery. The hepatic biopsy shows a cirrhosis and a chronic viral hepatitis C.

(Emphasis added)

[7] The Claimant's cardiologist and treating physician confirmed that a careful scrutiny of his past history indicated no other hepatitis C risk factors, except for the transfusion. The treating physician added that he could not rule out human error in handling the required blood samples.

[8] The Claimant's particularly credible and moving testimony, now 65 years of age, is worth noting. Married for the last 40 years, he still lives with his wife. They traveled to Haiti and made several trips to the United States. He was not hospitalized nor treated. He has submitted everything he could possibly obtain.

[9] His chronic viral hepatitis C was diagnosed by his family doctor, soon after his heart surgery in 1996 from which he could not recover. During his surgery in May 1999, there is confirmation that he is a carrier of a major macro-nodular liver cirrhosis. The relevant sections of his medical records and the written submissions of three of his physicians are produced.

[10] It seems that this Claimant's case must be segregated from cases that have been submitted as case law by the Fund Counsel. He justifies the need to examine more extensively the meaning and scope of section 3.04(2) of the Plan developed for the benefit of the transfused persons as well as the burden of proof imposed upon them.

[11] Here, possibilities stated by the Fund Counsel such as hernia surgeries without any blood transfusion at the end of the 70's or at the beginning of the 80's or again, an albumin transfusion received in 1996 seem to have been retained. But the problem here is that, contrary to the Claimant's evidence, which is supported by written submissions of his 3 physicians, there is no medical proof validating the Fund Counsel's hypothesis.

[12] Has the Claimant succeeded in establishing, on the preponderance of evidence, and despite investigation results, that he was most probably infected by the blood transfusions received in 1987? Is the evidence submitted sufficient to justify our ignoring the negative results of the donor investigation or "traceback"? What are the criteria that the court can use as a guide to intervene?

[13] It seems to me that the answer to the first two questions must be positive.

[14] In civil matter, it is the preponderance of evidence criteria that applies. However, we must recognize here that the medical evidence concurs with the Claimant's allegations. Furthermore, no explanation was provided here that would allow this court to retain the hypothesis of a cirrhosis at an advanced stage, as described in the 1999 operation record that would have developed within a 3-year period, in the alternative of an infection dating back to 1996 only. However, evidence shows that the Claimant has not received any other transfusions except those received in 1987.

[15] In a decision dated May 27, 2003, the undersigned rejected the appeal filed by Claimant number 1200273 who, questioning the first traceback results, requested that new more complete tests be conducted.

[16] His claim had to be rejected for lack of evidence supporting his allegations. Moreover, the tests that he requested had actually been conducted by Hema-Quebec in 1996. This Claimant was submitting no other evidence.

[17] However, paragraph 3.04(2) of the Transfused Plan constitutes an exception to paragraph 3.04(1). It provides that, despite the traceback results, a Claimant can prove that he was HCV infected for the first time by a blood transfusion received during the Class Period. We then need to examine the Claimant's burden of proof and the nature of the proof that could refute the traceback results.

[18] As already explained by the undersigned, in quoting the Honorable Mr. Justice Pitfield regarding paragraph 3.04(2):

[22] This Section rather provides that there could exist evidence, which would establish that the infection source, based on the balance of probabilities, would result from a transfusion received during the Class Action period.(...)

[23] The type of evidence that a Claimant could be required to provide during an appeal would at least include his personal medical and family history as well as detailed evidence of all aspects of his life-style, including evidence that he has not been infected by needles or injections, regardless of the

reasons for which they were used. This list is not exhaustive and tends rather to show the procedure that must be followed when one wants to refute the results of a Traceback Procedure.

[19] In this case, the evidence satisfies the prescribed criteria. To require more, the court would have to ignore paragraph 3.04(2). It cannot do that. Nor would it want to do it, since the purpose of the settlement entered into was to compensate the Class members.

[20] Concerning the criteria allowing the court to intervene at this stage, we must remember that it is an "appeal" pursuant to the Agreement. It would be useless to offer the Claimant the possibility of submitting additional proof, if we were to subsequently refuse to take it into consideration. In this sense, it is up to the court to examine all the evidence, to evaluate it and to decide on it.

[21] In this case, the evidence provided by the Claimant has convinced this court that he has in fact been HCV infected, through transfusions that he received in 1987, that is, during the Class Period and pursuant to the Settlement Agreement.

[22] Consequently, this court allows the appeal, declares that the Claimant is entitled to a compensation pursuant to the Settlement Agreement based on his condition and orders that the Administrator provide payments accordingly.

ON THAT GROUND, THE COURT:

ALLOWS THE APPEAL of Claimant number 1200309;

REVERSES the Administrator and the Referee's decisions;

DECREES that the Claimant is entitled to a compensation pursuant to the Transfused HCV Plan (Schedule A to the 1986-1990 Hepatitis C Settlement Agreement);

RETURNS the file to the Administrator for processing in accordance with this decision;

ALL THIS, without costs, except for costs incurred by the Claimant.

**ORIGINAL SIGNED BY
NICOLE MORNEAU, SCJ**

Me Catherine Mandeville
MCCARTHY TÉTRAULT
Fund Counsel

Claimant number 1200309

Me Michel Savonitto, in his quality of Member of the Joint Committee,
MARCHAND MELANÇON FORGET

Hearing Date: June 22, 2004