

**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 No. 00001214

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Judith Killoran, released
August 4, 2003)**

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. The Claimant is an Ontario resident who has been diagnosed with the Hepatitis C virus.

4. On June 26, 2002, the Administrator denied the Claimant's request for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan on the grounds that the Claimant failed to provide sufficient evidence that he received a blood transfusion during the Class Period. The decision of the Administrator was upheld by a referee on August 4, 2003.

5. The following factual summary pertinent to this motion is taken from the referee's decision:

6. On June 19, 2001, the Claimant stated in the Blood Transfusion

History Form that he believed that he received a blood transfusion when he was hospitalized in 1990 at Sunnybrook due to a compound fracture.

7. On December 31, 2001, Canadian Blood Services confirmed that Sunnybrook had no record that the Claimant received a blood transfusion in 1990.

8. On April 21, 2003, at the hearing conducted in Toronto, the Claimant and his mother both testified that they believed that the Claimant was transfused during his hospitalization at Sunnybrook in 1990.

9. After the oral hearing concluded, the referee contacted both the Claimant's former physician and Sunnybrook. The Claimant's former physician did not have any records of blood transfusion. On July 30, 2003, Sunnybrook forwarded the Claimant's hospital records to the referee and confirmed that there was no record of a blood transfusion in 1990.

6. The Claimant was invited to make additional submissions on appeal but has not submitted any material that indicates that he received a blood transfusion during the Class period.

Standard of Review

7. 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

8. The referee denied the claim on the basis that the Claimant did not provide the proof required pursuant to Section 3.01 of the Tranfused HCV Plan. Specifically, the Claimant failed to provide medical or hospital records demonstrating that he received a blood transfusion in Canada during the Class Period and the Claimant "did not provide corroborating evidence independent of his personal recollection and that of a Family Member."

9. The Claimant argues that he must rely on evidence from a family member because only family members are permitted to visit intensive care and emergency-room patients at hospitals.

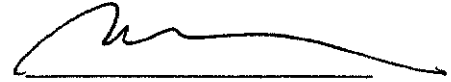
10. Section 3.01(2) of the Transfused HCV Plan specifically excludes evidence that is based on the personal recollections of the Claimant or a family member of the Claimant. In the absence of additional evidence, the Claimant cannot succeed. Here the referee took the extra step of obtaining the relevant records to determine if there was a basis for overturning the decision of the Administrator. The records did not provide any such basis.

11. The argument proffered by the claimant does not address the need for corroborative evidence in addition to that of family members, but rather suggests that this restriction should be ignored in cases where certain types of hospital care are engaged. However, this argument is flawed in that it focuses on necessity as a substitute for the reliability issue that the provision clearly addresses. It is obvious that the drafters of the Settlement Agreement had concerns about the reliability of uncorroborated evidence from family members. In my view, the requirement of corroboration is to impart a degree of reliability to the evidence of the claimant. The claimant's argument on the other hand suggests that the evidence becomes more reliable because of an assumed necessity. Notwithstanding that this assumption is not established on this record, it is a misguided approach.

Result

12. 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.

A handwritten signature in black ink, appearing to be 'R.S.J. Winkler', written over a horizontal line.

WINKLER R.S.J.

Released: April 28, 2005