

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *HCV Settlement Agreement Claim #1300243*,
2009 BCSC 1345

Date: 20091002
Docket: C965349
Registry: Vancouver

In the Matter of the HCV 1986-1990

Transfused Settlement Agreement

Re Claim No. 1300243

(Proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50)

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Applicant:

Self-Represented

Counsel for the Defendants:

William A. Ferguson

Place and Date of Judgment:

Vancouver, B.C.
October 2, 2009

[1] Claimant 1300243 applies to oppose confirmation of a Referee's decision made pursuant to the 1986-1990 Transfused HCV Settlement Agreement. The Referee upheld the Administrator's decision which terminated benefits that were being paid to him under the Plan.

[2] Termination resulted from the fact that completion of the traceback procedure indicated that none of the donors of blood with which the Claimant had been transfused was infected with the Hepatitis C antibody.

[3] The Claimant was transfused with blood products from six donors in the course of in-hospital treatment in Vancouver in 1988. The initial traceback procedures carried out after the Claimant had been identified as an individual infected with the Hepatitis C antibody and the recipient of a blood transfusion in the period from 1986 to 1990, indicated that five donors were not infected by the antibody. The test of a sixth donor was inconclusive. Whether for that reason, or because one of the donors was tested in Japan, the claim was processed and benefits were paid. Re-testing of the donor whose results were inconclusive produced a negative result. The negative traceback results in respect of all six donors caused the Administrator to conclude that the Claimant was not entitled to benefits under the 1986-1990 Hepatitis C Transfused HCV Settlement Agreement.

[4] Following a request from the Claimant for a review of the Administrator's decision by a Referee, Fund Counsel made inquiries about the testing procedures that may have been employed in Japan in respect of a donor. Canadian Blood Services made inquiries of authorities in Japan and determined that the testing procedure employed in Japan was that employed in Canada with the result that the traceback result should be regarded as reliable.

[5] In due course, the Referee considered all of the material provided to her by the Administrator and Fund Counsel, and conducted an oral hearing attended by the Claimant and Fund Counsel.

[6] The Referee's reasons described the Claimant's personal and medical history. The Claimant suggested that a comparison of a liver biopsy performed in 1998 to another performed in 2001, suggested a progression of his illness and pointed to infection in 1988. He did not provide a medical opinion to support the claim. The Referee recited the fact that the Claimant had difficulty recalling some of his work history, in particular, that between 1984 and 1988. The Claimant acknowledged that he did not have a regular doctor between 1982 and 1987. While the Claimant appears to have received in-hospital treatment on one or more occasions prior to the occasion on which he was transfused, he did not provide clinical records in relation to those incidents. The Referee also noted that while the Claimant questioned the results of the tracebacks, he did not provide any medical evidence that would provide a base from which to challenge the results.

[7] Against the general background described in considerably greater detail in her reasons, the Referee concluded that the Claimant had not discharged the onus that rested upon him to provide information that would support the claim that he had been infected by the HCV antibody by a transfusion of blood in the class period notwithstanding the traceback results.

[8] Following the filing of the application to oppose confirmation of the Referee's decision, the Claimant provided additional submissions and affidavit material to Fund Counsel, and requested that the material be provided to the court for review. For the Claimant's benefit, I can confirm receipt of the material, all of which I have reviewed. With respect, I cannot find anything in it which differs materially from the information before the Referee.

[9] For the reasons that follow, I conclude that the Claimant's application to oppose confirmation of the Referee's decision must be dismissed.

[10] There is no doubt that Hepatitis C is an extremely debilitating infection. There is also no doubt that many individuals were infected by a failure on the part of the Canadian Red Cross to employ appropriate screening techniques to identify the presence of the antibody in blood products. The failure to do so resulted in the class

action in which the Canadian Red Cross Society, Province of British Columbia and the Attorney General of Canada were all named as defendants. The parties to the litigation determined that traceback to blood donors would provide the base by reference to which the claims of infected persons would be assessed. There may have been other ways in which to attempt to identify the origin of the infection, but that was the method employed by the parties to the action which was settled with court approval.

[11] The defendants did not agree to compensate any individual who was infected with the Hepatitis C antibody other than by transfusion in the class period. The Settlement Agreement was concluded on the basis that a person would be entitled to compensation in the event that the Claimant was transfused in the class period extending from 1986 to 1990, and in the event the traceback procedure identified a donor of the blood received by the Claimant who tested positive for the Hepatitis C antibody.

[12] The Agreement, by which all concerned with the issue are bound, stipulates that in the event that the traceback procedure is complete and none is positive, then the Administrator is obliged to deny the claim. The Agreement stipulates that in such circumstances the onus falls upon the Claimant to adduce evidence that the infection must have resulted from a transfusion notwithstanding the traceback result or results.

[13] The task is onerous and the burden is difficult to discharge. At the very least, it requires the presentation of a complete and informative medical history of the Claimant which this Claimant has been unable to provide. That inability does not appear to result from the absence of records as much as it does from the inability of the Claimant to recall the various medical treatments to which he has been exposed over the course of his lifetime, and the details of various chapters in his life. The objective evidence that might possibly tend to undermine the traceback result is lacking.

[14] In summary, I am unable to conclude that the Administrator or the Referee have reached any conclusion that is inconsistent with the evidence before them and the terms of the Settlement Agreement by which they, the Claimant and the court are bound.

[15] The application to oppose confirmation of the Referee's decision must be dismissed.

“Mr. Justice Pitfield”