

**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. 01400399

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Judith Killoran, released
January 5, 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. The Claimant alleges that he received a blood transfusion in 1987 or 1988 at the Toronto East General Hospital. The Claimant and his doctor have requested transfusion records from the hospital but the hospital has not fulfilled these requests.

5. On February 21 and 22, 2002, Canadian Blood Services made written requests for transfusion records to the Toronto East General and Orthopaedic Hospital and the Toronto General Hospital. In response, an representative of the Toronto East General and Orthopaedic Hospital checked off a box that indicated "No records found for this

patient” and another box that indicated “Not transfused”. Similarly, a representative of the Toronto General Hospital wrote “chart destroyed” and indicated “not transfused 1982-90”. In light of these responses, Canadian Blood Services indicated in a letter dated April 5, 2002 that the two hospitals stated that the Claimant “received no blood transfusions in 1980-1990.”

6. On June 27, 2002, the Administrator declined the Claimant’s request for compensation on the grounds that he did not provide sufficient evidence to support his claim that he received a blood transfusion in Canada during the Class Period.

7. On January 5, 2003, a referee upheld the Administrator’s decision. In her decision, the referee referred to Canada Blood Service’s letter of April 5, 2002 and she indicated that a “traceback procedure [conducted by Canadian Blood Services] confirms that the Claimant has not received any Blood transfusions during the Class Period”.

Standard of Review

8. 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."

Reasons

9. I have concerns with the referee's reliance on the statements of the hospitals and of Canadian Blood Services that indicated that the Claimant did not receive blood transfusions. It is not clear how the hospitals could have determined whether the Claimant received blood transfusions in view of the fact that the hospitals have admitted that they either have no records relating to the Claimant or that their records have been destroyed. In my view it is an error in principle to draw inferences that are detrimental to the Claimant from the fact that hospital records are missing or destroyed.

10. This matter raises issues that are similar to those raised in a motion before this Court involving Claimant File No. 1000114. It is appropriate to remit this matter back to the referee for a re-hearing, just as it was appropriate to do so in the matter involving Claimant File No. 1000114. Similarly it is appropriate in these circumstances, as it was in the earlier case to appoint counsel as a friend of the court to assist the claimant in presenting his case. Mr. William Dermody is hereby appointed in this capacity. His fees shall be paid by the Administrator after approval by the court.

Result

11. The motion to oppose confirmation is granted. The matter is remitted back to the referee for a re-hearing in accordance with these reasons.



Winkler R.S.J.

Released: April 28, 2005