

**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 1400858**

**- and -**

**The Administrator**

**(On a motion to oppose confirmation of the decision of Judith Killoran, released  
September 9, 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. (4<sup>th</sup>) 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 a Class Member who seeks reimbursement for out-of-pocket expenses relating to treatment provided by a naturopath. At issue is whether the Claimant's expenses are reimbursable under the Transfused HCV Plan.

4. The following facts pertinent to this motion are taken from the referee's decision dated September 9, 2005:

7. On March 2, 2005, the Claimant submitted a Drug Therapy letter to the Administrator requesting compensation for intravenous injections which he claimed qualified as HCV drug therapy. A claim of \$6,658.15 was submitted for injections from a naturopath between November 1, 2004 and February 22, 2005. The Claimant also requested mileage expenses of \$1,985.59 for travel.

8. On March 18, 2005, the Administrator asked the naturopathic doctor to provide more information about the intravenous injections administered to the Claimant. On April 27, 2005, the naturopath confirmed that the injections were a cocktail including vitamins, minerals, antioxidants and homeopathic solutions.

9. The Claimant's treating physician is a professor of medicine at London Health Sciences Centre. On April 28, 2005, the Administrator asked him to confirm whether the homeopathic cocktail was a treatment which he recommended for treatment of HCV. On May 12, 2005, the physician responded that he had referred the Claimant to a naturopath at the Claimant's request.

10. On July 6, 2005, Fund Counsel wrote to the Claimant's treating physician asking him to confirm whether the treatment received by the Claimant were "generally accepted by the medical community as treatment for HCV." On July 7, 2005, the physician replied, "In response to your query about whether they are generally accepted by the medical community, I would say they are not."

5. The Claimant believes that the treatment that he received from the naturopath resulted in significant improvements to his health.

6. On June 7, 2005, the Administrator denied the Claimant's request for reimbursement on the grounds that the treatment that he received was not reimbursable under the Transfused HCV Plan.

7. The Administrator's decision was upheld by the referee. The referee indicated in her decision that she found it unfortunate that "the terms of the Plan do not allow the Claimant to receive compensation for his treatments or out-of-pocket expenses".

### **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."

### Analysis

9. To qualify for a reimbursement for the cost of treatment, the Claimant must satisfy the requirements set out in section 4.06 of the Transfused HCV Plan:

4.06 – An Approved HCV Infected Person who delivers to the Administrator evidence satisfactory to the Administrator that he or she has incurred or will incur costs for generally accepted treatment and medication due to his or her HCV infection which are not recoverable by or on behalf of the claimant under any public or private health care plan is entitled to be reimbursed for all reasonable past, present or future costs so incurred, to the extent that such costs are not costs of care or compensation for loss of services in the home, provided:

- a) the costs were incurred on the recommendation of the claimant's treating physician; and
- b) if the costs are incurred outside of Canada, the amount of compensation cannot exceed the lesser of the amount of compensation payable if the costs had been incurred in the Province or Territory where the claimant resides or is deemed to reside and the actual costs.

9. At present, the Claimant has not satisfied these requirements because (i) the Claimant's treating physician did not recommend the treatment in question (albeit, the treating physician referred the Claimant to the naturopath at the Claimant's request); and (ii) the Claimant has failed to provide satisfactory evidence that the treatment in question is "generally accepted". The Claimant's inability to satisfy both of these requirements led to the rejection of his claim for expenses for the naturopathic treatment as well as the travel expenses incurred to obtain those treatments under s. 4.07 of the Plan.

10. In my view, this motion raises issues that require further exploration. Some contextual meaning must be provided to the term "generally accepted" to determine its scope. Further, I am concerned that, in the absence of guidelines that are clear, the approach currently being taken, which appears to require a claimant to establish that a treatment is "generally accepted", may place too high an economic burden on a claimant at first instance. It seems that establishing the general acceptance of any treatment would require adducing expert evidence at a cost that may overshadow the potential recovery of

the claimant.

11. Accordingly, it would be in the interests of the Claimant, and the class members generally, to have further submissions on the interpretation of the scope of the term "generally accepted" as well as who is to bear the onus to establish same on an appeal. In my view, the likely class wide application that will follow from a determination of these issues make it appropriate to request submissions from the Joint Committee in addition to the Fund Counsel and the Claimant. If the Claimant wishes to obtain the benefit of counsel in providing his submissions, I am prepared to appoint Mr. William Dermody to assist him, with costs to be borne by the Fund. The Claimant may notify the monitor as to whether he wishes to utilize the services of Mr. Dermody.

12. I will expect to receive these additional submissions within 60 days from the release of these reasons.



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**Winkler R.S.J.**

**Released:** October 20,2006