

**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 1401015

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of C. Michael Mitchell, released
October 17th, 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. (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 following facts pertinent to this motion are set out in the referee's decision dated October 17, 2005:

2. The Claimant appeals the decision of the Administrator dated June 27, 2002, in which the Administrator found that there was not sufficient evidence to support the claim that the Claimant received blood during Class Period.

3. The Claimant states that she believed she was transfused at the Scarborough Centennial Hospital in 1986 and 1987.

...

5. The Claimant had been hepatitis C positive since 1997. A medical report from Dr. B. Kristan Mohindra dated January 10, 2001 indicated that the Claimant had a blood transfusion when she had gastric stapling in 1986 and again in 1987 when she had cholecystectomy. However, this statement from Dr. Mohindra was based on the Claimant's statement to him, and Dr. Mohindra had no independent knowledge that the Claimant had been transfused. A similar medical report dated July 9, 2003 from Dr. J. Sue-Chue-Lam had a similar statement, but it was also based on the Claimant relating her medical history to him. The aforementioned medical reports were made to Dr. A. Haukioja, who also indicated that transfusions occurred in 1986 and 1987, but a subsequent letter from him indicated this was also based on information provided by the Claimant. A similar medical report by Dr. R. Dale Taylor in August 2001 containing a similar statement, was also based on the Claimant's statements.

4. The Administrator's decision was upheld by the referee on the grounds that the Claimant had "no independent basis to support her claim that a transfusion must have taken place at the time of [the 1986 and 1987] surgeries and makes no direct claim that one occurred."

5. In submissions provided in support of this motion, the Claimant wrote:

"Please review my files carefully. I strongly believe I was given a blood transfusion in 1986 when my surgery with doctor J.D. Salmon was performed. You will find in my files a blood transfusion record for that date is incomplete. I have had subsequent surgeries (sic) and there are no such records as that one ..."

6. The Claimant has indicated in her submissions that she has been unable to locate the surgeon who performed the two surgeries she had during 1986 and 1987. Since the claimant believes strongly that she received transfusions during these surgeries, she believes that the surgeon will be able to offer evidence to that effect.

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. I have reviewed all of the documents filed on the appeal as well as the claimant's additional submissions. These documents include the two blood transfusion forms that the Claimant attached to her submissions in support of this motion. However, these forms do not indicate that the blood product specified was actually given to the claimant. Accordingly, there is no evidence in the medical records of the claimant indicating that she received a blood transfusion. Therefore, the onus is on her to demonstrate on a balance of probabilities that, notwithstanding the absence of a record of a transfusion, she was infected with Hepatitis C by a blood transfusion during the class period.

9. The Claimant has had two surgeries in the period from November 1986 to May 1987. The doctor performing each of these surgeries apparently made a request to have 2 units of packed red blood cells available if needed on each occasion. These requests are evidenced by forms contained in the claimant's medical records. Although the claimant has made submissions on this motion that the forms are incomplete and, as a result, indicative that transfusions occurred, I cannot determine from the reasons of the referee whether this issue was raised before him. In any event, the fact that the form is incomplete is not in itself sufficient evidence to meet the burden of proof that the claimant has pursuant to the terms of the Settlement Agreement.


10. Moreover, a review of the actual forms relied on by the Claimant reveals wording which implies that the mere existence of the form in respect of a particular patient is not necessarily determinative of whether a transfusion occurs. In what appears to be a pre-printed section of the form, the words "CROSSMATCHED BLOOD WILL ONLY BE KEPT AVAILABLE FOR 24 HRS. UNLESS OTHERWISE REQUESTED" are set out. The only reasonable inference to be drawn from this provision is that while blood may be crossmatched for the purpose of being available for a patient if needed, that blood may not necessarily be used for a transfusion.

Result

11. I have not been able to find any evidence that establishes on a 'balance of

probabilities" that the Claimant received a blood transfusion in 1986 or 1987. In that respect, the referee committed no errors in principle, with respect to jurisdiction or by misapprehending the evidence before him. However, in view of the points raised by the claimant regarding the incomplete forms and her inability to locate the actual treating surgeon, I am prepared to defer confirmation of the referee's decision pending receipt of additional information regarding the treating surgeon.

12. Since the claimant's efforts to locate the treating surgeon have been fruitless, I direct Fund Counsel and the Administrator to undertake an effort to locate the surgeon and obtain any relevant evidence he may be able to give on the matter. I will expect a report on these efforts, with a copy to the claimant, within 60 days of the release of these reasons.

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

Winkler R.S.J.

Released: October 20, 2006