

**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 1401129

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Daniel Shapiro, Q.C. ,
released September 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 a Saskatchewan resident who has been diagnosed with the Hepatitis C virus. The Claimant seeks compensation pursuant to the Transfused HCV Plan.

4. The Claimant received 6 units of blood on December 22, 1999 at St. Paul's Hospital in Saskatoon. He submits that he acquired Hepatitis C from this transfusion.

5. In or about July of 2000, the Claimant applied to the Administrator for compensation pursuant to the Settlement Agreement.

6. The Administrator arranged for Canadian Blood Services to conduct a traceback procedure in relation to the 6 units of blood received by the Claimant. At that time, all of the units could not be cleared through the traceback procedure since some of the donors of the units could not be traced immediately. As a result, the traceback was determined inconclusive and the Administrator approved the claim.

7. The Administrator was in the process of issuing compensation to the Claimant when it was advised by Canadian Blood Services that additional information had been received that indicated all six units of blood that the Claimant received were negative for the Hepatitis C antibody.

8. As a result of the new information, the Administrator denied the claim, thereby reversing its earlier decision. The Administrator informed the Claimant of this denial in a letter dated November 18, 2002. No compensation was ever issued to the Claimant.

9. On September 4, 2003, a referee upheld the Administrator's denial of the claim.

10. Because of the nature of the claim and advanced stage of processing the Claimant's claim when compensation was denied, the Claimant has been invited on several occasions over a period of time to make additional submissions in support of this motion but has not submitted any additional material to support his claim that he acquired Hepatitis C from a blood transfusion during the Class period.

Standard of Review

11. 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

12. The Administrator's initial determination was to conditionally approve this claim based on the inconclusive traceback results. However, once advised that the traceback had been completed and that all units received by the claimant had been confirmed as negative, the Administrator was required to deny the claim. It is understandable that this reversal was disappointing to the Claimant but a decision by the Administrator to approve a claim is not conclusive. The Claimant was specifically informed of the possibility of re-assessment in the Administrator's approval letter, dated April 24, 2001. Here, the initial decision to approve the claim was made on the basis of a presumption that operates in favour of claimants. However, the actual results, when made available to the Administrator, served to rebut the presumption and resulted in the denial of the Claimant's claim.

13. Once a claim has been denied because of negative traceback results, the burden falls to the Claimant to establish, on a balance of probabilities, that the infection with HCV occurred from a receipt of blood or blood products within the class period notwithstanding the negative traceback results. Evidence to that effect, if not available at the hearing before the referee, may be submitted by the Claimant as additional evidence on a motion to oppose confirmation. The Claimant has been advised of this right on several occasions but to date has been unable to provide any additional evidence relating to the HCV infection.

14. The Claimant has been unable to prove, pursuant to section 3.04(2), that he "was infected, for the first time, with Hepatitis C by a Blood transfusion received in Canada during the Class Period". Therefore, in light of the updated results of the traceback procedure, this motion cannot succeed.

Result

15. 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.



Winkler R.S.J.