

**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 1402088

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Harvey Sectar, released
March 8, 2006)**

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 referee set out a factual summary in paragraph 6 of his decision as follows:
- a) The claimant tested positive for HCV in 1996.

- b) He had received four units of blood during surgery at St. Boniface General Hospital in Winnipeg on March 25, 1988.
- c) A 1989 pre-operative test at the Mayo Clinic in Minnesota showed that he was positive for anti-HBc. At the time, that test was used as a "surrogate test" for HCV.
- d) The Traceback Report prepared by Canadian Blood Services, dated October 5, 2000, states that all four donors tested negative for HCV.
- e) The claimant's Declaration Form and Other Risk Factor Inquiry Form both declare that he had not used intravenous drugs; the same assertion is included in his affidavit dated August 8, 2002. However, medical records from FCI Brook dated 1989 and submitted by the claimant's counsel on July 22, 2004, include a reference to a history of past intravenous drug use.
- f) A letter to the claimant's counsel dated September 30, 2004, Dr. K. Kaita states that the claimant "has other nonprofessional risks such as tattoos." The claimant's affidavit of August 8, 2002 states that he has no tattoos.

4. When the Claimant was asked to respond to the results of the Traceback, the Claimant argued before the referee that he must have contracted the HCV from another source at the hospital, such as improperly sterilized equipment.

5. The Claimant denies that he used intravenous drugs. He submitted to the referee that he had falsely claimed that he used drugs following his arrest for drug possession, because he was under the impression that this would result in a lighter sentence.

6. The claim was denied by the Administrator on March 1, 2002. The Administrator's decision was upheld by a referee on March 8, 2006.

7. The Claimant has provided written submissions in support of this motion, in which he indicated:

In light of the St. Boniface Hospital's admission of faulty record keeping, I submit their records cannot be believed or relied on as accurate.

I have no other submissions.

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. The Claimant has established that he is infected with HCV and that he received blood transfusions during the Class Period. However, a Traceback report indicates that the four units of blood received by the Claimant in 1988 tested negative for HCV. Since the Claimant has no further evidence to establish that he received infected blood during the Class Period, his claim cannot succeed.

10. Although the Claimant has alleged that his hospital records are inaccurate, there is no evidence to substantiate this claim. Moreover, an assertion that the records are incomplete is not sufficient to meet the necessary burden of proof where the Traceback report is negative. In those cases, the Claimant must establish on a balance of probabilities that, notwithstanding the report, he contracted Hepatitis C from a blood transfusion within the class period.

Result

11. 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.

Released: October 20, 2006