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**IN THE MATTER 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 2218

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Reva Devins, released April
12, 2004)**

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

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C infection.

Facts

3. The Claimant is an Ontario resident who is infected with HCV. The Claimant seeks compensation pursuant to the Transfused HCV Plan as a primarily infected person. I have set out below the findings of fact made by the referee.
4. Between November 1976 to sometime in 1991, the Claimant received regularly scheduled blood transfusions for a chronic red cell deficiency. Although he was treated in clinics set up for Thalassaemia Major patients, he has not been diagnosed with Thalassaemia Major or Hemophilia.
5. As part of his treatment, the Claimant had extensive transfusions both in and outside of the class period. He received 686 units of blood; 398 units before the class period, 286 units during the class period and 36 units after the class period.
6. Canadian Blood Services ("CBS") provided a Traceback Procedure Report indicating that a positive donor was identified in the pre-class period. Specifically, the traceback on units transfused to the Claimant in 1984 confirmed that the donor of blood transfused to the Claimant on 1984-09-05 subsequently tested positive for HCV. Not all of the class-period donors of blood received by the Claimant were subject to the Traceback but there were no HCV positive results among those tested.
7. On January 16, 2003, the Administrator denied the claim on the grounds that the traceback procedure confirmed that the Claimant received blood prior to the Class Period from a donor who tested positive for the HCV antibody. The Administrator's decision was upheld by the referee in a decision dated April 12, 2004.

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 referee relied upon section 3.04 of the Transfused HCV Plan which provides in part:

(1) Notwithstanding any other provision of this Agreement, if the results of a Traceback Procedure demonstrate that one of the donors or

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units of Blood received by a HCV-Infected Person or Opted-Out HCV Infected Person before 1 January 1986 is or was HCV antibody positive or that none of the donors or units of Blood received by a Primarily-Infected Person or Opted-Out Primarily Infected Person during the Class Period is or was HCV antibody positive, subject to the provisions of Section 3.04(2), the Administrator must reject the Claim of such HCV Infected Person ...

(2) A claimant may prove that the relevant Primarily-Infected Person or Opted-Out Primarily-Infected Person was infected, for the first time, with HCV by a Blood transfusion received in Canada during the Class Period ... For greater certainty, the costs of obtaining evidence to refute the results of a Traceback Procedure must be paid by the claimant unless otherwise ordered by a Referee, Arbitrator or Court.

10. Since a Traceback procedure confirmed that the Claimant received blood prior to the Class Period from a donor who tested HCV antibody positive, the onus was and remains on the Claimant, pursuant to section 3.04, to establish that he was infected for the first time by a blood transfusion received in Canada during the Class Period. Unfortunately, the Claimant has been unable to produce any evidence to this effect.

11. The Claimant has made a number of submissions in support of his claim. He criticizes the contents of the Traceback Protocol and the alleged failure of the Administrator to provide him with a copy of the Traceback Protocol on a timely basis (in this regard, he claims that he would not have joined the settlement had he been aware of the contents of the Traceback Protocol). He argues that the HCV antibody positive blood donor may not have been infected at the time that the blood was donated. He also contends that the passage of time has made it difficult for him to obtain the evidence needed to succeed pursuant to section 3.04(2). Finally, he also argues that the Traceback Procedure is not appropriate for claims, such as his claim, which involve hundreds of blood donors.

12. Although many of the Claimant's criticisms are focused on the Traceback Protocol, it has limited relevance in this case. As the referee stated in her reasons, it is the Transfused HCV Plan that precludes the Claimant from admission to the class, not the Traceback Protocol.

13. The referee granted a number of extensions to the Claimant in order to permit him an opportunity to obtain evidence to refute the finding that he was infected with HCV from a blood transfusion prior to the class period. However, the Claimant has been unable to provide any evidence that establishes, on a balance of probabilities, that the donor identified by the Traceback as having provided blood infected with HCV prior to

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the class period, became infected after the donation was made. In fact, there was evidence before the referee corroborating the Traceback finding. The donor identified by the Traceback was also the source of blood received by a second individual at or around the same time as the Claimant. The second individual receiving the blood from the donor has also tested HCV antibody positive.

14. The fact that the onus of proof shifts to the Claimant after a claim is denied on the basis of a positive finding for a pre-class transfusion is a specific term of the Settlement Agreement. It cannot be changed by the Court on an appeal from the decision of a referee.

15. It was contemplated by the parties that there would be a screening process in place to aid in the determination of whether a particular claimant was a class member entitled to compensation. The Traceback procedure is but one mechanism utilized in the screening process. It is not inherently unfair, regardless of the number of donations a claimant has received. The Agreement contemplates the provision of compensation to a defined class of persons. Persons infected by HCV prior to the class period are excluded from that defined class. The receipt of one HCV positive transfusion prior to the class period suffices for the purpose of exclusion without regard to the total number of transfusions a person received.

16. I note, however, that the Settlement Agreement binds "class members" only. In this respect, the Claimant has not "joined" the Settlement but rather made a claim based on his contention that he was a class member. The denial of his claim is, in effect, a determination that he is not a class member and therefore not bound by the Settlement Agreement with respect to any claim he may wish to pursue individually.

Result

17. In my view, the referee committed no errors in principle, with respect to jurisdiction or by misapprehending the evidence before her. Accordingly, the referee's decision is confirmed.



Winkler R.S.J.

Released: September 21, 2005