

**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)**

B E T W E E N :

Claimant File 10209

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Referee, David Garth Leitch,
released March 27, 2006)**

Reasons for Decision

Perell 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.
2. The Claimant made a claim for compensation that was denied by the Administrator charged with overseeing the distribution of the settlement monies. The Claimant appealed the denial to a Referee. The Referee upheld the decision of the Administrator and denied the appeal.
3. The Claimant brought a motion to oppose the confirmation of the Referee's decision but, unfortunately, the Claimant died on January 21, 2008
4. The Claimant's family chose to continue the Claimant's motion to oppose the confirmation of the Referee's decision by this court. The Claimant's family opposes confirmation of the Referee's decision.
5. The motion has been outstanding for quite some time. Following the release of the Referee's decision in March 2006, on May 16, 2006, the Claimant sent his Notice of Motion opposing the decision. A short time later, the then Court Monitor made contact with the Claimant to provide him with information regarding the process and to invite him to file additional evidence and/or submissions. The final contact from the Claimant was by way of brief letter in May 2007.
6. Before the matter was brought to the court for consideration, the Court Monitor learned that the Claimant had died on or about January 21, 2008. The matter became dormant and was not brought to the attention of the new Court Monitor until late 2015.
7. In early 2016, the current Court Monitor confirmed with the Claimant's family

that they still wished to have the Claimant's motion brought forward to the Court and that they had no further documents or submissions to make.

Factual Background

8. 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). Under the agreement, persons infected with Hepatitis C through a blood or specified blood product transfusion during the period from January 1, 1986 to July 1, 1990 are entitled to varying degrees of compensation depending principally on the progression of the Hepatitis C infection.

9. Before his death, the Claimant was an Ontario resident who was infected with HCV. At issue is whether the Claimant acquired HCV from a blood transfusion during the Class Period. The Claimant submitted a claim, dated March 10, 2002, under the HCV Transfused Plan as a primarily infected person.

10. In his written materials and at the hearing before the Referee, the Claimant testified that he received a blood transfusion in July 1987 in the emergency department of Hospital "A".

11. The Claimant's treating physician noted in the Treating Physician Form that the Claimant did have a history of a risk factor for Hepatitis C other than through a blood transfusion received during the relevant class period, namely that he had genotype 4 e and that he was from Africa. This particular type of HCV is most commonly found in patients from Africa and the Middle East.

12. The medical records filed by the Claimant confirm that he had three attendances at the emergency department of Hospital "A" in 1987.

- a. On May 13, 1987, the Claimant attended the hospital for the treatment of persistent pain he was feeling in his finger, which had sustained a crush injury the month before. According to the hospital notes, the Claimant was given reassurance and provided aspirin. The medical records do not indicate that any blood or blood products were transfused at that time or even that a transfusion was medically indicated.
- b. On July 31, 1987, the Claimant attended the hospital as a result of a headache which had persisted for 4-days. The diagnosis was "headache" and the Claimant was provided with analgesia ("to go"). The Claimant was discharged. The medical records do not indicate that any blood or blood products were transfused at that time or even that a transfusion was medically indicated.
- c. On September 17, 1987, the Claimant returned to the hospital for recurrent headaches. The diagnosis was possible tension headaches or change in visual acuity. The Claimant was discharged without further treatment. The medical records do not indicate that any blood or blood products were transferred at that time or even that a transfusion was medically indicated.

13. The Claimant also filed a letter dated August 7, 2002 from the Medical Records

Department at Hospital "A". The letter states:

This patient was seen in the emergency department in July 1987. He states a transfusion was administered to him there. I have reviewed the chart and there is no transfusion record available. Due to the fact it was in emergency and in 1987, the transfusion record may not have been sent to medical records. I regret that I cannot obtain more information on this matter but will be available if you have any questions. Thank you for your time in this manner.

14. As a result of questions posed by the Referee during the hearing below, the Fund Counsel obtained additional information to clarify the contents of the letter dated August 7, 2002. In a letter dated January 30, 2006, Hospital "A" confirmed that both the Medical Records and Blood Bank records related to the Claimant were reviewed and no record of the Claimant having had a type and crossmatch, screen or transfusion was found.

15. In addition, the Referee had before him a letter confirming that a traceback investigation conducted by Canadian Blood Services concluded that the Claimant's records at Hospital "A" were available and that there was no record of transfusion found.

Decision of the Administrator

16. By letter dated May 17, 2004, the Administrator rejected the Claimant's request for compensation on the basis that he had not provided sufficient evidence confirming that he had received blood during the Class Period.

17. The Claimant completed a Request for Review dated May 31, 2004 requesting that the Administrator's decision be referred to a Referee.

Hearing before the Referee

18. At the hearing before the referee, the Claimant maintained that he had received a transfusion of the equivalent of a blood bag during his July 1987 visit to Hospital "A". He relied on the statements made in the letter dated August 7, 2002, to argue that the emergency department may have simply failed to document his transfusion at the time.

19. The Claimant stated that during his stay in the emergency department in July 1987, he was examined by a physician for about thirty minutes and that the physician administered a series of tests before ordering a blood transfusion. He stated that he had spent several hours at the hospital on that day.

20. The Emergency Report of July 31, 1987, as summarized by the Referee notes that the Claimant was admitted at 23:15, seen by a physician at 00:25, and was released at 00:40.

21. The Referee heard from a medical assistant employed by the Hepatitis C Claim Centre, who testified that it normally takes one and half hours to complete a blood transfusion. He also testified that he saw nothing in the Emergency Report of July 31, 1987 which would have justified a decision to give the Claimant a blood transfusion.

22. In his decision dated March 27, 2006, the Referee concluded that the Administrator's decision to deny the Claimant's request ought to be confirmed. The Referee concluded that the Claimant had failed to provide corroborating and independent evidence of a blood transfusion. Absent such evidence, the Claimant's request could not succeed. Further, the Referee concluded that in his opinion it was unlikely that the

Claimant could have been examined by a physician, undergone a series of tests and transfused the equivalent of a bag of blood during in the time that he was first seen by the physician and ultimately discharged some 20-minutes later.

23. The Claimant delivered his Notice of Motion to oppose the Referee's decision on May 16, 2006.

24. For the reasons described above, this matter was not brought forward to the Court for consideration until early 2016, several years following the Claimant's death. The Claimant's daughter has confirmed her family's desire to proceed with this motion. The family has not provided any additional evidence or submissions.

Standard of Review

25. In a prior decision in this class proceeding, the standard of review set out in *Jordan v. Mackenzie*, (1987), 26 C.P.C. (2d) 193 (Ont. H.C.), aff'd (1999), 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*, Justice Anderson stated that the reviewing court "ought not to interfere with the results unless there has been some error in principle demonstrated by the [referee's] reasons, some absence or excessive jurisdiction, or some patent misapprehension of the evidence."

Analysis

26. In order to qualify for compensation as a primarily infected person under the Transfused HCV Plan, section 3.01 of the Plan requires the Claimant to provide evidence that he received a blood transfusion in Canada during the Class Period.

27. Section 3.01(1)(a) provides in part:

(1) A person claiming to be a Primarily-Infected Person must deliver to the Administrator an application form prescribed by the Administrator together with:

(a) medical, clinical, laboratory, hospital, The Canadian Red Cross Society, Canadian Blood Services or Hema-Québec records demonstrating that the claimant received a Blood transfusion in Canada during the Class Period.

28. Where a Claimant is unable to provide proof of transfusion as required under section 3.01(1)(a), section 3.01(2) provides that, "...the claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant establishing on a balance of probabilities that he or she received a Blood transfusion in Canada during the Class Period."

29. Since neither the Claimant nor his family have been able to produce records that confirm the Claimant received Blood during the Class Period, the claim can only succeed if it meets the requirements set out in section 3.01(2).

30. As the Referee concluded following a thorough review of the evidence available, the Claimant was unable to offer any evidence to corroborate his claim that he received a

transfusion during his visit to the Emergency Department of Hospital "A" in July 1987 or at any other time during the Class Period.

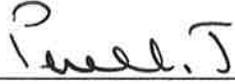
31. The Claimant's own recollections as told during the hearing before the Referee and as reproduced in the written materials available to this Court cannot be considered as independent or corroborating evidence of a transfusion.

32. I understand that the Claimant believed that the hospital records were incomplete and that he was transfused, despite the documentary evidence to the contrary. Unfortunately, there was no evidence before the Referee or before this Court to support such a belief. Even if the blood bank records were not initially available to the medical records department, the traceback and follow up information received from the hospital, confirm that there is no record of a blood transfusion for the Claimant during the relevant time period at Hospital "A".

33. The Claimant failed to provide any significant corroborating evidence that is "independent of the personal recollection of the Claimant or any other person who is a Family Member". Accordingly, the Referee's decision must be upheld.

Result

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



Justice Perell