

**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 2381

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Judith Killoran, released
May 27, 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 Claimant is a Primarily Infected Person who resides in Ontario.

4. The Claimant has been approved to receive compensation for loss of income pursuant to section 4.02 of the Hemophiliac HCV Plan, which is to be paid until the Claimant attains the age of 65. At issue is the method used by the Administrator to determine the amount of this compensation.

5. Section 4.02 of the Hemophiliac HCV Plan sets out a detailed formula for determining compensation for loss of income. In short, section 4.02 provides that annual compensation for loss of income is based on the excess of the claimant's "Pre-claim Net Income" over his or her "Post-claim Net Income" for such year. A claimant's Pre-claim Net Income is normally calculated by determining the average of the claimant's three highest consecutive years of "Earned Income" proceeding the claimant's entitlement to compensation under section 4.02, less "Ordinary Deductions" that would normally be payable on the Earned Income.

6. "Ordinary Deductions" are defined as including income taxes and Canada Pension Plan ("CPP") deductions. Accordingly, compensation for loss of income is based on the after-tax income that the claimant would have earned had he not become infected with HCV. For the purpose of calculating the income taxes that are treated as Ordinary Deductions, only income tax deductions that are specified in section 4.02(2)(g) can be applied, and these specified deductions do not include deductions relating to Registered Retirement Savings Plan ("RRSP") and Registered Education Savings Plan ("RESP") contributions.

7. In determining the Claimant's compensation for loss of income, the Administrator followed its usual procedure of including CPP premiums as Ordinary Deductions. Moreover, in determining the amount of tax that the Claimant would have paid on his income, the Administrator did not provide the Claimant with any credit for RRSP and RESP contributions that he either made or would have made had he not been infected with HCV. The Claimant argues that these two calculation procedures are unfair for the following reasons:

- a) The Claimant submits that CPP premiums should not be treated as an "Ordinary Deduction" and deducted from his compensation for loss of income unless he receives a corresponding benefit. As it stands, the money that is being deducted is not being paid into the Canada Pension Plan nor has the Claimant been provided with a substitute pension arrangement. By deducting the CPP premiums but not providing him with a corresponding benefit, he has been placed into a worse financial position than he would have been had he not been infected with HCV.
- b) The Claimant submits that he is being deprived of much of the benefit of RRSPs and RESPs since the Administrator's method of calculating his compensation is based on the amount of after-tax income that he would

have generated had he not contributed to RRSPs and RESPs. This places him into a worse financial position than he would have been in had he not been infected with HCV. The Claimant points out that he has a history of contributing to RRSPs.

8. The Administrator's determination of the Claimant's loss of income was upheld by a referee in a decision dated May 27, 2005. In this decision, the referee wrote:

While I sympathize with the concerns expressed by the claimant, I find that the Administrator correctly applied the formula for calculating the claimant's loss of income as set out in the Plan. The Administrator has no discretion to alter this formula. There is also no discretion granted to an Arbitrator or Referee to modify the terms or provisions of the Plan.

Standard of Review

9. 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

10. I accept that the method of calculation used by the Administrator has placed the Claimant into a worse position than he would have been in had he not been infected with HCV to the extent that:

- a) the Claimant is effectively being required to pay CPP premiums even though he is not receiving CPP benefits; and
- b) the Claimant's ability to benefit from RRSPs and RESPs has been limited.

Nonetheless, section 4.02 expressly requires the inclusion CPP premiums as Ordinary Deductions. This section also expressly prohibits all income tax deductions unless they are specifically listed (as mentioned earlier, RRSPs and RESPs are not listed). Accordingly, the Administrator had no choice but to calculate the Claimant's compensation for loss of income as it did.

Result

11. In essence, the Claimant's appeal is one directed at the terms of the Settlement

Agreement rather than its application in his particular case. The relief sought by the Claimant would require an amendment to the Settlement Agreement with respect to the method for calculating income. Such an amendment is beyond the scope of the Court's jurisdiction in this appeal process, just as it was beyond the authority of the referee and the Administrator.

12. In my view, the referee committed no errors in principle, with respect to jurisdiction or by misapprehending the evidence before her. Therefore, the Claimant's motion is dismissed and the referee's decision is confirmed.



Winkler R.S.J.

Released: May 8, 2006