

**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 No. 2644

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Judith Killoran, released
November 23, 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. This motion involves a claim by a personal representative on behalf of the estate of a deceased person.

4. The following factual summary pertinent to this motion is taken from the referee's decision:

7. The deceased received medical treatments from late 1985 until her death in March 1986. She was diagnosed at the Greater Niagara General Hospital (GNGH) with presumed alcoholic cirrhosis in December 1985. In February 1986, when the deceased presented at GNGH vomiting blood, an emergency GI endoscopy and scleral vein therapy procedure were conducted. At that time, she was provided with two units of blood and one unit of fresh frozen plasma. The deceased was discharged from the

hospital only to be readmitted 10 days later. On this second admission, the deceased was hemorrhaging and further blood products were provided.

8. On March 12, 1986, the deceased was admitted to Hotel Dieu Hospital in St. Catherines where she received an endoscopy and scleral vein therapy. The deceased died at Hotel Dieu on March 19, 1986. Her cause of death was an upper GI hemorrhage secondary to esophageal varices which were secondary to cirrhosis.

9. The deceased was never tested for HCV and no liver biopsy appears to have been conducted.

5. On August 31, 2003, the Administrator denied the personal representative's claim for compensation under the Transfused HCV Plan on the basis that the personal representative had not provided sufficient evidence that the deceased was infected with the Hepatitis C virus. The Administrator's decision was upheld by a referee on November 23, 2003.

6. In the Notice of Motion opposing confirmation, the personal representative emphasized that the deceased received many units of blood in addition to the two units of blood and one unit of fresh frozen plasma referred to by the referee.

Standard of Review

7. 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

8. The personal representative position's was and remains that it is likely that the deceased was infected with the Hepatitis C virus in view of the deceased's pre-existing condition and the significant number of transfusions that the deceased received. It was submitted that a definitive diagnosis, including a diagnosis for Hepatitis C infection cannot be performed, because no liver biopsy was conducted and that Hepatitis C antibody tests were not available until 1989. Moreover, the personal representative argued that the Administrator should have conducted traceback procedures.

9. As the referee indicated, sections 3.01 and 3.05 of the Transfused HCV Plan set out specific evidentiary requirements for establishing that an individual was infected with Hepatitis C during the Class Period. While the personal representative has provided evidence of blood transfusions and some evidence regarding the deceased's symptoms, the requirements that are set out in the Settlement Agreement have not been met. Specifically, and notwithstanding the absence of a Hepatitis C antibody test report or PCR test report, none of the alternative evidence listed in section 3.05(3) was provided at the hearing or in respect of this motion. Accordingly, the referee was obligated to deny the claim.

Result

10. 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.