

# SUPERIOR COURT

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-06-000016-960

DATE: September 17<sup>th</sup>, 2012

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**IN THE PRESENCE OF THE HONOURABLE CHIEF JUSTICE FRANCOIS ROLLAND**

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**CLAIM NUMBER 2629**

Petitioner

vs

**ATTORNEY GENERAL OF CANADA**

and

**ATTORNEY GENERAL OF QUEBEC**

and

**CANADIAN RED CROSS SOCIETY**

and

**GERALD J. CHARNEY Q.C. Referee**

Respondents

and

**FONDS D'AIDE AUX RECOURS COLLECTIFS**

and

**THE PUBLIC CURATOR OF QUEBEC**

Mis en cause

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**JUDGMENT**

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[1] The Claimant is asking to be relieved of default and be authorized to file an opposition to confirmation.

[2] This motion is made pursuant to the terms of the settlement agreement in the Hepatitis C litigation (the "Agreement") 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 (the "Administrator") charged with overseeing the distribution of the settlement monies. The Claimant appealed the denial to a referee ("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.

[3] The motion to oppose confirmation of the decision of the Referee was filed outside the prescribed delays.

[4] After hearing the evidence and the arguments, the court relieves the Claimant from her default and authorises her to file her opposition.

[5] This decision is made upon consideration of Claimant's physical condition at the time of the decision rendered by the Referee and the fact that some errors could have been made by her attorney and not by her.

[6] The Agreement is Pan-Canadian and was approved inter alia by madam Justice Nicole Morneau on September 21, 1999.

### **THE FACTS**

[7] 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 some compensation depending on the progression of the Hepatitis C infection.

[8] In 1999, the Claimant was diagnosed with Hepatitis C.

[9] On July 18, 2000 the Claimant submitted a claim to the Administrator under the Agreement.

[10] On February 3, 2003, after having obtained the relevant information from Claimant and given the responses obtained by the various medical institutions, the Administrator denied her claim for compensation on the basis that there was no evidence of a transfusion during the class period.

[11] The Claimant filed an appeal outside the prescribed limit, but the Referee nevertheless heard the appeal and on August 13, 2008 dismissed Claimant's appeal.

[12] The Referee dismissed Claimant's appeal on the ground that there was no evidence presented in accordance with the Agreement's condition that the Claimant would have had a blood transfusion during the class period.

[13] The Referee's decision contains the reasons on page 9 which read as follows :

The fact that there is a record of the 1986 procedure and that that record does not contain any evidence of a blood transfusion, and that the only witnesses to the fact that there allegedly was blood being transfused into the claimant, comes from relatives which are not to be used as corroboration under Article 3.01 of the Transfused HCV Plan. It seems to me very unlikely that the hospital would record therapeutic abortion at 1:30 p.m. and not mention that there was a blood transfusion if there was one, is to me unlikely and therefore improbable.

In addition, the evidence of the two witnesses was understandably confused after all this period of time and the time period that they suggest is not likely to have occurred as the evidence was given. In any event, neither the claimant nor the two relatives are capable under Article 3.01 as corroborating that the claimant received a blood transfusion.

In result then, the request for review is dismissed and the decision of the Administrator is upheld. [underlines added]

[14] The Claimant submits that she has received blood in 1986 at the Reddy Memorial Hospital but that she has no access to records to prove this since they were destroyed when the Hospital closed in 1997. She submits that her sister and her then common law spouse testified to that effect before the Referee.

[15] On May 23, 2002, the final report of the traceback study was sent to Claimant. The medical institution and the blood bank of the Montreal General Hospital both confirmed that the Claimant did not receive any blood transfusion during her hospitalisation at these hospitals.

[16] No one contests that the Claimant has contracted Hepatitis C.

[17] In prior decisions in these class proceedings, the Court adopted standards to be applied to motions presented by infected Claimants opposing confirmations of a Referee's decision. Under these standards, a Court will not 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.

[18] In order to succeed, the Claimant must establish, on the balance of probabilities, that she has received a blood transfusion during the specified class period. Proving a blood transfusion when there are no hospital records is difficult but not impossible.

### ANALYSIS AND DECISION

[19] In his decision the Referee states the following :

«To be entitled to compensation the claimant must prove that he/she has been infected by HCV following a blood transfusion in Canada during the class period.

Article 3.01 of the Transfused HCV Plan provides the following :

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, or Canadian Blood Services of Hema Quebec records demonstrating that the claimant received a Blood transfusion in Canada during the Class Period.

If a claimant cannot comply with the provisions of section 3.01(1) a of the Transfused HCV Plan, Article 3.01(2) provides the following:

Notwithstanding the provisions of Section 3.01(1) a), 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.

The claimant believes that she had received a blood transfusion in 1986 while hospitalised at the Reddy Memorial Hospital.

The traceback results confirm that the claimant did not receive any blood product during the Class Period.

Since there is no record of a blood transfusion taking place in the relevant time period, the only legal basis upon which the claimant could succeed is under the abovementioned article 3.01(2) of the Transfused HCV Plan.

Therefore, the claimant needs corroborating evidence independent of her personal recollection or that of a family member establishing on the balance of probability that she received a blood transfusion in Canada during the class period.»

[20] Since no hospital records of a blood transfusion could be provided because The Reddy Memorial had destroyed them, the Referee relied on Article 3.01(2) of the Agreement to establish the possibility that the Claimant had received blood.

[21] The Referee, after hearing the Claimant's witnesses, concluded that they did not qualify with the conditions set out in Article 3.01(2) as they were not independent witnesses.

[22] Again, no one questions that the Claimant has Hepatitis C but to be entitled to compensation under the Agreement, the Claimant must comply with the Agreement's requirements.

[23] The Agreement, sanctioned by 3 different judges, provides that in the absence of records establishing blood transfusion, a Claimant must present two independent witnesses confirming the transfusion, in order to be entitled to compensation.

[24] The onus is on the Claimant and must be met by providing independent corroboration evidence.

[25] Unfortunately, the Claimant has failed to do so.

**CONCLUSIONS**

[26] The Agreement sets out the requirements that must be met by a Claimant. The Referee correctly interpreted those requirements and applied them to the finding of fact that he made with respect to the Claimant's situation there was insufficiency of evidence to prove that the Claimant received blood during the class period.

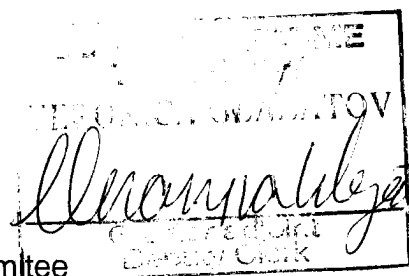
[27] The Referee committed no errors in principle with respect to jurisdiction or by misapprehending the evidence before him.

[28] Accordingly the Referee's decision is confirmed.

  
FRANÇOIS ROLLAND, chief justice

Me Joyce Blond Frank  
For the petitioner

Me Martine Trudeau  
Savonitto & Ass. inc.  
For Michel Savonitto, *ès qualités* of member to joint Comtee



Me Philippe Dufort-Langlois  
McCarthy, Tétrault  
Conseillers juridiques du Fonds d'aide aux recours collectifs

Me Michel Miller (absent)  
Ministère de la Justice du Canada  
For the Attorney general of Canada

500-06-000016-960

PAGE: 6

Me Manon Des Ormeaux (absente)  
Bernard Roy (Justice-Québec)  
For the Attorney general of Quebec

Date of hearing: August 20, 2012