

**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 19627**

**- and -**

**The Administrator**

**(On a motion to oppose confirmation of the decision of Shelley Miller, Q.C., released July 20, 2016)**

**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. 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.

**Factual 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. (4<sup>th</sup>) 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.

3. The Claimant is a resident of Alberta who is infected with HCV. She filed a claim for compensation under the HCV Transfused Plan as a Primarily-Infected Person.

4. The issue is whether the Claimant acquired HCV from a blood transfusion during the Class Period. There is no information in the case file from the Claimant's treating

physician with respect to the severity of her condition or disease level.

5. In her application forms, the Claimant alleges that she received an unknown number of units of blood at the Royal Alexandra Hospital in Edmonton, Alberta in December 1988 as a result of gallbladder issues.

6. During the hearing before the Referee, the Claimant testified that she attended hospital for treatment of her gallbladder issues on two occasions and that on one of those occasions she was offered emergency surgery at the Royal Alexandra Hospital.

7. She also testified that she was provided with a form to sign that would permit a transfusion. She recalled being treated by a physician by the name of Dr. Hackett, but seeing him only in the operating room. She further recalled that while in the recovery room a nursing attendant advised her that she was attaching blood to the IV pole. No one was present with her during her hospitalization.

8. The Claimant testified that following her surgery at the Royal Alexandra Hospital she was admitted to the Charles Camsell Hospital a few weeks later for jaundice. She explained that it was at about this time that she was diagnosed with non A non B hepatitis. At the time, she recalled being advised by someone at the hospital that she had contracted the virus from “her junkie friends”

9. The Claimant completed an “Other Risk Facts” (ORF) form, which is dated August 27, 2015. In the form, she indicates that she has 4 tattoos, all of which she received after 1990, some at home and some at a shop. The Claimant also acknowledged the use of non-prescription intravenous drugs, including codeine and morphine in the winter 1989. The Claimant denied sharing needles.

10. During the hearing before the Referee, the Claimant confirmed the risk factors set out in the ORF Form and explained that with respect to the non-prescription intravenous drug use that she had purchased both Demerol and Morphine “on the street” and used those drugs with needles acquired from a needles exchange program.

11. The Claimant believed that she was given a transfusion tainted with Hepatitis C and that the Royal Alexandra Hospital tampered with her hospital records to cover it up.

### **Results of Traceback Search and Decision of Administrator**

12. On October 26, 2015, Canadian Blood Services provided the Administrator with the results of the Traceback conducted in connection with the Claimant. The Canadian Blood Services confirmed the following:

- a. With respect to the Claimant’s admission and surgery at Royal Alexandra Hospital, the blood bank records from October 1985 to August 2015 were searched, the Claimant’s record was available and the Claimant was not transfused.
- b. With respect to the Claimant’s admission at Charles Camsell Hospital, the blood bank records from January 1981 to October 1993 were searched, the

Claimant's record was available and the patient was not transfused.

13. By letter dated November 4, 2015, the Administrator advised the Claimant that her claim was denied on the basis that there was not sufficient evidence to support the assertion that she had received blood during the Class Period.

#### **Decision of Referee**

14. The Claimant delivered a Request for Review by Arbitrator/Referee on November 25, 2015.

15. Before the hearing before the Referee, the Claimant and Fund Counsel agreed to attempt to retrieve the entirety of the Claimant's hospital records relating to her admissions at the two hospitals. Those records were obtained in March 2016.

16. Consistent with the Traceback report of Canadian Blood Services, there was no mention of the Claimant having been transfused in any of the hospital records retrieved.

17. The Referee convened a hearing of this matter on June 28, 2016 in Edmonton, Alberta.

18. In addition to receiving the Claimant file, the hospital records and the submissions of Fund Counsel, the Referee heard evidence from the Claimant and her daughter.

19. The Referee released her decision on July 20, 2016. In it, the Referee concluded that on the basis of the Claimant's own evidence, it was more probable than not that she contracted Hepatitis C from some source other than a blood transfusion in the Class Period or otherwise. As such, the Referee confirmed the decision of the Administrator to deny the Claimant's request for compensation.

#### **Motion to Oppose Confirmation of Referee's Decision**

20. On August 23, 2016, the Claimant delivered to Fund Counsel a Notice of Motion. The Claimant's husband, who prepared the Notice of Motion, submitted that the Referee misapprehended the Claimant's evidence and that the Royal Alexandra Hospital records have either been tampered with or have not been fully disclosed.

#### **Standard of Review**

21. 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.

22. In *Jordan*, Justice Anderson J. 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

23. 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 she received a blood transfusion in Canada during the Class Period.

24. Section 3.01(1)(a) of the Transfused HCV Plan provides in part:

3.01 (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.

25. 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.

26. In the immediate case, the Claimant has been unable to produce records that confirm she received Blood during the Class Period. Rather, the medical records and Traceback report that have been produced indicate that the Claimant was not transfused as alleged or at all.

27. The Royal Alexandra Hospital records obtained before the Referee's hearing describe what appears to have been an uneventful hospital admission for acute gallbladder issues, resulting in surgery. The physician's post-op note makes no mention of excessive blood loss or the requirement of a transfusion. Further, on the Pre-Operative Check-list, it appears that the nurse preparing the patient struck-out the notation for “blood available in the blood bank” suggesting that such precaution was not taken before the surgery.

28. Since the Claimant is unable to rely upon the medical records available to confirm that she received Blood during the Class Period, her claim can only succeed if she meets the requirements set out in section 3.01(2).

29. As the Referee concluded following a thorough review of the evidence available, the Claimant has been unable to offer any evidence to corroborate her own personal recollection that she received a transfusion during her surgery in December 1988 or at any other time during the Class Period.

30. The Claimant's own recollections as told during the hearing before the Referee and as reproduced in her submissions cannot be considered as independent evidence of a transfusion.

31. Finally, the Claimant adamantly believes that she was transfused in 1988 at the Royal Alexandra Hospital during or following her gallbladder surgery and that the

hospital records that suggest otherwise are incomplete or have been tampered with. There was nothing in the material before the Referee or the materials before this Court that support such a contention. The hospital records make no mention of severe blood loss or of a blood transfusion having been given. The Traceback report confirms that the Claimant was not transfused at either the Royal Alexandra Hospital or at the Charles Camsell Hospital.

32. The Claimant has been unable to provide any corroborating evidence that is “independent of the personal recollection of the Claimant or any other person who is a Family Member”. The Claimant’s allegations of tampering and hiding evidence have not been substantiated. Accordingly, the Referee’s decision must be upheld.

### **Result**

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



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Justice Perell

September 16, 2016.