

**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)**

BETWEEN

Claimant File 7518

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Daniel Shapiro, Q.C.,
released July 13, 2006)**

Reasons for Decision

WINKLER C.J.O.:

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 Manitoba resident who is infected with the Hepatitis C virus ("HCV"). He has applied for compensation pursuant to the Transfused HCV Plan.

4. The Claimant's application for compensation was denied by the Administrator in a letter dated December 5, 2006 on the basis that, on the balance of probabilities, he was not infected for the first time by a blood transfusion. The Administrator's decision was upheld by a referee on July 13, 2006.

5. It is undisputed that the Claimant received a transfusion of two units of blood at Concordia General Hospital. A traceback procedure determined that one unit of blood was HCV negative whereas it was inconclusive with respect to the other unit of blood.

6. This claim is complicated by the Claimant's history as a cocaine user. Although there is some conflicting evidence regarding when the Claimant used cocaine, the Claimant claims that he commenced use in 1988 and continued using it until as late as 1994.

7. In an affidavit sworn on April 1, 1995, the Claimant indicated that he started taking cocaine intravenously occasionally, "then progressed to a weekly basis and then to daily use." The referee inferred from this that, in total, he likely injected hundreds if not thousands of needles.

8. The Claimant contends that he never shared needles or straws when consuming cocaine, although it appears from the referee's decision that he admitted to having shared bills that were used for snorting cocaine (according to the referee, the Claimant indicated that "There were times where someone passed bills around and he saw blood on the ends of these and did not want to use them.").

9. The Claimant also has five tattoos, which he acquired in the late 1970s and early 1980s. He claims that he acquired these tattoos at his own shop using equipment that was not used on anyone else.

10. According to Carol Miller, a nurse who testified on behalf of the Administrator, the shared intranasal consumption of drugs poses an HCV risk because intranasal drug use can result in nose bleeds.

11. The Claimant underwent a liver biopsy in 2001 that indicated a 0 to 1 grade of fibrosis. According to Dr. Garber, a professor and head of Infectious Disease at the University of Ottawa, a 0 to 1 grade is "fairly minimal disease for an individual potentially infected 13-14 years ago and who has a significant alcohol intake." With this in mind, Dr. Garber concluded that the Claimant's drug use was the most likely cause of his infection:

... on the balance of probabilities and based on the minimal damage to the liver seen despite an extensive alcohol intake history suggests that his exposure to hepatitis C would most likely have been after 1988 and therefore most likely in when he was actively using injection drugs. On this basis, I think it's more likely on the balance of probabilities that he was exposed to Hepatitis C through injection drug use rather than a

single unit of blood that has not been traceable.

12. In a letter dated February 12, 2005, the Claimant's physician, Dr. Hamm, stated, "It is my opinion that the weight of evidence supports that [the Claimant] acquired Hepatitis C from the blood transfusion at Concordia Hospital in May of 1988." He provided no reasons for reaching this conclusion.

13. The referee found the Claimant to be an honest and credible witness. However, he expressed significant concerns regarding the reliability of the Claimant's evidence when considering that prolonged cocaine use can affect both judgment and memory.

Standard of Review

14. 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

15. Pursuant to section 3.01(3) of the Transfused HCV Plan, a Claimant who has used non-prescription intravenous drugs can only succeed if he can deliver to the Administrator evidence "establishing on a balance of probabilities that he or she was infected for the first time with HCV by a Blood transfusion in Canada during the Class Period." The process for determining whether the Claimant's evidence is sufficient is set out in the Court approved protocol relating to non-prescription intravenous drug use.

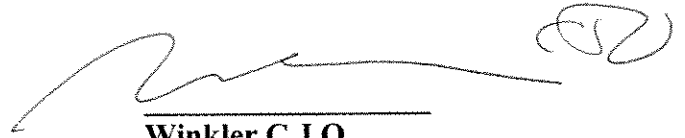
16. When considering that the Claimant injected cocaine on a regular basis for a prolonged period of time, it was not unreasonable for the referee to conclude that the Claimant's evidence regarding needle sharing was unreliable. Moreover, Dr. Garber's evidence that the progression of the Claimant's HCV infection is more consistent with an infection acquired after 1988 contradicted the Claimant's evidence that he received HCV for the first time in 1988. In addition, the referee was entitled to prefer the evidence of Dr. Garber to that of Dr. Hamm on the basis that Dr. Hamm is not an HCV expert, and further, that he did not provide reasons for his conclusion.

17. Accordingly, I see no basis to interfere with the referee's decision.

Result

18. 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 C.J.O

Released: March 25, 2010