

**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 9600

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Shelley L. Miller, released
June 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 resident of Edmonton who has been diagnosed with HCV. He

submitted an application for compensation pursuant to the Transfused HCV Plan in May 2002.

4. The Claimant received three units of transfused blood on May 4, 1986. There is no evidence that he has received any other transfusions.

5. A traceback procedure was initiated in June 2002.

6. In June 2003, the Administrator approved the Claimant's application for compensation pursuant to the Transfused HCV Plan. At this time, the results of the traceback procedure were inconclusive.

7. In a letter dated September 27, 2004, the Administrator informed the Claimant that new traceback results revealed that the donors of the blood that the Claimant received on May 4, 1986 all tested negative for the HCV antibody. Accordingly, the Administrator rejected the claim, thereby reversing its earlier decision to accept the claim. Pursuant to the terms of the Plan and the Court Approved Protocols, the Administrator permitted the Claimant to keep all money received to date but indicated that he would not be eligible for further payments unless he proved that he was infected for the first time with HCV by a blood transfusion received in Canada during the Class Period.

8. The Administrator's decision to reject the claim was upheld by a referee in a decision that was dated June 27, 2005. In his submissions to the referee, the Claimant indicated that he could think of no other way in which he could have received HCV other than from the transfusions that he received on May 4, 1986.

9. The Claimant was invited to make additional submissions in support of this motion but has not submitted any additional material to support his claim that he acquired Hepatitis C from a blood transfusion during the Class Period.

Standard of Review

10. 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

11. Section 3.04 of the Transfused HCV Plan provides:

(1) Notwithstanding any other provision of this Agreement, if the results of a Traceback Procedure demonstrate that one of the donors or units of Blood received by a HCV-Infected Person or Opted-Out HCV Infected Person before 1 January 1986 is or was HCV antibody positive or that none of the donors or units of Blood received by a Primarily-Infected Person or Opted-Out Primarily Infected Person during the Class Period is or was HCV antibody positive, subject to the provisions of Section 3.04(2), the Administrator must reject the Claim of such HCV Infected Person ...

(2) A claimant may prove that the relevant Primarily-Infected Person or Opted-Out Primarily-Infected Person was infected, for the first time, with HCV by a Blood transfusion received in Canada during the Class Period ... For greater certainty, the costs of obtaining evidence to refute the results of a Traceback Procedure must be paid by the claimant unless otherwise ordered by a Referee, Arbitrator or Court.

12. Since a Traceback Procedure has demonstrated that none of the donors or units of blood received by the Claimant during the Class Period were HCV antibody positive, the onus is on the Claimant to establish that he was infected for the first time by a blood transfusion received in Canada during the Class Period. The Claimant has been unable to produce any evidence to this effect.

13. It is understandable that the Administrator's decision to deny the claim after it was conditionally approved was disappointing to the Claimant. However, a decision by the Administrator to approve a claim is not conclusive. Section 7.01(2) of the Transfused HCV Plan empowers the Administrator to re-assess the compensation payable to a Claimant “if the Administrator determines that there has been a material change in circumstances.” Here, the actual negative traceback results represent a “material change” from the presumption that operated in favour of the Claimant leading to the initial decision to provide compensation. Moreover, the Claimant was specifically informed of the possibility of re-assessment in the Administrator's approval letter, dated June 19, 2003.

Result

14. In my view, the referee committed no errors in principle, with respect to

jurisdiction or by misapprehending the evidence before her. Accordingly, the referee's decision is confirmed.



Winkler R.S.J.

Released: May 19, 2006