

**IN THE MATTER OF 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 7438**

**- and -**

**The Administrator**

**(On a motion to oppose confirmation of the decision of the Referee, C. Michael Mitchell, released on November 14, 2013)**

**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 Settlement Agreement in the Hepatitis C litigation for the class period January 1, 1986 to July 1, 1990. The Claimant challenges the decision of the Administrator to terminate the Loss of Services benefits that he was receiving from the 1986-1990 Hepatitis C Class Action Settlement Fund. The Claimant appealed the termination to a Referee in accordance with the process set out in the Settlement Agreement. The Referee upheld the decision of the Administrator and denied the appeal. The Claimant now opposes confirmation of the Referee's decision.

**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 (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. The Settlement Agreement includes, among other things, a number of written court approved protocols ("CAPS"), including the "Loss of Services of the HCV Infected Person CAP", which is the protocol relevant in this case.

**Facts**

3. The Claimant's mother was infected with HCV by a blood transfusion she received at Hospital "A" in Ontario during the Class Period. The Claimant's mother was

approved for and received compensation from the Fund until her death on December 24, 2000. She was 71 at the time of her death.

4. The Claimant contracted Lyme disease in 1987, when he was in his early thirties. As a result of a delay in diagnosing and treating his condition, the Claimant continues to suffer from debilitating medical problems. As a result, the Claimant was determined to be a Dependent of his mother, and he was approved for Loss of Services benefits under the Fund, which he received up until October 1, 2012.

5. On October 1, 2012, the Administrator terminated further payments, on the basis that October 1<sup>st</sup> was the actuarially determined life expectancy for the Claimant's mother. As is required under the Settlement Agreement, the Administrator used the Canada Life tables current at the time of death to determine the maximum period for which loss of services may be payable. Loss of Services payments are made only for the period of life expectancy as determined by the actuarial tables.

6. The Claimant is opposing the confirmation of the decision of the Referee on the basis that in light of his unique circumstances, he ought to continue to receive Loss of Service benefits, despite the language of the Settlement Agreement.

### **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 Court Approved Protocol for loss of services of an HVC Infected Person provides ongoing entitlement to benefits for Dependents after the death of the primarily infected family member on the following basis:

16. The Administrator will use the most current Canada Life Tables to calculate a notional life expectancy of the deceased HCV Infected Person without reduction for pre-existing ailments or illness (including HCV) to determine the maximum period loss of services may be payable.

17. Loss of services will be paid to Dependents for the calculated life expectancy of the deceased HCV Infected Person, so long as the Spouse who is Dependent remains alive or there is a Child who is Dependent who continues to qualify for payments. Loss of services payments will cease

upon the death of the Spouse who is a Dependent unless there is a child who continues to qualify for payments as a Dependent.

9. There is no dispute that the Claimant was entitled to benefits as a Dependent of a primarily infected person. The only issue on this motion is whether those benefits should continue beyond the life expectancy date determined by the Administrator.

10. It is clear from the materials provided that the Claimant has had a challenging life and that as a result of his own medical conditions continues to have serious difficulties. It is also clear from the evidence provided that the Claimant will have significant difficulty supporting himself without the Loss of Service benefits he received from the Fund.

11. Unfortunately, there is nothing in the Settlement Agreement or relevant CAPs that gives the Administrator or this court the discretion to extend the period for which the Claimant is entitled to benefits beyond the life expectancy date.

12. I note that in his decision, the Referee, while dismissing the claim, provided suggestions as to how to address this apparent unfairness in the administration of the fund for Dependents in circumstances similar to that of the Claimant here. The Referee suggested that loss of services benefits be paid: (i) indefinitely for the life of the dependent; or (ii) until the dependent reaches age 65 and is eligible for old age security benefits. As a third option the Referee suggested to limit the benefits payable up to age 65 to the difference between the CPP pension in this case (or other income in other cases) and the amount of the full old age security benefit would be if the dependent was age 65.

13. I share the Referee's concerns and echo his suggestion that this matter be brought to the attention of the Joint Committee for future consideration, particularly in the event that the Committee has the opportunity to make submissions to this court as to what should be done with any Fund surplus.

## **Result**

14. The Settlement Agreement and relevant court approved protocols establishes limits on the payment of Loss of Services benefits. The Referee correctly interpreted the Agreement and the limits on his discretion in the circumstances.

15. In my view, the Referee committed no errors in principle, with respect to jurisdiction or by misapprehending the evidence before him.

16. Accordingly, the Referee's decision ought to be confirmed.

**Perell, J.**

**Released:** December 16, 2013.