

CANADA / JUDGMENT

Thompson v. Canada (Attorney General)

2002 FCT 450

COURT

Federal Court

DECIDED

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Thompson v. Canada (Attorney General)

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Decision Content

Date: 20020419

Docket: T-795-01

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BETWEEN:

ROBERT THOMPSON

Applicant

-and-

THE ATTORNEY GENERAL OF CANADA and

THE MINISTER OF HEALTH

Respondents

REASONS FOR ORDER AND ORDER

HENEGHAN J.

INTRODUCTION

- [1] Mr. Robert Thompson (the "Applicant") seeks judicial review of a decision, dated April 10, 2001, made pursuant to the Extraordinary Assistance Plan ("EAP"), a programme instituted by the Government of Canada to grant financial assistance to persons who became infected with human immuno-deficiency virus ("HIV") as a result of receiving blood or blood products in Canada since 1977. The Applicant's request for financial assistance was denied.

FACTS

- [2] The Applicant was born in Ontario on January 11, 1952. He claims that he was diagnosed with leukaemia during childhood, at the age of 3½ years. According to his affidavit filed in support of the present application, the Applicant underwent frequent blood transmissions between 1979 and the mid 1980's; the leukaemia then went into remission.
- [3] In January 1993, the Applicant required medical care because he was injured when he was hit by a moving car while he was crossing a street. The medical examination which was performed two days after that accident disclosed that he had a perforated rectum. The link between the accident and this rectal condition was questioned by the attending physician but at any event, the Applicant underwent surgery to treat that condition and a colostomy was performed. Blood analysis was conducted and the attending physician obtained a low platelet count.
- [4] This feature led to further investigations and the Applicant was diagnosed as HIV positive in February 1994.
- [5] In 1997 the Applicant became aware of the EAP for persons suffering from HIV as the result of receipt of blood or blood products in Canada since 1977 up to 1989. The EAP provided for ex gratia payments to persons suffering from HIV. The availability of financial assistance for HIV victims was presented by the federal government by means of Order in Council P.C. 1990 - 4/872 dated May 10, 1990 (the "Order in Council"), as amended by Orders in Council P.C. 1991 - 5/456 of March 7, 1991, P.C. 1991 - 7/2543 of December 16, 1991, P.C. 1994 - 529 of March 5, 1994 and 1998 - 1462 of August 26, 1998. The latter amendment provided for a global payment of \$120,000.00 to a HIV - infected blood or blood payment recipient.
- [6] The Order in Council, as amended, established qualifying criteria for eligibility to receive assistance pursuant to the plan. The Order in Council defines "HIV - infected blood or blood product recipient" as follows:

... a person, who, in the opinion of the Minister on the basis of an independent medical review, received blood or blood products in Canada between 1978 and 1989 and became infected with the human immuno-deficiency virus (HIV) as a consequence ...

- [7] A critical feature about this definition is the requirement that an applicant satisfy the Minister of Health on the basis of an independent medical review, that he or she received blood or blood products in Canada and consequently, became infected with HIV. As well, an applicant for the financial assistance must be a current resident of Canada and must have had status, either as a Canadian citizen or landed immigrant, at the time of receipt of the tainted blood or blood products and subsequent infection.
- [8] Liberty Health, a subsidiary of Liberty Mutual Insurance Company was chosen by Health Canada to provide the medical review of all EAP applications in accordance with specified parameters. Liberty Health is a private health benefit management corporation. It is independent of the government.
- [9] The Applicant filed his application for the benefits on July 17, 1997. Although the application was submitted after the published termination date for access to the EAP, no issue was taken with its timeliness and it was processed. As part of that processing, the Applicant was required to submit evidence of medical treatment that he had received during the relevant time frame, including information concerning receipt of blood or blood products. Specifically, he was required to provide the names and addresses of his treating physicians who had direct knowledge of his receipt of blood or blood products, the HIV infection and any tests that were conducted.
- [10] The Applicant initially submitted his application together with proof of citizenship and a letter setting out the grounds why his application should be accepted. He also referred to the fact that his mother had been advised by the Canadian Red Cross Society that he may have received tainted blood and should be tested for HIV. He did not provide any of the required signed medical forms or HIV test results. He did not submit any documentation from a medical doctor or the Canadian Red Cross Society confirming receipt of tainted blood or blood products.
- [11] In August 1997, a copy of the Applicant's HIV test was forwarded to Liberty Health. Subsequently, Liberty Health received a copy of the Applicant's HIV test but it did not provide any information concerning "Patient Risk" identifiers.
- [12] The Applicant was asked by Liberty Health to provide further information about his medical history including the names and addresses of hospitals where he had received transfusions, the name and addresses of all doctors seen between 1981 and 1994, completed medical information forms, and a copy of the communication received by his mother from the Canadian Red Cross Society.

- [13] In October 1997, the Applicant provided completed medical information forms from Dr. Ross McKay and Dr. W.G. Ghesquiere. These physicians did not indicate that they had personal knowledge of receipt of blood transfusions by the Applicant or that they were aware of other risk factors.
- [14] The Applicant later informed Liberty Health that he did not have a copy of any letter from the Canadian Red Cross Society to his mother and provided the names of two other physicians whom he had seen during the relevant period.
- [15] At the request of Terry Buffone, the Manager for the EAP with Health Canada, the Canadian Red Cross Society initiated a trace-back with the three hospitals where the Applicant had indicated he had received blood transfusions in Canada. The Hotel Dieu Hospital in St. Catharines advised that the Applicant did not receive any blood products there. St. Michael's Hospital in Toronto indicated that there was no record of the delivery of blood products to the Applicant in that institution but there was a record that he had been treated for jaundice in 1973. The Toronto Hospital advised that, following a search of its records, no record of an admission to the Hospital for the Applicant was found for the 1970's or 1980's.
- [16] Further information was requested by Liberty Health of Dr. Ghesquiere. He replied by a letter dated May 4, 1999 and referred to the Applicant's hospital admission in January 1993 for repair of a perforated rectum. He also noted that the Applicant had claimed to have sustained this injury as the result of being hit by a car while crossing a street.
- [17] The available information was assessed by Dr. S. Krajden, the medical reviewer with Liberty Health. Dr. Krajden did not recommend acceptance of the application for assistance, on the basis that the information provided did not constitute direct evidence that the Applicant had been transfused with blood or blood products in Canada. The Applicant was advised of the decision to deny his application by letter dated June 29, 1999.
- [18] It was later determined that the Applicant had been inadvertently deprived of an opportunity to have his claim adjudicated in a formal hearing, although he had requested such a hearing in the original application form. Ultimately, a hearing took place on February 29, 2000. The Applicant was represented by counsel at the hearing. Dr. Krajden, the medical reviewer and Ms. Terry Buffone, the Manager of the EAP with Health Canada, also attended, together with counsel for Health Canada. Notes were maintained of the proceedings and these notes were later provided to the Applicant.
- [19] The Applicant presented his case and reviewed his medical history. He recounted that he had been diagnosed with leukaemia in early childhood and required blood transfusions as part of his treatment. He expressed the view that his efforts to establish a history of blood transfusions was hindered by the lack of hospital records. A further opportunity to locate relevant information was extended and by letter dated July 5, 2000, the Applicant's legal counsel wrote to Liberty Health, advising that no new information had been located.

- [20] At the hearing, the Applicant again addressed the issue of communication from the Canadian Red Cross Society to his mother advising that he was at risk from receipt of tainted blood. However, he said he was unsure if his mother had received a letter or a telephone call.
- [21] The personal medical history of the Applicant included information about surgical procedures he had undergone.
- [22] The Applicant had undergone a discotomy, an appendectomy, a vagotomy in the mid 1980's at St. Paul's, colostomy in May 1993, and colostomy reversal in 1994. The Applicant could not provide dates for the discotomy and appendectomy, but the other procedures took place between the mid 1980's and 1994.
- [23] Following the hearing on February 29, 2000, the Applicant was afforded the opportunity to seek further information in support of his claim. By letter dated May 24, 2000, counsel for the Applicant wrote to Liberty Health and advised that records had been requested from the following organizations:
1. Sick Children's Hospital in Toronto;
 2. Royal Jubilee, Victoria, British Columbia;
 3. St. Paul's Hospital, British Columbia;
 4. The Toronto Hospital General Division;
 5. St. Michael's Hospital, Toronto;
 6. Victoria City Police concerning the 1993 motor vehicle accident.
- [24] By letter dated July 5, 2001, counsel for the Applicant wrote to Liberty Health to advise that medical records had been obtained from Medical Services Plan of British Columbia for the period January 1, 1993 onwards, and a copy of these records was provided to Liberty Health. The records from the Victoria City Police and St. Michael's Hospital were no longer available. As well, counsel forwarded a letter and a copy of an email from the Applicant's older sister which referred to the illness of the Applicant in his early childhood, that her mother had described him as "a blue baby".
- [25] All the information provided by the Applicant, including the evidence led at the hearing of February 29, 2000 and material submitted by his lawyer, was available to Dr. Krajden for consideration. Dr. Krajden prepared a report which concluded with the recommendation that the Applicant's application be denied on the ground that he had failed to present independent proof that he had received blood in 1978, 1979 or June 1980 to mid 1980's, and that he became infected with HIV as a result of the blood transfusions. Second, the reviewing medical officer was not persuaded, on a balance of probabilities, that even if the Applicant had received blood, that the HIV infection occurred as a result.

[26] The reviewing medical officer also noted inconsistencies in the Applicant's evidence about receipt of blood products while working outside Canada.

[27] Dr. Krajden took other matters into account in reviewing the medical history presented by the Applicant, including the delay in the onset of symptoms of HIV and whether the motor vehicle-pedestrian accident would cause a perforated rectum. Dr. Krajden identified some ambiguities in the Applicant's evidence, as follows:

Given the lack of independent proof of the receipt of blood and the ambiguities listed below:

- a) timing of receipt of blood
- b) receipt of blood outside of Canada
- c) Red Cross letter to his mother - later he said it was a telephone call
- d) he was hit by a motor vehicle and sustained a "ruptured rectum" - later he said he was hit on the hip. One should note that his physicians have addressed the same issue regarding the MVA - ruptured rectum. [Emphasis in original.]

[28] He reached the following conclusion:

On the basis of evidence provided by the applicant, his physicians, and his legal representative, there is no independent proof that Mr. Thompson received blood in 1978 (#2 - File notes), or 1979 (EAP application form) or from "early 1980, to mid-80's [sic] (#3 - File notes); and that he was infected with HIV as a result of the blood transfusions. Even if he did receive blood as he claims, I cannot conclude, based on a balance of probability, that the applicant was infected with HIV as a result of blood transfusions. Therefore, I recommend a decline of this application.

[29] The recommendation from Dr. Krajden was presented to Ms. Buffone, the EAP Manager. According to her affidavit filed in this proceeding, she accepted the recommendation made by Dr. Krajden. She subsequently made a written recommendation to the visiting Assistant Deputy Minister, Health Promotion and Programs Branch of Health Canada that the Applicant's EAP application be denied. The visiting Assistant Deputy Minister acted on that recommendation by endorsing it.

[30] By letter dated April 10, 2001, the Applicant received written notification that his application had been denied. The present application seeks judicial review of that decision.

APPLICANT'S SUBMISSIONS

[31] The Applicant, who represented himself upon the hearing of this application, argues that the decision-maker erred in law by rejecting his application for assistance. The error of law flows from a patently unreasonable finding of fact that he, the Applicant, had failed to provide independent proof of receipt of blood or blood products in Canada during the relevant time.

- [32] The Applicant argues that the medical reviewing officer gave no weight to the evidence he presented and that he is being unfairly penalized for an inability to produce medical records, when those records are not available because the hospitals in question do not maintain records for more than seven years. The Applicant says that he has no control over the record-keeping processes.
- [33] The Applicant further submits that the decision-maker did not address the varying incubation periods for HIV. He says that the incubation period can be very short or as long as ten years. In his case, the HIV was discovered in 1994 following surgery to reverse a colostomy which had been carried out in 1993, following his involvement in a pedestrian-motor vehicle accident.
- [34] Finally, at the hearing of this application for judicial review, the Applicant argued that he "felt" that Dr. Krajden had exhibited anti-semitic bias against him.

RESPONDENTS' SUBMISSIONS

- [35] The Respondents take the position that the Order in Council creating a compensation fund for recipients of tainted blood or blood products grants a broad discretion to the Minister but that discretion becomes available only when the Minister has been provided with an independent medical review of the circumstances surrounding a particular claim. In this case, an independent medical review was conducted and concluded that there was a lack of independent, reliable proof that the Applicant had received blood or blood products in Canada during the relevant time frame.
- [36] Accordingly, there is no basis upon which the Minister can award compensation. The independent medical review does not support the Applicant's claim.
- [37] The Respondents further submit that the independent medical review was conducted by a duly qualified medical practitioner and that the Court should defer to the medical expertise involved in its conduct. As well, the Respondents note that none of the physicians who provided information concerning the medical history of the Applicant advanced or supported the theory of the Applicant, that he had contracted HIV as the result of blood transfusions.
- [38] The Respondents argue that the decision in question should be reviewed on the standard of patent unreasonableness, in accordance with *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. The Respondents submit that when viewed against that standard, the decision to deny the Applicant's claim is not patently unreasonable, having regard to the record. Furthermore, the decision was reached fairly.

ISSUES

- [39] This application raises two issues;

1. Was it reasonable for the Minister to deny the request for assistance under the EAP?
2. Was the Applicant afforded procedural fairness by the decision-maker?

ANALYSIS

- [40] As noted above, the EAP was created by Order in Council to provide financial assistance to persons who became infected with HIV as the result of receiving blood or blood products in Canada between 1978 and 1989. Eligibility for participation in the compensation program was contingent upon the presentation of satisfactory medical evidence of receipt of infected blood or blood products, to an independent medical review board. The board was authorized to make a recommendation to the Minister.
- [41] The decision under review here was made by the Minister following a review of the Applicant's claim by an independent medical review board. Indeed, the Applicant's claim was reviewed twice, first on the basis of the material submitted and second, following an oral hearing when the opportunity was extended for the filing of further information, if same were available. It appears, and I so find, that the Applicant was given every opportunity to present all available information and to present the evidence in support of his claim for assistance. That information was found lacking.
- [42] I accept the Respondents' submissions that in the absence of a positive recommendation from the independent medical review board, in accordance with the Order in Council, the operation of the Minister's discretionary power to grant assistance under the EAP was not engaged.
- [43] In *B.C. Landscape and Nursery Association Ltd. et. al. v. Canada (Attorney General)* (2000), 186 F.T.R. 62, the Court dealt with a judicial review of a discretionary ministerial decision. The decision in question was made under the Plant Protection Regulations, SOR/95-212, section 3. Those Regulations were enacted pursuant to the Plant Protection Act, S.C. 1990, c.22.
- [44] Section 3 of the Regulations provides for two separate but interrelated decisions. The first, a risk assessment, is a threshold test. The second is the ministerial decision, to make a determination that is appropriate in the circumstances, for the purpose of eradicating or preventing the spread of the pest, North American Gypsy Moth.
- [45] The Court described the decisions that were taken as follows:
- ...Rather, the decision or decisions taken were purely discretionary decisions as to choices among authorized actions directed to the purpose of eradicating NAGM or preventing its spread.

B.C. Landscape and Nursery Association Ltd. et al, supra, at page 70

[46] The Court went on to discuss the standard of review of a discretionary ministerial decision and, following *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, concluded that the application standard is that of patent unreasonableness. In relation to the particular matter at issue, this Court said:

I am satisfied that the words of section 3 of the Plant Protection Regulations invest considerable discretion in the Minister at the level of the threshold test. It is his or her responsibility to make a determination whether or not, in the circumstances, it is necessary and cost-justifiable to take pest control measures. It is his or her determination of what are the relevant circumstances that impact on, when it is necessary and when it is cost-justifiable. Those words leave considerable discretion to the Minister.

...

As such, considerable flexibility for the Minister and inspectors is warranted and significant deference is appropriate subject to limited judicial control and more significant political accountability.

B.C. Landscape and Nursery Association et al, supra, at page 70

[47] In my opinion, the same approach applies here. The decision here under review is solely within the discretion of the Minister who derives his authority from the Order-in-Council. The Order in Council spells out the circumstances in which the Minister can award assistance pursuant to the EAP. A critical factor is the conclusion of an independent medical review board that a claimant has become infected with HIV as the result of the receipt of blood or blood products in Canada during a specified time-frame. In the absence of such a conclusion from the medical review board, the Minister is without authority to award assistance.

[48] That is what happened here. The independent medical review board recommended that the Applicant's claim be denied. The report from that board, prepared by Dr. Krajden, is comprehensive. Dr. Krajden is a duly qualified physician. The matter in issue concerning the nexus between the Applicant's condition of HIV and receipt of blood in Canada, was reviewed on the basis of the information provided by the Applicant.

[49] In my opinion, that report is a detailed review of the evidence and information submitted by the Applicant, and of other information which was sought on his behalf. I note the Manager of the Plan requested the Canadian Red Cross Society to contact hospitals where the Applicant claimed to have been treated and presumed obtaining hospital records on his behalf.

- [50] The report of Dr. Krajden summarizes evidence presented by the Applicant and notes ambiguities in that evidence. In particular, Dr. Krajden noted a conflict in the Applicant's evidence concerning communication from the Canadian Red Cross to his mother; at one time the Applicant had indicated that his mother had received a letter and later, that she had received a telephone call.
- [51] The decision to recommend rejection of the Applicant's application is, in my opinion, reasonable. In the absence of a positive recommendation from the medical authority to make a favourable decision, I find that the Minister's decision is not patently unreasonable, in the circumstances outlined above.
- [52] As for the second issue raised by the Applicant concerning an alleged denial of procedural fairness in the manner in which his claim was handled, this allegation is not supported by the record. On the contrary, the record shows that Ms. Buffone, the Manager of EAP, facilitated the Applicant's efforts to obtain medical records. This assistance was provided by means of financial assistance in paying for copies of medical records and, in relation to the Canadian Red Cross Society, by direct inquiries of the organization on behalf of the Applicant.
- [53] Finally, I turn to an issue raised by the Applicant upon the hearing of this application. He raised the issue of bias on the part of Dr. Krajden.
- [54] This issue was not raised in the application for judicial review which commenced this proceeding and it was not addressed in the Applicant's Application Record. I declined to entertain submissions on this issue, in the absence of any notice in the Applicant's materials to indicate that bias was a basis for his application for judicial review. The fact that the Applicant was self-represented does not allow the Court to ignore the usual rules of practice and procedure. In this regard, I refer to *de Korompay v. Ontario Hydro*, [1990] 3 F.C. D-26 (T.D.).
- [55] In conclusion, I find that there is no basis to intervene in the decision of the Minister dated April 10, 2001. The application is dismissed with costs to the Respondents.

ORDER

The application is dismissed with costs to the Respondents.

"E. Heneghan"

J.F.C.C.

Ottawa, Ontario

April 19, 2002

FEDERAL COURT OF CANADA TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-795-01

STYLE OF CAUSE: Robert Thompson v. AGC

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: March 26, 2002

REASONS FOR ORDER AND ORDER OF THE HONOURABLE MADAM JUSTICE HENEGHAN

DATED: . April 19, 2002

APPEARANCES

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Mr. Curtis Workum for the Respondent

SOLICITORS OF RECORD:

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