

Court of Queen's Bench of Alberta



Citation: Adrian v Canada (Minister of Health), 2016 ABQB 729

Date:
Docket: 9903 19153
Registry: Edmonton

**IN THE MATTER OF AN APPEAL PURSUANT TO THE HEPATITIS C
PRE-1986/POST-1990 CLASS ACTION SETTLEMENT AGREEMENT**

Between:

**Shirley Adrian, Debbie Anderson, Richard Edward Auten, James Edgar Baker,
Constance Doreen Baker, Jeff Beeston, Isabell Bresse, John Bresse, Harry Chichak,
Brian Edwin Ferguson, Ron George, Janice Patricia Hammond, Delores Hickmott,
Gary Hickmott, James Milton Jobe, Brian W. Johnson, Wendy Lee Ramey,
Marlene Dorothy Keep, Dennis Keep, Carol Dianne Knott, Byron Knott,
Laura Catherine Kristianson, Ralph Samuel Kristianson, Kimberly Ann Lebeuf,
Alexander Patrick Nowosad, Elena Ricioppo, Dalvino Ricioppo, Shannon Ricketts,
Kevin Roe, Kathy Romaniw, Ellen Sanderson, Jean Darlene Snipes,
Richard Joseph Lipscombe, Deborah Anne Stabryla, Elizabeth Treau, Guiseppe Volpe,
June Volpe, And John Does 1 to 100 And Jane Does 1 to 100**

Plaintiff

- and -

**The Attorney General of Canada As Represented By
The Minister of Health for Canada and
Her Majesty the Queen in Right of the Province of Alberta**

Defendant

**Memorandum of Decision
of the
Honourable Mr. Justice V.O. Ouellette**

I. Introduction

[1] In 2007, a Settlement Agreement was reached for individuals who were infected with the hepatitis C virus by transfusion of blood before January 1, 1986 and after July 2, 1990.

[2] Under the Settlement Agreement, Class Counsel must apply to the Courts of British Columbia, Alberta, Ontario and Quebec within 120 days of June 30, 2016, to access the financial sufficiency of the Compensation Fund and seek advice and direction.

II. Issues

[3] The issues in this application are as follows:

- i) Is the Compensation Fund sufficient?; and
- ii) If there is a surplus in the Compensation Fund, how should it be distributed?

III. Facts

[4] The Actual Report Assessing the Financial Sufficiency (“Actuarial Report”)(Exhibit B, Tab 7B, Joint Book of Documents) states that as at June 30, 2016, the Compensation Fund (see Article 2.04 of the Settlement Agreement – Exhibit “A” – Affidavit of Hilda Mozaffar, Joint Book of Documents) was sufficient, with an estimated surplus of approximately \$15,000,000 (for ease of reference, Appendix A contains the Articles which are relevant to this case).

[5] The Actuarial Report also states the Past Economic Loss and Dependents Fund (“PELD Fund”)(Articles 2.05, 2.06 and 2.07 of the Settlement Agreement), as of June 30, 2016, is insufficient in the approximate amount of \$66,000,000. Further, it assessed the sufficiency of the notional fund called the “Dynamic Non-Segregated Family Benefits Fund” (“Family Fund”)(Article 4.02 of the Settlement Agreement) and the Claims Experience Premiums (“CEP”)(Article 5.07 of the Settlement Agreement). It found both to be insufficient, in the approximate amounts of \$30,000,000 and \$116,000,000 respectively.

IV. Analysis

A) Is the Compensation Fund sufficient?

[6] Both Class Counsel and the Attorney General of Canada (“Canada”) agree that the evidence before the Courts show the Compensation Fund created pursuant to Article 2.04 is sufficient. I agree. The surplus is estimated at \$15,600,000.

B) If there is a surplus in the Compensation Fund, how should it be distributed?

[7] It is important to note the issue of sufficiency of the Fund or its lack thereof was contemplated in Article 5.09. It states as follows:

5.09 Sufficiency of the Fund and Disposition of Surplus

(1) In express recognition of the fact that Canada has not negotiated any discount for legal risk:

- (a) the Parties agree that Canada will not be liable to provide further funding in the event that the Compensation Fund is inadequate to compensate all Class Members who have met the eligibility requirements. For greater certainty, any risk of

insufficiency in the Compensation Fund will be borne by the Class Members.

(b) the Parties specifically agree that any funds remaining in the Trust Fund on the Termination Date will be the sole property of and will be transferred to Canada within 60 days of the Termination Date.

[8] The Family Fund is inadequate. However, this fund is notional (i.e. imaginary, speculative) and has never had any amounts paid into it. Article 4.02(4) clearly states a distribution if there is a positive balance at the Termination Date. The amounts to be paid in compensation are set out in Schedules C3 and C3A (Articles 4.02(2)(3)). In the event of a positive balance, the payments are mandatory... “will be paid compensation...” (Article 4.02(3)).

[9] The CEP payments are discretionary and can only occur after the PELD and Family Fund have met their obligations. First, Article 5.07(1) states the Courts may order CEP. It is not mandatory. Second, the payment of CEP is subject to Articles 5.07(2) and 4.02(4)(Article 5.07(1)).

[10] I interpret the “subject to” Article 4.02(4) in Article 5.07(1) to mean that there is in fact a positive balance in the Family Fund after the payments under Schedules C3 and C3A. This is made clear by the wording of Article 4.02(4), in that any positive balance is to be prorated in the same amounts as the notional transfers. Further, the distribution under Article 4.02(4) and Article 5.07(1)(CEP) are to exactly the same individuals: Approved HCV Infected Class Members or HCV Personal Representatives. I interpret the “subject to” Article 5.07(2) in Article 5.07(1) to mean that before the court exercises its discretion to pay a CEP, the Compensation Fund must be sufficient.

[11] What is meant by Compensation Fund? “Compensation Fund” is defined under Article 1.01 of the definition section of the Settlement Agreement. It states that the amount for Class Member compensation is \$962,000,000. The Compensation Fund was then divided into two parts:

- a) \$869,000,000 to the primary Compensation Fund (Article 2.04); and
- b) \$93,000,000 to the PELD (Article 2.07).

[12] Therefore, the PELD is in fact part of the Compensation Fund. It is for that reason that Article 2.07(3) allows the Courts to order a transfer from the primary Compensation Fund (Article 2.04) to PELD (Article 2.05, 2.06 and 2.07), if there are any surplus funds in the primary Compensation Fund.

[13] As a result, the priority of any transfer of surplus funds in the primary Compensation Fund must go to PELD, as they both fall under the Compensation Fund as defined and understood under Article 5.07(2).

VI. Conclusion

[14] The primary Compensation Fund is sufficient. However, the Compensation Fund (primary and PELD) is not. Since the Compensation Fund is not sufficient, no payments can be made to the Family Fund or to the CEP.

[15] The Court orders any surplus funds in the primary Compensation Fund be transferred to the PELD.

Heard on the 15th day of December, 2016 in the Cities of Toronto, ON (in person), Montreal, QB (CCTV), Vancouver, BC (CCTV) and Edmonton, AB (CCTV) in conjunction with Chief Justice C. Hinkson, Judge P. Perell and Juge C. Corriveau.

Dated at the City of Edmonton, Alberta this 19th day of December, 2016.



V.O. Ouellette
J.C.Q.B.A.

Appearances:

Brian Laidlaw
Kolthammer, Batchelor & Laidlaw LLP
For the Plaintiffs – Class Members from Alberta

David Klein
Klein Lawyers LLP
For the Plaintiffs - Class Members from British Columbia

Michel Belanger
Barrister & Solicitor
For the Plaintiffs – Class Members from Quebec

Peter Roy
Roy O'Connor LLP
For the Plaintiffs – Class Members from Ontario and all other provinces

Paul Vickery & Natalie Drouin
Department of Justice Canada
For the Defendant - Attorney General of Canada

Appendix A

Definition:

“**Compensation Fund**” means the sum of one billion, twenty-three million, four hundred and seventy-five thousand five hundred and seventy-five dollars (\$1,023,475,575.00), which is comprised of nine hundred and sixty-two million dollars (\$962,000,000.00) for Class Member compensation...

Article Two – Compensation to HCV Infected Class Members

Article 2.04 Compensation to Approved HCV Infected Class Members

(1) Each Approved HCV Infected Class Member who is alive will be paid compensation as set out in the compensation grid attached as Schedule C1 to this Agreement in accordance with the Approved HCV Infected Class Member’s year of birth Disease Level, subject to the deductions provided in this Agreement.

Article 2.05 Damages for Past Loss of Income

(1) An HCV Infected Class Member at Disease Level 4 or higher, or the HCV Personal Representative of an HCV Infected Class Member at Disease Level 4 or higher who died on or after January 1, 1999, who delivers to the Administrator proof satisfactory to the Administrator that the HCV Infected Class Member’s infection with HCV has caused Past Loss of Net Income (as defined below) will be paid compensation in an amount equal to 8/11ths of 70% of his or her Past Loss of Net Income for each year until he or she attained the age of 65 years...

Article 2.06 Damages for Past Loss of Services in the Home

(1) An HCV Infected Class Member at Disease Level 4 or higher, or the HCV Personal Representative of an HCV Infected Class Member at Disease Level 4 or higher who died on or after January 1, 1999, who delivers to the Administrator proof satisfactory to the Administrator that the HCV Infected Class Member’s infection with HCV has caused his or her inability to perform his or her household duties will be paid compensation for that past loss of such services as set out in this Section.

Article 2.07 Past Economic Loss and Dependants Fund

(1) The Trustee upon implementation of this Settlement will transfer ninety three million on hundred thousand dollars (\$93,100,000.00) from the Compensation Fund into a separate fund to be known as the Past Economic Loss and Dependants Fund, for the purpose of providing compensation for damages for past loss of income and past loss of services in the home to Approved HCV Infected Class Members or Approved HCV Personal Representatives pursuant to Sections 2.05 and 2.06, and for compensation to Dependants pursuant to Sections 4.03 and 4.04.

(2) All amounts payable under Section 2.05, 2.06 and Section 4.04 will be paid from the Past Economic Loss and Dependants Fund.

(3) Notwithstanding Section 2.07(1) and (2), in the event that the Past Economic Loss and Dependents Fund is insufficient to provide compensation for damages for past loss of income and past loss of services in the home to Approved HCV Infected Class Members or Approved HCV Personal Representatives as provided in Sections 2.05 and 2.06, and for compensation to Dependents pursuant to Sections 4.03 and 4.04, the Courts, on application by Class Counsel, may order the Trustee to transfer an additional amount from the Compensation Fund to the Past Economic Loss and Dependents Fund, but only to the extent that the funds held in the Compensation Fund after such a transfer remain sufficient pursuant to Section 5.07(2).

Article Four – Compensation to Dependents and Family Members

Article 4.02 Compensation to Approved Family Members

(1) The Trustee will create a notional fund within the Compensation Fund, to be known as the “Dynamic Non-Segregated Family Benefits Fund”, for the purpose of monitoring and accounting for compensation to Approved Family Members.

(2) Upon approval of the Claim of an HCV Infected Class Member or an HCV Infected Class Member whose death was caused by the HCV Infected Class Member’s infection with HCV, the Administrator will notionally transfer the amount corresponding to the HCV Infected Class Member’s Disease Level, as set out in Schedule C3, to the Dynamic Non-Segregated Family Benefits Fund.

(3) Subject to Section 5.02(2), each Approved Family Member will be paid compensation in the amounts set out in Schedule C3A in relation to the Disease Level of the HCV Infected Class Member, or in relation to an HCV Infected Class Member whose death was caused by HCV. On payment of such compensation, a corresponding deduction will be made to the notional balance of the Dynamic Non-Segregated Family Benefits Fund.

(4) Any positive balance remaining in the Dynamic Non-Segregated Family Benefits Fund on the Termination Date will be distributed pro-rata to Approved HCV Infected Class Members or their HCV Personal Representative based upon the amounts notionally transferred pursuant to Section 4.02(2).

Article Five - Compensation – Miscellaneous

Article 5.07 Claims Experience Premium

(1) Subject to Sections 5.07(2) and 4.02(4), the Courts *may* order that each Approved HCV Infected Class Member or the Approved HCV Personal Representative of an HCV Infected Class Member receive claims experience premium payments which shall not in total exceed 1/9th of the amount received by or in respect of the HCV Infected Class Member pursuant to Section 2.04 or 3.03(1)(ii) in respect of Disease Levels 2 through 6, or Section 3.02, save as to funeral expenses.

(2) On notice to Canada, Class Counsel shall apply to the Courts 120 days or more after each of June 30, 2010, June 30, 2013 and June 30, 2016 to assess the financial sufficiency of the Compensation Fund and may seek directions as to the amounts and timing of the payments of the claims experience premium set out in Section 5.07(1).