

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Killough v. The Canadian Red Cross Society*,
2016 BCSC 2403

Date: 20161222
Docket: C976108
Registry: Vancouver

Between:

**Edward Killough, Patricia Nicholson, Irene Fead, Daphne Martin,
Deborah Lutz and Melanie Crehan**

Plaintiffs

And

**The Canadian Red Cross Society, Her Majesty the Queen in Right
of British Columbia and the Attorney General of Canada**

Defendants

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiffs:

David Klein

Counsel for the Defendant, Attorney General
of Canada:

Paul Vickery and
Nathalie Drouin

Counsel for Class Members from Alberta:

Brian Laidlaw

Counsel for Class members from Quebec:

Michel Belanger

Counsel for Class members from Ontario and
all other Provinces:

Peter Roy

Place and Date of Hearing:

Vancouver, B.C. via video from
Toronto, Ontario
December 15, 2016

Place and Date of Judgment:

Vancouver, B.C.
December 22, 2016

Introduction

[1] In 1997, class actions on behalf of persons who had contracted Hepatitis C virus (“HCV”) from blood products in Canada before January 1, 1986 and after July 1, 1990 were brought in British Columbia, Alberta, Ontario, and Québec. The class actions were: *Killough v. Canadian Red Cross Society* (British Columbia); *Adrian v. AG Canada* (Alberta); *McCarthy v. Canadian Red Cross Society* and *McCarthy v. Connaught Laboratories Limited* (Ontario); and *Desjardins c. Canadian Red Cross Society* (Québec). There was a national settlement of the class actions, and in 2007, the courts approved the Settlement Agreement.

[2] This is an application brought in Toronto at a joint hearing of the four courts for: (a) an assessment of the financial sufficiency of the Compensation Fund under s. 5.07 (2) of the Settlement Agreement; (b) a declaration that a transfer of monies to the Past Economic Loss and Dependents Fund (the “PELD Fund”) shall have priority over the payment of the Claims Experience Premium (the “CEP”) and in priority to the payment of any positive balance in the Dynamic Non-Segregated Family Benefit Fund; and (c) a declaration that future payments out of the PELD Fund shall be in a manner to be determined by the courts at a future hearing. The applications to the four courts are interdependent in the sense that for a party to obtain an operative order, the party must succeed in all four courts.

[3] I have had the considerable benefit of collaboration with Mr. Justice Ouellette of the Court of Queen’s Bench of Alberta, Madam Justice Corriveau of the Cour Supérieure du Québec, and Mr. Justice Perell of the Ontario Superior Court of Justice. Our respective draft decisions in the actions in each province were shared, but each court has arrived at its own decision.

Factual Background

[4] The facts that underlie the applications before me are conveniently set out in the draft reasons of Perell J. in *McCarthy v. The Canadian Red Cross Society*.

[5] I will adopt his summary of those facts and highlight the following:

[4] The Settlement Agreement provides compensation to: (a) Primarily Infected Class Members; and, (b) Secondarily Infected Class Members; i.e., spouses or children who have contracted Hepatitis C as a result of contact with the Primarily Infected Class Member. The Settlement Agreement also provides compensation for the Estates of HCV Infected Class Members and compensation to Family Members and Dependents of HCV Infected Class Members.

[5] The Settlement Agreement and its funding and compensation scheme were based on calculations based on actuarial predictions that the parties agreed were sound and reasonable. The quantum of the payments [was] determined based on the Disease Level of the Class Member and on the probability of disease progression in the future. ...

[6] The Settlement Agreement provides 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. ...

[7] Canada paid \$962 million to fund compensation to the Class Members and \$20 million for administration of the settlement. The following are the categories of compensation:

- a. Lump sum payments to living HCV Infected Class Members based on the age and disease level of the Class Member.
- b. Payment for past loss of income or past loss of services for HCV Infected Class Members who are at the higher disease levels.
- c. Payments to the estates of HCV Infected Class Members who were deceased at the time of the application for compensation. There are two categories of estate claim. One where the HCV Infected Class Member died before January 1, 1999, and the other where the HCV Infected Class Member died on or after January 1, 1999. The payments to estates involve a combination of lump sums and payments for past loss of income and past loss of services.
- d. Lump sums for Family Members of the HCV Infected Class Member.
- e. Payments to the Dependents of deceased HCV Infected Class Members for the loss of support (i.e. loss of income and loss of services).

[8] In approving the Settlement Agreement, the courts based their approvals on the principal that with one major difference, the Settlement Agreement had 8/11th parity with the settlement in another set of national class actions for HCV Infected persons who had contracted Hepatitis C from the receipt of blood products in Canada. The Class Members in the other

class actions had received transfusions of blood between 1986 and 1990. In the 1986-1990 class actions, Canada had contributed 8/11th of the settlement funds. The one difference between the 1986-90 class actions and the class actions now before the courts was that the Settlement Agreement in the immediate actions provides for lump sum as opposed to periodic payments, which was the approach used in the settlement for the Class Members of the 1986-1990 settlement.

[9] The principle of parity with the other settlement was noted by the Courts as a fundamental feature of the Settlement Agreement that favored its approval. For example, in Alberta, *in Adrian v. Canada (Minister of Health)*, 2007 ABQB 376, Justice Ouellette stated at paras. 18-19:

18. The settlement is based on the principles of parity with the 1986-1990 settlement, the efficient delivery of the compensation to Class members and the minimization of administrative costs and delays. The settlement includes an extensive Class of individuals who will receive substantial benefits. The principle of parity with regard to the 1986-1990 settlement is very important having regard to the issue of fairness and reasonableness, not only to the present Plaintiffs but to those individuals who formed part of the 1986 -1990 settlement, which includes one-time, lump sum payments. This will result in the delivery of the compensation on a much faster and more efficient basis.

[19] Further, the current settlement limits the administrative costs and further delay in the administration of the settlement due to the one-time, lump sum payments as opposed to payments on a progressive basis.

[10] At the time of the settlement of the class actions now before the courts, it was anticipated that approximately \$80 million would be required to pay the claims for loss of income and loss of services. However, the total required for loss of income and service claims was actuarially difficult to predict, and, therefore, a segregated PELD Fund was created to safeguard against the possibility that an over-subscription might deplete the main Compensation Fund and adversely affect the lump sum payments. Thus \$93.1 million was taken from the \$962 million Compensation Fund and put into the PELD Fund.

...

[12] A safeguard significant to the application before the court was that most of the lump sums were reduced by 10%. The Settlement Agreement provides that if there are sufficient funds in the Compensation Fund, this 10% reduction may be restored through the payment of a CEP ("Claims Experience Premium"). Thus, s. 5.07(1) of the Settlement Agreement, provides that the Court may order, subject to sections 5.07(2) and 4.02(4), the payment of a CEP to all infected persons and estates at disease levels 2 to 6. Section 5.07 (1) states:

5.07 (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.

[13] For present purposes it is important to note that the Courts are not obliged to order a CEP payment to the HCV Infected Class Members, who in any event will have received 8/9th of the amount received by or in respect of the HCV Infected Class Member pursuant to s. 2.04 or 3.03(1)(ii) in respect of Disease Levels 2 through 6, or s. 3.02, save as to funeral expenses.

[14] Within the Compensation Fund, the Administrator established a notional-segregated amount designated as the Dynamic Non-Segregated Family Benefits Fund (“the Family Benefits Fund”). This was a notional fund (the funds were not actually segregated within the Compensation Fund) The purpose of the notional fund was [to] track the compensation paid to Family Members for the eventual purposes of achieving to the extent possible, 8/11th parity between the Settlement Agreement. Thus, for each HCV Infected Class Member for whom a Family Member claim was approved, a notional amount was allocated to this Fund. However, the actual payouts could be higher or lower than the notional amount. The Settlement Agreement provided that if at the Termination of the Settlement, the total notional allocation were higher than the amounts actually paid and there was money remaining in the Compensation Fund, then the excess notional amount was to be paid on a *pro rata* basis to HCV Infected Class Members at disease levels 2 to 6. If the total notional allocation was negative, there would be no additional payment to the HCV Infected Class Members. Thus, s. 4.02(4), states:

4.02(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).

[15] For present purposes three things are to be noted about the notional Family Benefits Fund. First, it is notional. Second, any entitlements arising from this accounting exercise are to be paid out of the Compensation Fund if at all at the termination of the settlement. Third, the entitlements, if any, are to be paid to HCV Infected Class Members.

[16] As of July 8, 2016, the Administrator of the settlement had approved 5,816 HCV Infected Class Members. This number of claims was close to the actuarial predictions but more Class Members had higher disease levels than predicted. The actuarial predications had not foreseen that the demographics of the Class Members would be more younger and sicker Class Members.

[17] As of June 30, 2016, \$862,626,844 had been paid from the Main Compensation Fund to 5,649 Alive Claimants and Estates and \$29,639,981 has been paid to Family Members.

[18] As of July 31, 2016, there was approximately \$27.5 million remaining for payment of claims out of the Compensation Fund. The final claims deadline was June 30, 2016, but at least half of what remains in the Compensation Fund will likely be required to pay lump sums for the claims that are in process or under appeal. As at June 30, 2016, the Main Compensation Fund has an actuarially projected surplus of \$15,651,000.

[19] The PELD Fund, however, has a deficiency. The higher numbers at higher disease levels had a cascading effect. 1,156 PELD Fund claims were paid with a total value of \$97,999,248, but payments were suspended in February 2010 when the fund was close to being exhausted. The PELD Fund is insolvent, and it does not have sufficient funds to pay all eligible Class Members. All but \$150,000 has been paid out. It is estimated that about 500 HCV Infected Class Members, their Estates and their Dependents have eligible claims that will not be paid due to the shortfall in the PELD Fund. The total value of those claims is estimated to be between \$60 to \$70 million.

[20] Payment of CEP, if it could be made, is estimated to cost \$115,904,000.

[21] The summary of the administrative expenses from 2007 to August 2016 indicates that the balance remaining in the \$20,000,000 administration fund is \$2,205,948.42. It is anticipated that the Administration fund is sufficient to cover future expenses.

[22] There is a notional positive balance in the Family Fund of over \$30 million.

[23] Class Counsel seek an order prioritizing the transfer of funds to the PELD Fund. Canada takes no position on the question of priorities.

[24] Seven Class Members made submissions to the court at the joint hearing. Their personal and family stories were heart rendering, and all expressed disappointment or dissatisfaction that the PELD Fund payments had not been made to qualified Class Members. There were other grievances about the administration of the Settlement Agreement and some of the Class Members urged that Canada infuse the Compensation Fund with additional funds.

[6] The issues to be determined on these applications were conveniently stated by Ouellette J. at para. 3 of the draft reasons in *Adrian v. Canada (Minister of Health)*. I adopt this statement of the issues as follows:

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

Discussion

The Sufficiency of the Compensation Fund

[7] Both Class Counsel and the Attorney General of Canada agree, and I find, that the evidence before me shows that the Compensation Fund created pursuant to Article 2.04 of the Settlement Agreement is sufficient. It remains solvent and has sufficient funds to cover the anticipated remaining lump sum payments with a surplus estimated at \$15,600,000.

The Sufficiency of the Other Funds

[8] It is also clear that the PELD Fund is insolvent. The Compensation Fund does not have sufficient assets to pay the PELD Fund deficiency, the CEP, and the Family Benefit Fund allocation.

Distribution of the Surplus in the Compensation Fund

[9] Because the PELD Fund has insufficient assets to pay all benefits for approved claims, I am permitted to authorize a transfer of assets from the Compensation Fund, but according to s. 2.07(3) of the Settlement Agreement, "only to the extent that the funds held in the Compensation Fund after such a transfer remain sufficient pursuant to section 5.07(2)" of the Settlement Agreement.

[10] I agree with and adopt the analysis of Perell J. with respect to the distribution of the anticipated surplus in the Compensation Fund as follows:

[30] Where the PELD Fund has insufficient assets to pay all benefits for approved claims, the courts may authorize a transfer of assets from the Main Compensation 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)." Section 5.07 of the Settlement Agreement provides:

5.07(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 received claims experience premium payments 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 payment of the claims experience premium set out in Section 5.07(1).

[31] More than 90% of the Class Members have received 90% of the parity compensation the Settlement Agreement sought to achieve. However, Class Members who applied for compensation from the PELD Fund after the fund was depleted in 2010 have received less than 90% parity. Unless there is a transfusion of funds, some of the claimants will have received nothing at all.

[32] Class Counsel is seeking direction from the Courts that once the liabilities of the Main Compensation Fund have been satisfied, a transfer of the remaining funds to the PELD Fund be authorized for a distribution to unpaid claims, with the manner of distribution to be determined at a subsequent hearing of the courts. Canada takes no position with respect to this request.

[33] Section 2.07(3) of the Settlement Agreement governs the transfer of funds from the Compensation Fund to the PELD Fund and allows the transfer of funds if the Compensation Fund is sufficient to do so. Section 2.07 (3) states:


2.07(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, for compensation to Dependents pursuant to Section 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).

[11] As I have found that the Compensation Fund has sufficient funds to cover the anticipated lump sum payments remaining under the Settlement Agreement, the surplus balance should be made available for transfer to the PELD Fund. While the estimated \$15,600,000 surplus will not pay for all of the deficiency in the PELD Fund, this transfer will prevent the injustice of some of the Class Members eligible for payments from the PELD Fund from receiving nothing at all.

[12] In the circumstances, I decline to authorize a CEP payment.

Conclusion

[13] I order that any surplus funds in the primary Compensation Fund be transferred to the PELD Fund and that the manner of future payments out of the PELD Fund be determined by the courts at a future hearing.



The Honourable Chief Justice Hinkson