IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Killough v. The Canadian Red Cross Society,*** 2007 BCSC 836

Date: 20070608
Docket: C976108
Registry: Vancouver

Between:

Edward Killough, Patricia Nicholson, Irene Fead, Daphne Martine, Deborah Lutz and Melanie Crehan as representative plaintiffs

Plaintiffs

And

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

Defendants

(Proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50)

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Representative Plaintiffs: David A. Klein

Counsel for The Attorney General of Canada: Paul Vickery
Wendy A. Divoky

No Other Appearances

Date and Place of Trial/Hearing: February 21-23, 2007
Vancouver, B.C.

[1] The plaintiffs apply for certification of this proceeding as a class action and approval of the settlement reached with the Attorney General of Canada. The settlement is conditional upon courts in British Columbia, Alberta, Ontario, and Quebec certifying the proceeding and approving the settlement without material differences.

[2] I have had the benefit of reading a draft of the reasons of Ouellette J. resulting from the comparable application to the Court of Queen's Bench in Alberta. With the exception of references to class counsel fees which are the subject of a separate application and will be the subject of separate reasons, the reasons of Ouellette J. commend themselves to me in both analysis and result.

[3] Consequently, I order that any aspect of the proceeding in British Columbia not already certified as a class proceeding shall be so certified, and I approve the settlement.

[4] The relevant background is briefly stated by Ouellette J. as follows:

> 2. In 1998, Canada and others agreed to compensate persons who had been infected with the Hepatitis C virus, as a result of tainted blood, between January 1st, 1986 and July 1st 1990. The compensation did not include individuals before January 1st, 1986 or after July 1st, 1990.
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> 3. The Plaintiffs, who are persons not eligible for compensation from the settlement reached for persons infected between January 1st, 1990, sued Canada. After years of court proceedings and difficult and complex negotiations, the Plaintiffs reached a settlement agreement with Canada. The settlement agreement reached provides that compensation would be paid to those individuals who contacted Hepatitis C from the blood system before January 1st, 1986 and after July 1st, 1990. The settlement agreement was based on the general

> principle of parity with the 198601990 settlement agreement. The settlement agreement provides for the following sums of money:
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> a) $962 million to compensate Class members;
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> b) $20 million for administration;
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> c) $37.29 million for Class counsels' fees.
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> ...
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> 5. Canada consents to the application for certification of the Plaintiff's action as a class proceeding and approval of the pre-1986/post-1990 Hepatitis C settlement agreement for the purpose of settling all outstanding claims against Canada, including Charter claims, relating to or arising from the infection of persons with Hepatitis C through the blood system prior to January 1st, 1986 and after July 1st, 1990.

[5] Section 35 of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50, provides as follows:

> **35** (1) A class proceeding may be settled, discontinued or abandoned only
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> (a) with the approval of the court, and
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> (b) on the terms the court considers appropriate.
>
> (2) A settlement may be concluded in relation to the common issues affecting a subclass only
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> (a) with the approval of the court, and
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> (b) on the terms the court considers appropriate.
>
> (3) A settlement under this section is not binding unless approved by the court.
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> (4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.

[6] The standard that applies in British Columbia when assessing the merits of a settlement is that set out by Sharpe J. in *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No. 1598 at para. 9 (QL), in the following terms:

> ...the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

[7] In *Endean v. Canadian Red Cross Society* (1999), 68 B.C.L.R. (3d) 350, [2000] 1 W.W.R. 688, K.J. Smith J., as he then was, observed that in applying the test, the court is to be concerned with the interests of the Class as a whole rather than the interests of particular members. The learned judge also adopted the reasoning of Winkler J., as he then was, in *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151, [1999] O.J. No. 3572 (Sup .Ct.) (QL) as follows:

> The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

[8] The provisions in the British Columbia *Class Proceedings Act* do not differ materially from those stated in the *Class Proceedings Act*, S.A. 2003, c. C-16.6, the equivalent legislation considered by Ouellette J.

[9] In his reasons, Ouellette J. considered the various factors enumerated in *Dabbs*, namely:

(a) the likelihood of success and the risk of loss;

(b) the cost and likely duration of the litigation;

(c) the terms of the settlement;

(d) the presence of arm's length bargaining in the absence of collusion;

(e) the number and nature of objections;

(f) the recommendation and experience of counsel;

(g) the recommendations of neutral parties; and

(h) the personal circumstances of the plaintiffs.

The learned judge concluded that the settlement was reasonable in the context of each of the factors. As previously stated, I concur in the analysis and see no advantage in embarking upon consideration of the issues anew.

[10] I want to address the fact that a small number of the Class members in the Province of British Columbia spoke at the approval hearing. Most were supportive of the agreement. Those who were not were concerned that the benefits were inadequate, and the stipulation of a lump sum, as opposed to the periodic payments provided by the 1986-1990 Settlement, could result in under-compensation. The corollary is that as with any assessment of damages on a current as opposed to deferred basis, over-compensation may equally be the result.

[11] A settlement of this kind cannot be expected to achieve perfection. What is of paramount concern is the benefit that accrues to the class as a whole. Having heard the submissions of counsel on behalf of the plaintiffs and on behalf of the Attorney General of Canada, I am persuaded that the benefits to be paid to Class members, when considered in conjunction with an earlier payment made out of settlement funds provided by the Canadian Red Cross Society, result in substantial parity for

the members of this Class and the 1986-1990 Class in respect of which a settlement was previously concluded.

[12] I want to explain the delay between the hearing of the applications for approval in the four jurisdictions in late February and early March 2007, and the release of reasons.

[13] At present, there is no authority for the commencement and settlement of a national class action. In these actions, as has been the case in relation to the ongoing administration of the 1986-1990 Hepatitis C Settlement Agreement, the judges presiding over the conduct of the separate class actions were authorized by class counsel to consult with a view to ensuring, if possible, a common result. In my judgment, the consultative process has worked effectively to the benefit of all concerned, both in relation to the earlier 1986-1990 Settlement and in relation to the current actions.

[14] As consented to by counsel, the presiding judges in British Columbia, Alberta, Ontario, and Quebec consulted with respect to the merits of the application heard by each of them, and discussed various aspects of the claims process and the administration of the settlement with which the courts will be involved in the future. Concerns were identified in relation to certain aspects of the proposal for administration, the adequacy of the administration budget, and the process by which disputes between claimants and the administrator with respect to the validity of claims would be resolved.

[15] The judges asked the court-appointed monitor who serves as the liaison between the courts and class counsel, to engage in discussions with a view to overcoming the deficiencies. Revisions to the settlement agreement which resolved the concerns which had been identified were only recently finalized with the agreement of class counsel and counsel for the Attorney General of Canada.

[16] Accordingly, any aspect of the action not previously certified is now certified as a Class Action against the Attorney General of Canada under the *Class Proceedings Act* of British Columbia, and the settlement is approved. Counsel shall prepare and submit the form of order appropriate to the circumstances.

"The Honourable Mr. Justice Pitfield"