IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Killough v. The Canadian Red Cross Society,* 2014 BCSC 1789

Date: 20140912
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 The Province Of British Columbia, and The Attorney General Of Canada

Defendants

Before: The Honourable Chief Justice Hinkson

Oral Reasons for Judgment

Counsel for Plaintiffs, E. Killough, P. Nicholson, I. Fead, D. Martin:	D. Klein, G. Smith
Counsel for Defendant, Canada (Attorney General):	P. Bickery, M. Tessier
Place and Date of Trial/Hearing:	Vancouver, B.C. September 12, 2014
Place and Date of Judgment:	Vancouver, B.C. September 12, 2014

[1] This action arose as a result of the contamination of the national blood supply with the Hepatitis C virus. It was one of four such actions; the other three being in Alberta, Ontario and Quebec. After years of court proceedings and difficult and complex negotiations, Class Counsel reached a settlement with the defendants in 2007. The Settlement Agreement provides that compensation would be paid to those individuals who contracted Hepatitis C from the blood system before January 1, 1986 and after July 1, 1990.

[2] The Settlement Agreement was approved in this class action by an order made by Mr. Justice Pitfield on June 8, 2007. The appeal period from that order was 30 days from its date.

[3] Pursuant to the Settlement Agreement, both this Court and Class Counsel have ongoing roles in the administration of the Settlement.

[4] According to paragraph 25 of the Settlement Approval Order, this Court retains jurisdiction over the action to implement and enforce the provisions of the Settlement and supervise the ongoing performance of the Settlement.

[5] As a part of its ongoing role, Klein Lyons, one of the firms appointed as Class Counsel for this action seeks two orders from this Court:

a) an order for a protocol to deal with claims by the estates of class members; and

b) an order pursuant to s. 5.07(2) of the Settlement Agreement with respect to the sufficiency of the Compensation Fund.

Background

[6] In the Settlement Agreement, the defendant, The Attorney General of Canada (hereinafter “Canada”) agreed to pay $962 million to create a Compensation Fund to provide lump sum benefits to class members. Pursuant to Article 1.03 of the Settlement Agreement, Canada’s obligation to fund the settlement is limited to the amount already paid.

[7] Article 3.01(1) of the Settlement Agreement stipulates that the filing deadline for deceased HCV Infected Class Members is the later of 3 years after the death of the HCV Infected Class Member, or 2 years after the Implementation Date. The Implementation Date is defined as 30 days after the last of Court Approval Orders became final. Subsequent to the Courts' approval of the settlement, the parties agreed that the Implementation Date was August 10, 2007.

[8] Seventy estate claims filed prior to the June 30, 2010 initial claim deadline have been rejected because they were filed more than three years after the death of the HCV Infected Class Member and more than two years after the Implementation Date.

[9] The Compensation Fund is divided into two subsidiary funds: the Main Compensation Fund and the Past Economic Loss and Dependents Fund. The latter fund provides payment for loss of income and loss of services benefits, as well as all benefits payable to dependents. All other benefits are paid from the Main Compensation fund. Should the Past Economic Loss and Dependents Fund have insufficient assets to pay all benefits for approved claims, there is a provision to allow the courts to authorize a transfer of assets from the Main Compensation Fund to the Past Economic Loss and Dependents Fund, so long as the Main Compensation Fund would remain sufficient following such a transfer.

[10] Under article 4.02 of the Settlement Agreement, the families of class members may be eligible for certain benefits. Class Counsel described the Main Compensation Fund as including a notional accounting for these family benefits, called the "Dynamic Non-segregated Family Benefits Fund", but concedes that there is no true separation of assets (as with the Past Economic Loss and Dependents Fund) or limit on total benefits payable.

[11] Article 4.02(4) of the Settlement Agreement provides that any positive balance in the notional family fund is to be paid out *pro rata* to the infected class members upon termination of the fund. I have been advised by Class Counsel that currently, there is a $27 million positive balance in this fund.

[12] The Settlement Agreement also provides certain limits on the benefits that may be transferred from the Main Compensation Fund to the Past Economic Loss and Dependents Fund, at a later date, if the former fund has sufficient assets.

[13] There is a “Claims Experience Premium” provided for in Article 5.07 of the Settlement Agreement. The premium recognizes that many of the lump sum amounts payable under the Settlement Agreement have been reduced by 10% to create a provision for adverse deviation, subject, to later payment on the termination of the fund provided the fund is sufficient to make such payment.

[14] Article 5.07(2) of the Settlement Agreement permits the supervising courts to order payment of the Claim Experience Premium if the fund is financially capable of bearing it. This article provides:

> 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 she amounts and timing of the payment of the claims experience premium set out in Section 5.07(1).

[15] One of the responsibilities of Class Counsel set out in Section 5.07(2) of the Settlement Agreement is to apply to the court 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 seek directions as to the amounts and timing of the payments of the Claims Experience Premium set out in Section 5.07(1). To do so, Class Counsel are to retain actuaries to determine the financial sufficiency of the Trust Fund pursuant to Section 8.05(1)(f) of the Settlement Agreement.

[16] This application is the first of these four sufficiency hearings and no application is presently before any of the other three supervising courts.

[17] A current issue regarding fund sufficiency is that the Past Economic Loss and Dependants’ Fund is now insufficient to provide compensation to all Approved HCV Class members, Approved Personal Representatives and Dependants. As a result, payments to class members who qualify for compensation from this Fund have stopped.

[18] If there are sufficient monies in the Compensation Fund, the Courts can authorize claims experience premium payments to certain categories of Class Members pursuant to Article 5.07(1) of the Settlement Agreement.

Discussion

a) The Requested Protocol

[19] The Settlement Agreement sets an initial claim deadline of June 30, 2010. That date is featured prominently on the Administrator's website and on the Claim Application Package, but the parties agree that the Notice of Settlement, the Administrator's website and the Claim Package all failed to state the Implementation Date. None of the Approval Orders were on the website. Thus, there was no publicly available information as what the Implementation Date was, nor was it reasonably possible for class members to calculate the Implementation Date.

[20] In *Canada Post Corp. v. Lepine*, 2009 SCC 16, the Supreme Court of Canada discussed the requirement that individual rights be safeguarded in a class proceeding, and at para. 42 Mr. Justice LeBel described the notice procedure in class action proceedings as indispensable in that it informs class members about how the judgment authorizing the class action or certifying the class proceeding affects them. At para. 43 LeBel J. explained that:

> … In a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. In some situations, it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights. These requirements constitute a fundamental principle of procedure in the class action context.

[21] Class Action Counsel contends that the Notice in this settlement was inadequate with respect to the Implementation Date deadline applicable to estate claims, because the deadline date was not specified in any of the material available

to class members and it was not reasonably possible for class members to determine that date. Canada does not disagree.

[22] The protocol requested by Class Counsel is:

> 1. The Administrator shall consider applications made pursuant to Article Three of the Settlement Agreement if the claimant first advised the Administrator of a potential claim on or before June 30, 2010.
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> 2. If an application has not already been received by the Administrator, the Administrator shall notify the claimant in writing that the deadline to deliver the application will be ninety (90) days from the date of the .Administrator's written notification. After the expiration of ninety (90) days from the date of the Administrator's written notification to the claimant, the Administrator shall process the claim as denied.
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> 3. If the application was received by the Administrator on or before June 30. 2010. but was rejected as a result of being received after the applicable deadline, the Administrator shall re-
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> open and process the claim to determine eligibility for compensation in accordance with the terms of the Settlement Agreement and the Court Approved Protocols in place at the time of processing.
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> 4. If, as a result of the processing of a claim made under this Protocol, the Administrator rejects the claim, the Administrator shall:
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> A. notify the claimant in writing that the claims is rejected, and the basis for rejecting the claim: and
>
> B. advise the claimant of the right to appeal as provided in the Settlement Agreement.

[23] I am satisfied that the requested Protocol is necessary and appropriate to ensure that class members are not prejudiced by the failure to clearly state the Implementation Date, and I will approve the protocol as requested.

b) The Sufficiency of the Compensation Fund

[24] The second application is brought pursuant to Sections 2.07(3), s. 5.07(2), 8.05(1)(f) of the Settlement.

[25] Canada contends that the financial sufficiency assessment order should be made on the following terms:

> a) that as of November 30, 2012, the Main Compensation Fund is sufficient; and

b) that as of November 30, 2012, the Past Economic Loss and Dependents Fund is insolvent.

[26] There are essentially two issues in this application:

i. Is the fund sufficient?

ii. What payments can be made out of the Main Compensation Fund and in what priority?

i) The Sufficiency of the Fund

[27] In 2009, Class Counsel retained actuaries to assess the financial sufficiency of the Compensation Fund as required by the Settlement Agreement. This application has been delayed until this time as there were several issues related to outstanding claims that needed to be resolved before the actuarial report could be completed.

[28] The actuary's report by Ernst & Young was provided to Class Counsel on February 20, 2013 and was delivered to Canada the next day. Canada points out that this actuarial report assesses the funds' sufficiency as of November 30, 2012. To maintain parity, Canada's actuarial report by Morneau Shepell also assesses the fund as of November 30, 2012, and notes that the "results as of 30 June 2010 would he similar to those presented herein and my findings and actuarial certification would be the same as presented herein."

[29] Class Counsel and Canada agree that the Main Compensation Fund is sufficient, with certain qualifications. Morneau Shepell's best estimate for the surplus in the Main Compensation Fund is $54,369,000 (prior to any payment of the Claims Experience Premium). If the full Claim Experience Premium were to be paid out, there would be a shortfall in the Main Compensation Fund totalling $47,052,000.

[30] Class Counsel and Canada agree that the Past Economic Loss and Dependants Fund is insufficient and has "effectively run out of money". Morneau Shepell's best estimate for the Past Economic Loss and Dependants Fund's shortfall

is $55,303,000 (before the removal, of the limits on benefits under Article 2.05) or $84,953,000 (after the removal of the limits on benefits).

[31] Canada asserts that the Ernst & Young report also fails to address all the liabilities facing the Compensation Fund, but based on the report of its own actuarial expert, Canada agrees with Class Counsel that the Main Compensation Fund is solvent and that the Past Economic Loss and Dependants fund is insolvent and is unable to pay further benefits.

[32] Canada's position is that the report commissioned by Class Counsel and executed by Ernst & Young is inadequate because it fails to address all the liabilities facing the Compensation Fund, including:

- There is a $27 million balance in the "Dynamic Non-segregated Family Benefits Fund". In all likelihood, this full amount will not be required to pay family benefits, and there will thus be a surplus in this notional fund. This surplus must be paid out *pro rata* to the infected class members upon termination of the fund.
- The Ernst & Young Report fails to account for future fees and expenses for administering the plan. This is a troubling omission since Morneau Shepell estimates that expected future fees and expenses will most likely exceed the $20 million limit set by Article 8.03 of the Settlement Agreement.
- As will be discussed below the Ernst & Young Report offers the opinion that there are insufficient assets to pay out the Claims Experience Premium or remove the limits on benefits under PELD. However, the Ernst & Young Report fails to quantify how much these payments would cost.
- Page 9 of the Ernst & Young Report may appear to suggest that as a whole, the settlement fund is solvent. This is inaccurate because the PELD is insolvent and should not be aggregated with the Main Compensation Fund.

[33] Notwithstanding these issues, the actuaries agree that there is a surplus in the Main Compensation Fund. Morneau Shepell's estimate of $54,369,000 for the surplus in the Main Compensation Fund is based on actuarial assumptions that represent the most likely outcome (i.e., "the best estimate"). For a more conservative approach, Morneau Shepell says that standard practice is to factor in a provision for

adverse deviations. Under this provision for adverse deviations, Morneau Shepell estimates a surplus in the Main Compensation Fund of $45,849,000.

[34] Ernst & Young, on the other hand, provide estimates for a “base case" (where the surplus in the Main Compensation Fund is $67,200.000) or an “adverse scenario” (where the surplus is $17,700.000).

[35] I find that that the Main Compensation Fund was solvent as of November 30, 2012, but that the Past Economic Loss and Dependents Fund was insolvent as of that date.

ii) Payments from the Main Compensation Fund

[36] Class Counsel’s actuarial report of February 20, 2013 provided an analysis pursuant to Section 2.07(3) of the Settlement Agreement on whether the Trustee can transfer an amount from the Compensation Fund to the Past Economic Loss and Dependants Fund. In his opinion, there may be insufficient funds in the Compensation Fund for Class Counsel to recommend to the court that a transfer of money to the Past Economic Loss and Dependants Fund be authorized.

[37] As noted above, the actuaries for both Canada and Class Counsel agree that there is some amount of surplus in the Main Compensation Fund, but this agreement raises the question of whether the Main Compensation Fund should assume any further liabilities, and if so, in what priority.

[38] Canada’s position is that first priority must be given to (a) the pro *rata* distribution of any positive balance in the Non-segregated Dynamic Family Fund to infected class members under Article 4.02(4)(a), and (b) to pay for all future fees and expenses under Article 8.03. Both these liabilities are already factored into Morneau Shepell’s best estimate of a surplus in the Main Compensation Fund of $54,369,000 (prior to any payment of the Claims Experience Premium). These liabilities are not mentioned in the Ernst & Young Report.

[39] The next priority identified by Canada is the Claims Experience Premium. The Ernst *&* Young Report concludes that there "may" be insufficient funds to pay the Claims Experience Premium, but does not provide a figure for the cost of paying the Premium. Morneau Shepell's best estimate is that paying the full Claims Experience Premium would cost $101,421,000. As discussed above, this would push the best, estimate for the $54,369,000 surplus in the Main Compensation Fund into a shortfall of $47,052,000.

[40] The next priority identified by Canada would be the Past Economic Loss and Dependents Fund. Transferring money from the Main Compensation Fund, to the Past Economic Loss and Dependents Fund, and/or lifting the restrictions in Article 2.05(1) and Article 2.05(2)(b)(i) are both possibilities.

[41] Class Counsel did not make submissions with respect to the priority to be given to any *pro rata* distribution of any positive balance in the Non-segregated Dynamic Family Fund to infected class members under Article 4.02(4)(a) or to the payment of any future fees and expenses under Article 8.03, and I make no findings with respect thereto.

[42] I do find, however, that although the Main Compensation Fund was solvent as of November 30, 2012, it cannot be assumed that it is in a position to transfer funds to the Past Economic Loss and Dependents F**u**nd. Based on the actuarial reports, the Main Compensation Fund might be able to make a partial payment on the termination of the Settlement Agreement. Therefore, the Main Compensation Fund would also not have sufficient assets to support making any payment into the Past Economic Loss and Dependents Fund, a secondary priority to the Claims Experience Payment under the Settlement Agreement.

[43] Canada agrees with Class Counsel that there should be no payment of the Claims Experience Premium at this time.

[44] A partial payment of the Claims Experience Premium may, however, be possible following the termination of the Settlement Agreement.

[45] Given that both actuaries estimate that the Main Compensation Fund cannot pay the entire Claims Experience Premium, it is my opinion that it would be inappropriate to allocate any funds from the Main Compensation Fund to the Past Economic Loss and Dependents Fund at this time.

"The Honourable Chief Justice Hinkson"