

CITATION: McCarthy v. The Canadian Red Cross Society, 2016 ONSC 8032

COURT FILE NO.: 98-CV-143334

DATE: 20161222

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
MICHAEL MCCARTHY, CHRISTINE) *David Klein, Peter L. Roy, Brian J. Laidlaw,*
MCCARTHY, DEREK MARCHAND) *and Michel Belanger, Class Counsel*
Plaintiffs)
)
- and -)
)
THE CANADIAN RED CROSS) *Paul Vickery, Nathalie Drouin, John*
SOCIETY, THE ATTORNEY GENERAL) *Spencer, William Knights, and Rolinda*
OF CANADA) *Mack, for the Attorney General of Canada*
Defendants)
)
) **HEARD:** December 15, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] In 1997, class actions on behalf of persons who had contracted the 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 (“CEP”) and in priority to the payment of any positive balance in the Dynamic Non-Segregated Family Benefit Fund (the “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] During and after the hearing, I conferred with Chief Justice Hinkson of the British Columbia Supreme Court, Justice Ouellette of the Court of Queen's Bench of Alberta and Justice Corriveau of the Québec Superior Court. Our draft decisions were shared, but each court will make its own independent decision.

B. FACTUAL BACKGROUND

1. The Settlement Agreement

[4] The Settlement Agreement provides compensation to: (a) Primarily Infected Class Members; and, (b) Secondly Infected Class Members; i.e., spouses or children who have contracted HCV as a result of contact with a 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 using actuarial predictions that the parties agreed were sound and reasonable. The quantum of the payments were determined using the disease level of the Class Member and on the probability of disease progression. The parties relied upon the medical model developed by Dr. Murray Krahn and others to determine the probability of HCV progression.

[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. Section 5.09 states:

5.09 ... 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.

[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 claims; 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 principle 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.

[9] The class members in the other class actions had received blood transfusions between 1986 and 1990. In the 1986-1990 class actions, Canada had contributed 8/11th of the settlement funds. The one difference between the 1986-1990 class actions and the class actions now before the courts is 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.

[10] 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.

[11] 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 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] Other safeguards against adverse deviation were built into the Settlement Agreement. For example, the anticipated settlement take up was 5,623 HCV Infected Class Members. For the purpose of calculating the total settlement fund, this was increased by 15% to 6,466. The total settlement amount was then grossed up by 2.5%. For another example, loss of income claims were capped at 70% of lost income and the annual gross income amount was capped at \$75,000.

[13] A safeguard significant to the applications 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. 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.

[14] 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.

[15] Within the Compensation Fund, the Administrator established the notional Family Benefit Fund. This was a notional fund because the funds were not actually segregated within the Compensation Fund. The purpose of Family Benefit 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 Agreements. Thus, for each HCV Infected Class Member for whom a Family Member claim was approved, a notional amount was allocated; 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).

[16] For present purposes three things are to be noted about the Family Benefit 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.

[17] As of July 8, 2016, the Administrator of the settlement had approved the claims of 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 younger and sicker Class Members.

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

[19] 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 Compensation Fund has an actuarially projected surplus of \$15,651,000.

[20] 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 and \$70 million.

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

[22] 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.

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

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

[25] Seven Class Members made submissions to the court at the joint hearing. Their personal and family stories were heart wrenching, 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.

2. Fund Sufficiency Reviews

[26] Section 8 of the Settlement Agreement provides for the administration of the Settlement Agreement, and states that a court-appointed Administrator will manage the claims process, and that Class Counsel will act on behalf of the class in order to give effect to the terms of the Settlement Agreement, including making recommendations to the courts. Under the Settlement Agreement, Class Counsel are required to apply to the courts after each of June 30, 2010, June 30, 2013 and June 30, 2016 to assess the financial sufficiency of the Compensation Fund, and Class Counsel may seek directions as the amounts and timing of the payments of the CEP set out in section 5.07(1) of the Settlement Agreement.

[27] There was a sufficiency hearing in 2014, and it was determined that the Compensation Fund was solvent as of November 30, 2012, but that the PELD Fund was insolvent. In 2014, it was also determined that the Compensation Fund was not in a position to transfer funds into the PELD or to pay the CEP. See *Killough v. The Canadian Red Cross Society*, 2014 BCSC 1789.

[28] This is the second sufficiency hearing, and Class Counsel are seeking a direction from the courts that once the liabilities of the Compensation Fund have been satisfied, a transfer of the remaining funds to the PELD Fund will be authorized for a distribution to outstanding PELD claims. Class Counsel requests that how the distribution will be made should be determined at a subsequent hearing.

C. DISCUSSION AND ANALYSIS

1. Introduction

[29] This application is brought pursuant to sections 2.07 (3), 5.07 (2), 8.05 (1)(f) of the Settlement Agreement. The issues are: (1) determining the solvency of the Compensation Fund; and (2) if there is a surplus in the Compensation Fund, determining whether the courts should transfer the surplus to the PELD Fund.

2. Is the Compensation Fund sufficient?

[30] Based on the information about the current claims provided by the Claims Administrator, the Compensation Fund remains solvent and has sufficient funds to cover the remaining lump sum payments. It appears that there will be a small surplus remaining in the Compensation Fund. The PELD Fund remains insolvent. The Compensation Fund does not have sufficient assets to pay the PELD Fund deficiency, the CEP, and the Family Fund allocation. While the lump sum payments under the Settlement Agreement can be paid, at best there is approximately \$15 million for other payments.

3. If there is a surplus in the Compensation Fund, should the Courts set a priority for transfer of that surplus to the PELD Fund?

[31] Where the PELD Fund has insufficient assets to pay all benefits for approved claims, the courts may authorize a transfer of assets from the 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).

[32] 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.

[33] Class Counsel is seeking direction from the courts that once the liabilities of the 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.

[34] 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).

[35] Since it appears that the Compensation Fund is sufficient to meet its obligations for lump sum payments under the Settlement Agreement, it is reasonable and fair that any balance remaining should be made available for transfer to the PELD Fund. Although the surplus will not be sufficient to pay the entire outstanding PELD amount, an inequity would occur if Class Members who are eligible for PELD payments receive nothing for those claims.

[36] Accordingly, I approve the requested transfer with the allocation of any transferred funds to be determined at a future hearing. It is not necessary to declare that the transfer to the PELD Fund has priority to the CEP because I do not propose to authorize a CEP payment.

[37] Orders accordingly.



Perell, J.

Released: December 22, 2016

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

MICHAEL MCCARTHY, CHRISTINE MCCARTHY,
DEREK MARCHAND

Plaintiffs

– and –

THE CANADIAN RED CROSS SOCIETY, THE
ATTORNEY GENERAL OF CANADA

Defendants

REASONS FOR DECISION

PERELL J.

Released: December 22, 2016