Unofficial English Translation

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

Nos.: 500-06-000016-960
500-06-000068-987

DATE: May 6, 2014

PRESIDED BY: THE HONOURABLE FRANÇOIS ROLLAND, Chief Justice

500-06-000016-960

DOMINIQUE HONHON
Applicant
v.
ATTORNEY GENERAL OF CANADA
and
ATTORNEY GENERAL OF QUEBEC
and
CANADIAN RED CROSS SOCIETY
Respondents
and
MTRE MICHEL SAVONITTO, in his capacity as member of the Joint Committee
Applicant
and
FONDS D'AIDE AUX RECOURS COLLECTIFS
and
PUBLIC CURATOR OF QUÉBEC
Impleaded third party

JR 1056

500-06-000068-987

DAVID PAGE
Applicant
v.
ATTORNEY GENERAL OF CANADA
and
ATTORNEY GENERAL OF QUEBEC
and
CANADIAN RED CROSS SOCIETY
Respondents
and
FONDS D'AIDE AUX RECOURS COLLECTIFS
and
PUBLIC CURATOR OF QUEBEC
Impleaded third party

JUDGMENT ON THE APPLICATION OF COUNSEL IN QUEBEC'S CLASS ACTION FOR APPROVAL OF A PROTOCOL FOR THE PROCESSING OF LATE CLAIMS NOT CONTEMPLATED BY ANY OF THE EXISTING PROTOCOLS

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[1] The applicant Mtre Michel Savonitto, who is acting as class action counsel for the Quebec proceedings, asks the Court to approve a draft protocol that has not received the unanimous consent of all of the parties.

[2] If approved, the protocol would allow the victims to file a claim for compensation after June 30, 2010, the deadline for filing a claim, if they can demonstrate that they were not able to do so before this date for a reason deemed sufficient by an arbitrator (see proposed protocol in **Schedule B**).

[3] The respondents and one of the members of the Joint Committee contest this application, arguing that its effect is to amend the agreement reached in 1999 and approved by the Superior Courts of Quebec, British Columbia, and Ontario.

[4] Mtre Kathryn Podrebarac, class action counsel in the Ontario proceedings, maintains that, for her part, she agrees with the decision rendered in the Ontario class

action on this issue by Perell J., who conditionally approved the draft Late Claim Requests Protocol.

THE FACTS

[5] The objective of the class action settlement is to compensate victims in Quebec (and, under some conditions, their family members or their estates) who were infected either directly or indirectly by the hepatitis C virus (HCV) during a blood transfusion received between January 1, 1986, and July 1, 1990, using blood supplied by the Canadian Red Cross Society.

[6] This class action was one of six that were authorized, which include three actions arising from transfusions in British Columbia, Quebec and Ontario, and three actions for hemophiliac victims in the same provinces.

[7] As stated previously, the six actions were settled in 1999, and these settlements were approved by the Courts of the three provinces.

[8] The terms of the settlement can be found in **Schedule A** of this judgment.

[9] This agreement was subject to two amendments integrated by protocol to allow victims to file claims after June 30, 2010, which was the deadline for filing a claim.

[10] Thus, save for these two exceptions, no one is allowed to file a claim after June 20, 2010.

[11] Observing that many people (497) have asked to file a claim since June 30, 2010 (late claims), the class action counsel seeks the approval of the draft protocol, which is appended to this judgment in **Schedule B**.

THE RELEVANT DOCUMENTS

[12] The Court believes it is useful to reproduce the following provisions of the Settlement Agreement reached in 1999 and approved by Nicole Morneau J.:

> 2.1 The relevant provisions of the Settlement Agreement
>
> Preliminary provisions of the Settlement Agreement [TRANSLATION]
>
> WHEREAS
>
> ...
>
> D. The FPT Governments and the Class Action Plaintiffs, subject to the Approval Orders, have agreed to settle the Class Actions upon the terms contained in this Agreement.
>
> NOW THEREFORE THIS AGREEMENT WITNESSES that, in consideration of the premises and the covenants and agreements herein contained, the Parties

agree that all actions, causes of actions, liabilities, claims and demands whatsoever of the Class Members in any way relating to or arising from, in the case of Transfused Class Members, the infection of a Primarily-Infected Person with HCV during the Class Period and, in the case of Hemophiliac Class Members, the infection of a Primarily-Infected Hemophiliac with HCV from Blood (including, in each case, the infection of a Secondarily-Infected Person) will be finally settled based on the terms and conditions set forth herein upon delivery of the Approval Orders:

Settlement Agreement

1.01 Definitions

"Approval Orders" means the judgments or orders of the Courts to be granted approving this Agreement as being a good faith, fair, reasonable and adequate settlement of the Class Actions pursuant to the class proceedings legislation in British Columbia, Ontario and Québec.

2.01 Purposes

The purposes of this Agreement are (i) to establish the Transfused HCV Plan and the Hemophiliac HCV Plan, (ii) to settle the Class Actions and (iii) to provide for payment by the FPT Governments of the Contribution Amount to the Trustee and the payment by the Trustee of the Disbursements, in accordance with and as provided in the Funding Agreement.

2.02 Binding Effect

On the Approval Date this Agreement will become effective and be binding on and after the Approval Date on all the FPT Governments and all the Class Members including the Class Action Plaintiffs. Each Approval Order will constitute approval of this Agreement in respect of all Class Members (including minors and mentally incompetent persons) in each jurisdiction so that no additional court approval of any payment to be made to any Class Member will be necessary.

2.03 Effective in Entirety

The Approval Orders must be issued with respect to this Agreement in its entirety (including all the Schedules) so that none of the provisions of this Agreement will become effective unless all the provisions of this Agreement become effective.

4.03 No additional liability

On and after the Approval Date, the only obligations and liabilities of any of the FPT Governments, including their respective past, present and future ministers and employees and their past and present agents, and their respective

successors, under this Agreement are their obligations and liabilities under this Article Four and the Funding Agreement. For greater certainty, none of the FPT Governments will be liable to provide any additional funds if the amount of funds to be provided by the FPT Governments pursuant to this Article Four and the Funding Agreement are insufficient to make all the payments to be made pursuant to this Agreement including, for greater certainty, the Plans and the Funding Agreement.

10.01 Supervising Role of the Courts

1. The Courts will issue judgments or orders in such form as is necessary to implement and enforce the provisions of this Agreement and will supervise the ongoing performance of this Agreement including the Plans and the Funding Agreement. Without limiting the generality of the foregoing, the Courts will:

n. approve any amendment or supplement to, or restatement of, this Agreement agreed to in writing by the FPT Governments and the Joint Committee;

11.01 Releases

The Approval Orders will declare that:

e. the FPT Governments' obligations and liabilities pursuant to Article Four hereof and the Funding Agreement constitute the consideration for the releases and other matters referred to in Sections 11.01(a) to (d) inclusive and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Class Members are limited to the compensation payable pursuant to the Plans as funded, in whole or in part, pursuant to the Funding Agreement as their only recourse on account of any and all such actions, causes of actions, liabilities, claims and demands.

12.02 Amendments

Except as expressly provided in this Agreement, no amendment or supplement may be made to the provisions of this Agreement and no restatement of this Agreement may be made unless agreed to by the FPT Governments and all members of the Joint Committee in writing and any such amendment, supplement or restatement is approved by the Courts without any material differences. [Emphasis added.]

13.02 Entire Agreement

This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and cancels and supersedes any prior or other understandings and agreements between the Parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between the

Parties with respect to the subject matter hereof other than as expressly set forth in this Agreement.

Schedule A Transfused HCV Plan

2.01 Purpose

The purpose of this Plan is to provide compensation to Class Members on the terms and subject to the conditions set out herein.

2.02 Binding Effect

This Plan is binding on all Class Members.

3.08 First Claim Deadline

Except as otherwise expressly provided in this Agreement, no person may make a Claim for the first time under this Plan after 30 June 2010 unless:

a) a. the Claim is made within one year of the person attaining his or her age of majority;

or

b) the Claim is made within the three year period following the date upon which the person first learned of his or her infection with HCV and the Court having jurisdiction over the person grants leave to the person to apply for compensation.

Schedule B Hemophiliac HCV Plan

2.01 Purpose

The purpose of this Plan is to provide compensation to Class Members on the terms and subject to the conditions set out herein.

2.02 Binding Effect

This Plan is binding on all Class Members.

3.07 First Claim Deadline

Except as otherwise expressly provided in this Agreement, no person may make a Claim for the first time under this Plan after 30 June 2010 unless:

a) the Claim is made within one year of the person attaining his or her age of majority;

or

b) the Claim is made within the three year period following the date upon which the person first learned of his or her infection with HCV and the Court having jurisdiction over the person grants leave to the person to apply for compensation.

Schedule D

1.01 Definitions

"Contribution Amount" as at any time means an amount equal to the sum of $1.118 billion plus the Total Interest Amount as at such time

2.01 Purpose

The purpose of this Agreement is to (i) provide for the establishment of the Trust for the benefit of Class Members and other persons entitled to be paid out of the Trust in accordance with this Agreement and the Settlement Agreement, (ii) provide for the payment of the Contribution Amount to the Trust, (iii) provide that the Federal Government is severally liable to pay an amount equal to the Proportionate Contribution of the Federal Government to the Trust on or prior to the Approval Date representing 8/11 (i.e., 72.7273%) of the Contribution Amount as at the time of such payment minus the Withheld Amount, (iv) provide that each PT Government is severally liable to pay to the Trust a portion of 3/11 (i.e.,27.2727%) of the Contribution Amount as at the time that the liability is being determined, (v) provide that the several liability of each PT Government is based on the Sharing Proportion of the PT Governments as at the time that the liability is being determined, and (vi) provide for the payment of the Disbursements out of the Trust, in the manner set out in this Agreement.

3.03 No additional liability

For greater certainty, subject to Section 3.02, neither the Administrator nor any of the Class Members will have any recourse if the Settlement Amount as at any time is insufficient to fund Plan Disbursements to be paid at or after such time.

4.01 Liability to pay

(2) The several liability of each of the PT Governments under this Agreementadded together will equal 3/11 (i.e., 27.2727%) of the Contribution Amount as at the time that the liability is being determined.

(4) Each PT Government will be severally liable to pay the Sharing Proportion ofsuch PT Government as at the time that the liability is being determined multiplied by 3/11 (i.e., 27.2727%) of the Contribution Amount as at the time that the liability is being determined.

4.04 Calculation and Notice of Payments

(1) The Sharing Proportion of each PT Government will be calculated by the PTGovernments from time to time. The PT Governments will notify the Trustee of the Sharing Proportions within one month following the Approval Date and upon any changes therein.

4.05 No additional liability

For greater certainty, subject to Section 3.02, no FPT Government will be liable to pay any additional amounts pursuant to this Agreement if the Contribution Amount as at any time is insufficient to fund the Disbursements as at such time.

DISCUSSION AND DECISION

[13] Like Hinkson C.J. of the Supreme Court of British Columbia, I have read the decision rendered by Perell J. on December 17, 2013, further to the filing of the application in the Ontario class action (*Parsons v. The Canadian Red Cross Society*, 2013 NSC 7988).

[14] Paragraphs 89 to 96 of Perell J.'s decision are reproduced here:

> [89] I begin the discussion by stating, as already noted above, that I agree with Canada's, Ontario's, the Intervenors,' and Ms. Podrebarac's arguments that while courts in class actions possess a supervisory jurisdiction to protect absent class members throughout the litigation, once a settlement agreement has been concluded and judicially approved, this jurisdiction is limited to implementing and not changing the terms of the settlement agreement.
>
> [90] I agree with the opponents of the First Claim Requests Protocol that in exercising its ongoing supervisory jurisdiction, the court may not vary the agreement reached by the parties by adding, deleting or modifying any material term and that changes to material terms can only be made with the consent of all of the parties: *Coopérative d'habitation Village Cloverdale c. Société canadienne d'hypothèque et de logement*, 2012 QCCA 57; *Lavier v MyTravel Canada Holidays Inc.*, 2011 ONSC 3149; *Harrington v. Dow Corning Corp.* [2010] B.C.J. No. 867 (S.C.); *Bodnar v. Cash Store Inc.* [2011] B.C.J. No. 1777 (C.A.). Further, I agree that there are no express terms of the Settlement Agreement or any of the accompanying documents that authorized the court to extend the First Claims deadline beyond the two exceptions already provided for in the Settlement Agreement.
>
> [91] I, therefore, agree with the arguments in the case at bar that however reasonable and fair the proposed protocol may be, the court does not have the jurisdiction to make an agreement for the parties and that I may not add, delete, or modify the terms of the Settlement Agreement by approving the Late Claim Requests Protocol. I further conclude that the Settlement Agreement in the case at bar included a firm claims deadline that does not admit of extension by the

court and that I cannot use the court's jurisdiction over the administration of a class action settlement to extend the First Claims deadline.

[92] Because of this last conclusion it is not necessary to address the merits of the parties' arguments that the Late Claim Request Protocol does or does not actually impose burdens on the federal, provincial, or territorial governments or adversely affect the immediate, inchoate, or residual financial interests of the federal, provincial or territorial governments. Thus, I do not need to decide, for instance, whether the Late Claim Requests Protocol meaningfully affects the pay-as-you go governments who may be at their maximum liabilities soon regardless of this proposed protocol. I simply conclude that in the case at bar there is no room to use the court's administrative jurisdiction to extend a firm claims deadline.

[93] However, I also agree with Ms. Podrebarac's argument that if there were *actuarially unallocated* assets in the Trust, it would be entirely permissible to extend the benefits of the settlement to the late claimants.

[94] Thus, because I think the proposed Late Claim Requests Protocol is consistent with the spirit of the Settlement Agreement, which is to compensate persons infected by HCV who have released their claims against the Defendants, I shall conditionally approve the Late Claims Requests Protocol. In order to respond to the request for approval of the Late Claim Requests Protocol, I shall conditionally apply the court's jurisdiction under Paragraph 9 of the Ontario Court's Approval Order.

[95] Here, it may be recalled, and as set out above, that pursuant to Paragraph 9 of the Approval Order, the Settlement Agreement was approved subject to the modification that in their unfettered discretion, the courts may order that actuarially unallocated assets held by the trustee may be allocated **for the benefit** of Class Members and/or the Family Class Members in the Class Action. Paragraph 9 of the Approval Order is thus an existing term of the Settlement Agreement that would authorize a protocol for **benefits** for Class Members even after the First Claims Deadline. These benefits are independent of the deadline for making **claims** as specified in Section 3.08 of the Transfused HCV Plan and Section 3.07 of the Hemophiliac HCV Plan.

[96] While the Settlement Agreement with some exceptions imposes a firm deadline for applying for **claims**, there is nothing in the Settlement Agreement as modified by Paragraph 9 of the Approval Order that imposes a temporal limitation on the court's jurisdiction to allocate **benefits.** Rather, the pre-condition for the exercise of the court's unfettered discretion is just that the allocation of benefits be from actuarially unallocated assets.

[15] Perell J. thus approved the draft Late Claim Requests Protocol conditionally, for the reasons set out in paragraphs 98 to 100 of his judgment:

[98] At this time, I am satisfied that it would be fair, just, and consistent with the letter and spirit of the Settlement Agreement to approve conditionally a

> protocol for Class Members to receive benefits when those Class Members may have an explanation as to why they did not make a timely claim. I am satisfied that the conditions or terms of the proposed protocol are fair, just, and appropriate.
>
> [99] In considering this exercise of the court's jurisdiction under the Settlement Agreement, it is worth emphasizing that the Class Members who may benefit by the Late Claim Requests Protocol are Class Members who, like all Class Members, immediately released their claims against the Defendants in consideration of the prospect of compensation, and it is worth noting that under the proposed protocol, the Class Members must qualify for benefits subject to the same criteria that other Class Members must meet to qualify for claims, and, in addition, they must satisfy the particular criteria of the Late Claim Requests Protocol.
>
> [100] I see no unfairness to the other Class Members who are receiving compensation under the Settlement Agreement because at the time of the approval of the Settlement Agreement there was the prospect of some claims being exempt from the deadline, there was at least the theoretical prospect that all other claimants would make timely claims and most importantly there was the prospect that the court could exercise its unfettered discretion to approve benefits to Class Members who had explanations for missing the deadline for claims.

[16] I have also had occasion to read Hinkson C.J.'s decision. Like him, I agree with paragraphs 89 to 91 of Perell J.'s decision and adopt them as my own, but I cannot approve this protocol because it would have the effect of amending the agreement.

[17] Moreover, I do not believe that the agreement and its schedules, as approved by Morneau J., allow me to approve a claim conditional upon there being unallocated assets remaining.

[18] With great respect, in the view of the Court, this would constitute an amendment to the agreement approved by Morneau J., since the agreement does not permit dividing up or distributing unallocated assets before determining whether there will be unallocated assets, and permits it only after the parties have been heard on the distribution of the unallocated assets.

[19] In the view of the Court, this conclusion is premature and the Court does not have the power to make such a ruling at this stage of proceedings without amending the terms of the agreement.

[20] As in the case argued before Hinkson J., the class action counsel have cited the following cases before the Court in support of their application:

> *Harrington v Dow Corning Corp.*, 2006 BCSC 1174, [2006] B.C.J. No. 1733; *Campbell v. Flexwatt* (1998), 62 B.C.L.R. (3d) 11, [1998] B.C.J. No. 1620; *Guglietti v. Toronto Area Transit Operating Authority* (2000), 50 C.P.C. (4th) 355,

> [2000] O.T.C. 412; *Pelletier v. Baxter Healthcare Corp.* (1999), REJB 1999-10573, [1999] Q.J. No. 102; *Boys and Girls Club of London Foundation v. Molson Coors Brewing Company*, 2010 QCCS 6306, [2010] Q.J. No. 14108; and *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149, 38 C.P.C. (7th) 65, leave to appeal refused 2011 ONSC 5559.

[21] Like Hinkson C.J., the Court does not believe that these cases apply here.

[22] The Court recalls that the class action counsel's application is contested by a member of the Joint Committee and by the other parties.

[23] The Court shares the opinion of the Attorney General of Canada and the Attorney General of Quebec whereby the draft protocol has the effect of amending the Settlement Agreement.

[24] The Settlement Agreement is the result of long negotiations amongst the parties over a period of several months. The date of June 30, 2010, was negotiated along with all of the other elements of the Agreement.

[25] In addition, the Settlement Agreement was approved by a government decree.

[26] The Court is also of the opinion that approval of this draft protocol could increase the amounts paid or to be paid by the provincial and territorial governments under the Agreement.

[27] In the Court's opinion, the draft protocol constitutes an attempt to amend the Settlement Agreement.

[28] Moreover, Perell J.'s conditional approval constitutes an amendment to the Agreement, since the Agreement has no provision for distribution before it has been determined that there are unallocated assets remaining, which is not the case at present.

[29] The Court believes it is useful to reproduce paragraphs 24 and 25 of Hinkson C.J.'s judgment:

> [24] In my opinion, the remedy conditionally approved of by Perell J. will defeat the bargain reached by the parties in this case. Those parties included class members who filed their claims before the deadline permitted by the Settlement Agreement or the two approved protocols, and those who failed to do so. The settlement was approved of in the two Ontario actions by Mr. Justice Winkler, as he then was. At para. 133 of his reasons approving the settlement (indexed at 40 C.P.C. (4th) 151, [1999] O.J. No. 3572 (S.C.J.)), Winkler J. wrote:
>
> > *The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money*

within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

[25] This conclusion is supported by the reasons of Perell J. in *Lavier*, which was cited with approval by the British Columbia Court of Appeal in *Bodnar v. Cash Store*, 2011 BCCA 384 at para. 43-44, 23 B.C.L.R. (5th) 93:

[43] That principle has been affirmed many times by trial judges in the course of supervising the administration of class action settlements. These cases have almost universally involved attempts by class members to vary the deadlines or other requirements for submitting claims that were established by the settlement agreement. In general, they turn on the wording of the particular agreement. In Lavier, however, Justice Perell identified a more nuanced approach. Having acknowledged the court's administrative jurisdiction did not include the power to vary the settlement reached, he stated:

> [34] In some instances – and the case at bar is not one of them – the court's administrative jurisdiction may allow adjustments to be made to the scheme of the settlement, and at first blush, these variation [*sic*] might resemble a variation of the settlement agreement. For example, in my opinion, an extension of the deadline for making claims would be permissible administrative adjustment in a settlement in which the contribution of the defendant was fixed with any surplus being paid *cy pres*. In such a settlement, the defendant should be indifferent to how the settlement funds are allocated.
>
> [35] In contrast, in a claims made, no-cap settlement, unless the settlement agreement provided for an extension of the deadline for making claims, an extension of time for making claims would vary the settlement and not be a permissible administrative adjustment because the defendant would not be indifferent to having to pay more claims. See *Gray v. Great-West Lifeco Inc.*, 2011 MBQB 13 at paras. 41-42, 63.

He concluded that once the court approves the settlement it cannot be enhanced "to the detriment of the defendant".

[44] In my view, the chambers judge properly applied a similar approach here. While Cash Store argues that acting as Settlement Administrator was a substantive right it specifically negotiated, the evidentiary record does not support that submission. On the material before her, the chambers judge was entitled to conclude Cash Store had not demonstrated any prejudice arising from its removal and replacement,

> *that these changes were merely a variation to the administrative aspects of the settlement, and that they did not represent substantive amendments to the Agreement that operated to Cash Store's detriment. The material terms of a settlement are typically provision of consideration in exchange for a release of further claims and dismissal of the action. Effecting that exchange is an administrative matter, and the entity who carries it out is immaterial to the substance of the settlement. In this case, the duties of the Settlement Administrator set out in the Agreement are clearly administrative, and the substance of the settlement will remain the same regardless of who performs those duties.*

[30] In the Court's opinion, this proceeding is premature and late claims can be dealt with later on, once the existence of unallocated assets has been established and once the parties have been heard on the distribution of these unallocated assets.

[31] Despite the Court's sympathy toward the victims with late claims, the Settlement Agreement cannot be amended without the consent of all of the parties. The Agreement does not permit the Court to approve the draft protocol.

[32] **FOR THESE REASONS, THE COURT:**

[33] **DISMISSES** the application;

[34] **THE WHOLE** without costs.

(S) François Rolland

FRANÇOIS ROLLAND, Chief Justice

Mtre Martine Trudeau
Savonitto & Assoc. Inc.
For Michel Savonitto, in his capacity as Class Action Counsel
in the Quebec class action

Mtre Michel Miller
Mtre Véronique Forest
Procureur général du Canada/Attorney general of Canada
Department of Justice Canada
For the Attorney General of Canada

Mtre Manon Des Ormeaux
Bernard, Roy (Justice Quebec)
For the Attorney General of Quebec

Mtre Philippe Dufort-Langlois
Mtre Mason Poplaw
McCarthy, Tétrault
Counsel for the Fonds