THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR DATED May 28, 2008

DATE OF HEARING:	By Conference Calls November 16, 2009 and February 10, 2010
IN ATTENDANCE:	Claimant #1100829
FOR THE ADMINISTRATOR:	John Callaghan Carol Miller
REFEREE:	C. Michael Mitchell

BACKGROUND

1. This is an Ontario-based claimant, claim #1100829.

2. The Claimant in this case has received compensation from the Plan for loss of income for calendar years 1989 through 2006. However, when the Claimant reached the age of 65, the provisions of the Plan required that loss of income payments cease at that age. The Claimant challenged the provisions restricting any payments past age 65 as discriminatory and unfair.

3. Essentially, there was no hearing in this matter, save and except for two telephone conference calls, wherein the Claimant advised that as Referee, I should proceed to decide the matter based on the materials before me and his oral submissions on the telephone, and based upon the written submissions from the Administrator that had also been provided to the Claimant.

4. Essentially, the Claimant argued that legislative changes eliminating mandatory retirement should have had the effect of making payments possible past age 65, and in any event, he himself had been self-employed and would have been able to continue work past age 65 had he not been tainted with infected blood and contacted the disease for which he is being compensated.

DECISION

5. Pursuant to section 4.02(2) of the Hemophiliac HCV Plan, loss of income is only payable until the year that the infected person reaches age 65:

> "(2) each Approved HCV Infected Person who is entitled to receive compensation for past, present or future loss of income caused by his or her infection with HCV will be paid, subject to the provisions of Section 7.03, an amount each calendar year equal to 70% of his or her Annual Loss of Net Income for such year **until he or she attains the age of 65 years** determined in accordance with the following provisions."

6. Furthermore, it is clear that at the time that this class action was approved by the Court, the Court was fully aware that payments to infected persons would cease at age 65. In his reasons, Mr. Justice Winkler, as he then was, specifically indicated as follows:

> "Payment of loss of income is made on a net basis after deductions for income tax that would have been payable on earned income and after deduction on all collateral benefits received by the Class member. **Loss of income payments cease upon a Class Member reaching age 65**. A claim for the loss of services in the home may be made for the lifetime of the Class Member."

7. In other words, the Superior Court approved the class action settlement which clearly restricts any payments on account of lost income past the age of 65, and that Plan has not been amended subsequently, and it continues to be supervised by Judges in four provinces.

8. From the point of view of this Claimant, the provisions of the class action settlement appear to be unfair because, as the Claimant points out, he was self-employed, and had he not been infected, he would have been able to have the assistance of his family and had the option of working past age 65. However, even if other eventualities that could have prevented the Claimant from working past age 65 are not taken into account, the fact is that the Plan was approved with this restriction on payments for loss of income, and the Plan has not been subsequently amended. An arbitrator or a Referee has no authority to amend the Plan.

9. The issue then becomes whether or not there is legislation or a constitutional provision which overrides the provisions of the Plan.

10. The Claimant alludes to changes in the *Ontario Human Rights Code*, which made mandatory retirement at age 65 illegal. However, the Code has no application to the settlement agreement, since it only applies "with respect to employment", and there is nothing in the statute which extends it to a settlement of a class action lawsuit that does not relate to employment. Parenthetically, the combined effect of the *Ontario Human Rights Code* amendments, together with the *Employment Standards Act*, is that disability plans for employees do not infringe the *Ontario Human Rights Code* by virtue of the fact that they cut off benefits at age 65. In any event, the fact remains that there is nothing statutorily in the *Ontario Human Rights Code* which affects this settlement agreement and its legality.

11. While the Claimant did not refer to the *Charter of Rights and Freedoms*, the Administrator referred to it in its written submissions. Essentially, the submission of the Administrator is that this judicial determination does not constitute government action, and therefore the *Charter* has no application since it does not apply to court orders. The Administrator refers to *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. I note that the Supreme Court of Canada case, *B.C.G.E.U. v. British Columbia (Attorney General) (1988), 53 D.L.R. (4th) 1 (S.C.C.)*, appears to have determined that a court order did constitute governmental action. However, I make no determination as to whether this

particular court order constitutes governmental action or not. I simply note that it is arguable.

12. With respect to the merits of a *Charter* claim under section 15, I also note that age is a enumerated ground of prohibited discrimination under section 15(1), and that the differential treatment of claimants based on that age difference potentially exacerbates the threat of poverty and economic hardship for those over the age of 65 who are either not entitled to benefits under this settlement or who are cut off benefits at age 65. No doubt there are arguments to the contrary with respect to the necessity for a cut-off in benefits at that age and arguments could be made that analogous provisions such as disability contracts lawfully require that benefits cease at age 65. There are also many other factors that could be brought to bear on the merits.

13. As interesting as all these points may be, I have determined that Referees and Arbitrators acting under the settlement agreement in this class action do not have jurisdiction that would entail a finding that the provisions of the settlement agreement are constitutionally invalid.

14. In *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, the Supreme Court of Canada laid down a broad and expansive test as to when administrative tribunals have the authority and duty to determine *Charter* issues in the course of exercising their jurisdiction. The Court decided that administrative tribunals which under legislation have jurisdiction, explicit or implied, to decide questions of law are presumed to have the jurisdiction to also decide the constitutional validity of the provision. However, in this case, there is no legislative provision governing or establishing the jurisdiction of Referees and Arbitrators under this settlement agreement. Further, as a Referees or Arbitrator under a settlement agreement, I am not an administrative tribunal acting pursuant to legislation to decide particular disputes and policy questions pursuant to that legislation. Rather, I am limited in my role to interpreting the provisions of a particular contract without any statutory context or legislative provision regarding my jurisdiction.

15. In my view, it was not the intention of the parties in negotiating the settlement agreement, nor the intention of the Court in endorsing it and appointing Arbitrators and Referees under its terms, that those Arbitrators and Referees would consider the constitutional validity of the settlement agreement itself. Rather, in my view, if there is an issue with respect to the constitutional validity of the settlement agreement, the appropriate place to challenge the agreement would be in the courts.

16. I therefore have concluded that I do not have the jurisdiction to consider whether the *Charter* applies in this case or whether there was any governmental action, much less decide the actual merits of the *Charter* dispute under section 15 or any defence under section 1 of the Charter.

17. In the result, I do not have any jurisdiction to alter the provisions of the Plan, and the appeal is dismissed.

DATED at Toronto this 12th day of May, 2010

C. Michael Mitchell
Referee

F:\09-1556\00269228.DOCX