Court File No. 98-CV-141369 CP00

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

DIANNA LOUISE PARSONS, MICHAEL HERBERT CRUICKSHANKS, DAVID TULL, MARTIN HENRY GRIFFEN, ANNA KARDISH, ELSIE KOTYK, Executrix of the Estate of Harry Kotyk, deceased and ELSIE KOTYK, personally

Plaintiffs

and

THE CANADIAN RED CROSS SOCIETY, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and THE ATTORNEY GENERAL OF CANADA

Defendants

and

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF ALBERTA
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF SASKATCHEWAN,
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF MANITOBA,
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NEW BRUNSWICK
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF PRINCE EDWARD ISLAND,
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NOVA SCOTIA
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NEWFOUNDLAND,
THE GOVERNMENT OF THE NORTHWEST TERRITORIES,
THE GOVERNMENT OF NUNAVUT and THE GOVERNMENT OF THE YUKON TERRITORY

Intervenors

Proceeding under the Class Proceedings Act, 1992

Court File No. 98-CV-146405

B E T W E E N:

JAMES KREPPNER, BARRY ISAAC, NORMAN LANDRY, as Executor of the Estate of the late SERGE LANDRY, PETER FELSING, DONALD MILLIGAN, ALLAN GRUHLKE, JIM LOVE and PAULINE FOURNIER as Executrix of the Estate of the late PIERRE FOURNIER

Plaintiffs

and

THE CANADIAN RED CROSS SOCIETY, THE ATTORNEY GENERAL OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

and

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF ALBERTA, HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF SASKATCHEWAN, HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF MANITOBA,
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NEW BRUNSWICK, HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF PRINCE EDWARD ISLAND HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NOVA SCOTIA
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NEWFOUNDLAND,
THE GOVERNMENT OF THE NORTHWEST TERRITORIES,
THE GOVERNMENT OF NUNAVUT AND THE GOVERNMENT OF THE YUKON TERRITORY

Intervenors

Proceeding under the Class Proceedings Act, 1992

No. C965349
Vancouver Registry

In the Supreme Court of British Columbia

Between:

Anita Endean, as representative plaintiff

Plaintiff

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

and:

Prince George Regional Hospital, Dr. William Galliford, Dr. Robert Hart Dykes, Dr. Peter Houghton, Dr. John Doe, Her Majesty the Queen in Right of Canada, and Her Majesty the Queen in Right of the Province of British Columbia

Third Parties

Proceeding under the Class Proceedings Act, R.S.B.C. 1996, C. 50

C A N A D A

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

NO : 500-06-000016-960

SUPERIOR COURT

Class action

DOMINIQUE HONHON

Plaintiff

-vs-

THE ATTORNEY GENERAL OF CANADA THE ATTORNEY GENERAL OF QUÉBEC THE CANADIAN RED CROSS SOCIETY

Defendants

-and-

MICHEL SAVONITTO, in the capacity of the Joint Committee member for the province of Québec

PETITIONER

-and-

FONDS D'AIDE AUX RECOURS COLLECTIFS

-and-

LE CURATEUR PUBLIC DU QUÉBEC

Mis-en-cause

C A N A D A

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

NO : 500-06-000068-987

SUPERIOR COURT

Class action

DAVID PAGE

Plaintiff

-vs-

THE ATTORNEY GENERAL OF CANADA THE ATTORNEY GENERAL OF QUÉBEC THE CANADIAN RED CROSS SOCIETY

Defendants

-and-

FONDS D'AIDE AUX RECOURS COLLECTIFS

-and-

LE CURATEUR PUBLIC DU QUÉBEC

Mis-en-cause

NOTICE OF MOTION OF THE ATTORNEY GENERAL OF CANADA AND RESPONSE TO THE NOTICE OF MOTION OF THE JOINT COMMITTEE

The defendant, the Attorney General of Canada ("Canada"), will respond to the October 15, 2015 motion of the Joint Committee and will make a motion before Justice Paul M. Perell on Monday June 20-22, 2016, at 10:00 a.m. or as soon after that time as the motion can be heard, at a Courthouse to be designated in Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An order dismissing the Joint Committee's request for a declaration that as at December 31, 2013, the trustee of the 1986-1990 Hepatitis C Settlement Agreement (the "Trustee") holds $206,920,000 of actuarially unallocated money and assets.

2. An order that the current order of this Honourable Court dated July 10, 2015 that as at December 31, 2013, the Trustee holds actuarially unallocated money and assets in an amount between $236.3 million to $256.6 million (the "Excess Capital") not be varied at this time.

3. An order on consent that the restrictions on payments of amounts for loss of income claims in section 4.02(2)(b)(i) of the Transfused HCV Plan and section 4.02(2)(b)(i) of the Hemophiliac HCV Plan and for loss of support under section 6.01(1) of the Transfused HCV Plan and section 6.01(1) of the Hemophiliac Plan, as previously varied, not be varied or removed in whole or in part at this time.

4. An order directing the allocation of the Excess Capital to Canada.

5. An order dismissing the Joint Committee's request that the Court allocate the Excess Capital for the exclusive benefit of the Class Members as set out in the Joint Committee's Notice of Motion.

6. In the alternative, an order that any allocation of Excess Capital to the exclusive benefit of the Class Members be limited to such changes as would not require any material amendment to the Settlement Agreement; would ensure that such compensation is proportionate to, and not greater than, any losses suffered by the class members affected; and would respect the integrity of the Settlement Agreement.

7. An order that any unallocated Excess Capital shall be retained by the Trustee subject to any further application by Canada or the Joint Committee.

8. Such further and other relief as counsel may request and this Honourable Court may direct.

9. An order that the orders made pertaining to paragraphs 1-8 above not be effective unless and until corresponding orders are made by the Superior Court of Quebec and the British Columbia Supreme Court.

THE GROUNDS FOR THE MOTION ARE:

Background:

10. In the fall of 1999, a pan-Canadian settlement of the January 1, 1986 to July 1, 1990 Hepatitis C class actions (the "Settlement Agreement") was approved by this Court and the Supreme Courts of British Columbia and Quebec (the "Courts").

11. The Settlement Agreement, as approved by the Courts, provides that upon judicial declaration of the termination of the agreement, once the Plans and programs have been fully administered and all obligations satisfied, any surplus amount which remains in the trust fund created pursuant to the Settlement Agreement (the "Trust Fund") is to be the sole property of and transferred to the Federal, Provincial and Territorial governments.

12. In the interim, the Courts are directed by the approval orders to conduct triennial reviews to determine the sufficiency of the Trust Fund and the existence of any actuarially unallocated amounts. In the event of such an amount at any interim point, the parties or the Joint Committee may apply to the Courts to have the amount allocated according to the terms of the judgments approving the Settlement Agreement, detailed below, in a manner that is reasonable in all the circumstances.

13. Following the most recent triennial review, the Courts ordered that as at December 31, 2013, the assets of the Trust Fund exceeded its liabilities, after taking into account an amount to protect the class members from major adverse experience or catastrophe, by an amount between $236.3 million to $256.6 million.

14. It is Morneau Shepell's current actuarial opinion that, notwithstanding any reclassification of Level 2 class members to Level 3 which may occur, as described in the Joint Committee's Notice of Motion, the Excess Capital totals $256 million.

15. The Order of this Honourable Court dated October 22, 1999 approving the Settlement Agreement (the "Settlement Approval Order") sets out the procedure by which any unallocated amount may be allocated at paragraph 9 ("Paragraph 9").

16. Paragraph 9 allows for allocations of actuarially unallocated amounts:

    a. For the benefit of the Class Members and/or the Family Class Members in the Class actions [para. 9(b)(i)];

b. Allocated in any manner that may reasonably be expected to benefit Class Members and/or the Family Class Members even though the allocation does not provide for monetary relief to individual Class Members and/or Family Class Members [para. 9(b)(ii)];
c. Paid, in whole or in part, to the FPT Governments or some or one of them considering the source of the money and other assets which comprise the Trust Fund [para. 9(b)(iii)]; and/or
d. Retained, in whole or in part, within the Trust Fund [para. 9(b)(iv)].

17. The intent and purpose of Paragraph 9 was to modify the provisions of paragraph 10.01(1) of the Settlement Agreement, pertaining to the Courts` supervisory role, and not section 12.03. In Quebec, this is acknowledged in that paragraph 10.01(1)(p) was added to the Settlement Agreement.

18. Canada moves under Paragraph 9(b)(iii). The Joint Committee seeks an allocation under 9(b)(i). No party has sought an allocation under (9)(b)(ii).

No Substantive Amendments

19. Paragraph 9 does not permit substantive amendments to the Settlement Agreement. It merely permits the Courts to allocate the Excess Capital in a way not otherwise provided for in the Settlement Agreement.

20. Substantive changes to the agreement may only be made through the amending formula in Article 12.02 of the Settlement Agreement, as has already been determined by the Courts on the motions concerning the late claims protocols.

21. The allocations proposed by the Joint Committee require substantive amendments to the Settlement Agreement, which are beyond the jurisdiction of the Courts.

22. The Courts may, in their unfettered discretion as referred to hereafter, allocate monies to the benefit of class members provided that such allocations do not require that the Settlement Agreement be amended.

23. In particular, the Joint Committee's proposals to (1) permit late claimants to come into the settlement agreement, (2) cease the deduction of collateral benefits from revenue in determining loss of income, (3) compensate family members for accompanying infected class members on medical appointments, and (4) compensate for loss of pension in determining income loss, all require substantive amendment of the Settlement Agreement.

Fair and judicial exercise of discretion

The Court's discretion in making allocations, while unfettered, must still be exercised reasonably and judicially.

24. In making any reasonable and judicial allocation of the Excess Capital, this Court should have regard for the listed criteria in paragraph 9(c) of the Settlement Approval Order. The factors to be considered are:

(i) the number of Class Members and Family Class Members;
(ii) the experience of the Trust Fund;
(iii) the fact that the benefits provided under the Plans do not reflect the tort model;
(iv) section 26(10) of the Ontario *Class Proceedings Act* regarding the return to the settlor of unclaimed or otherwise undistributed awards for division among individual class members;
(v) whether the integrity of the Settlement Agreement will be maintained and the benefits particularized in the Plans ensured;

(vi) whether the progress of the disease is significantly different from the medical model used in the 1999 Eckler actuarial report supporting settlement approval;

(vii) the fact that the Class Members and Family Class Members bear the risk of insufficiency of the Trust Fund;

(viii) the fact that the FPT Governments' contributions under the Settlement Agreement are capped;

(ix) the source of the money and other assets which comprise the Trust Fund; and

(x) any other facts the Courts consider material;

Integrity of the Agreement

25. Allocations which result in substantial amendments to the Settlement Agreement are not only impermissible, but ought to be disallowed as a matter of fairness because they jeopardize the integrity of the Settlement Agreement, contrary to Paragraph 9(c)(v).

Overcompensation

26. In order to be reasonable, an allocation must not overcompensate class members.

27. The Class Members have received full and fair compensation in accordance with the terms of the Settlement Agreement.

28. Class Counsel (now the Joint Committee) took the position during the motions to approve the Settlement Agreement that it was a fair settlement. They took this position even though there had been a risk (which has not matured) of fund insufficiency. Class Counsel emphasized the Settlement Agreement was preferable to the tort model of compensation because it permitted Class Members to seek further compensation in accordance with the progression of their disease.

29. The three approving Courts also found that the Settlement Agreement was fair and reasonable and in the best interests of the class as a whole.

30. In particular, any allocations to Class Members that permit recovery of more than the amount of any actual loss sustained by a class member are unreasonable and unfair. To the extent that the Joint Committee's proposal that amounts deducted from a loss of income claim be repaid and that such deductions in future cease, when those deductions pertained to the Canada Pension Plan, disability payments, disability insurance, Employment Insurance, and the Multi-Provincial and Territorial Assistance Program under sections 4.02 and 6.01(1) of the Transfused HCV Plan and sections 4.02 and 6.01(1) of the Hemophiliac HCV Plan, such allocations would overcompensate the majority of class members, as would its proposal to increase loss of support payments.

Canada is the source of the Excess Capital

31. The sufficiency of the Trust Fund and the existence of the Excess Capital are the result of Canada's up-front contribution of settlement monies in 1999. The investment of these monies since 1999 has permitted the Trust Fund to grow. This is a factor that should be given significant weight in the interest of fairness, and is reflected in paragraph 9(c)(ix) of the Settlement Approval Order, which invites the Court to consider "the source of the money and other assets which comprise the Trust Fund".

32. Further, Canada agreed to tax remission on investment income generated by the Trust Fund, and on allocations paid to Class Members under the Settlement Agreement, which amounted to a significant increase in the value of the settlement monies.

Overfunding of Settlement

33. The past 14 years of claims experience indicates that the 1999 estimates of class size, which underpinned the Settlement Agreement, were significantly overstated. This is a factor the Court should consider under paragraph 9(c)(i) of the Settlement Approval Order.

34. In addition, the advent of new drug therapies, not known in 1999, has fundamentally changed the nature of infection with Hepatitis C. The viral clearance rates of these new drug therapies exceed 90% after a short course of orally ingested medication, and they are dramatically changing the percentage of Class Members who can become virus free.

35. Although expensive, these drug therapies are available to qualifying Class Members at no cost to them, with the costs fully covered by the Trust Fund under the terms of the Settlement Agreement.

36. In addition, estimates made in 1999 as to rates of spontaneous clearance underestimated actual rates.

37. As a result of all of the above, fewer people will experience significant income loss; fewer people will progress through the most severe disease levels; and the amount of money required to fund the Settlement Agreement is very much less than the parties anticipated in 1999. This is also a factor the Court should consider under paragraph 9(c)(vi) of the Settlement Approval Order.

<u>Return of Excess Capital to Canada</u>

38. For all the reasons outlined above, fairness requires that the Excess Capital be returned to Canada. Returning the Excess Capital to the Consolidated Revenue

Fund will permit Canada to use these funds to pursue policy initiatives for the benefit of the public that address the continuing public-health burden of HCV-infected populations in Canada in the face of the highly effective but very costly new drug therapies.

39. In the alternative, any allocation of Excess Capital to the exclusive benefit of the Class Members should be limited to such changes as would not require any material amendment to the Settlement Agreement, would ensure that such compensation is proportionate to, and not greater than, any losses suffered by the class members affected, and would respect the integrity of the Settlement Agreement. Of the Joint Committee`s requested allocations, only the following should reasonably be considered: increased hours for loss of services; increased cost of care; increase in funeral expense costs; increase in payments for surviving children and parents; increase in lump sum payments.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Selected portions of the materials listed in Part 4 of the Joint Committee's Notice of Application

2. Affidavit of Peter Gorham, affirmed January 29, 2016, and exhibits thereto;

3. Affidavit of Dr. Samuel S. Lee, affirmed January 26, 2016, and exhibit thereto;

4. Affidavit of Asvini Krishnamoorthy, sworn January 29, 2016, and exhibits thereto;

5. Such further and other documentary evidence as counsel advise and this Honourable Court may allow.

January 29, 2016

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