Court File No. 98-CV-141369CP
Court File No. 98-CV-146405CP
20020711

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N

DIANA 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**	*Harvey Strosberg, Q.C.* for the Joint Comittee *Bonnie Tough* for the Joint Comittee
-and-	
THE CANADIAN RED CROSS SOCIETY, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and THE ATTORNEY GENERAL OF CANADA **Defendants**	*Carolyn Horkins* for the Fund Counsel
-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**	*Elizabeth Stewart* for the Provincial and Territorial Governments, except Ontario *Jamie Trimble* for Her Majesty the Queen in Right of Ontario *W.A. Knight* for the Attorney General of Canada *William Dermody*, Friend of the Court Heard: June 12, 2002

A N D 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

REASONS FOR DECISION

WINKLER J.:

Nature of the Motion

[1] This is a motion for directions brought by the Ontario members of the Joint Committee pursuant to sections 7.03(1) and 10.01(i) of the 1986-1990 Hepatitis C Settlement Agreement. The Joint Committee seeks an order permitting the payment of the holdback amount of $5,000 (plus inflation adjustment) to the level 2 claimants who have currently received $15,000 of their $20,000 entitlement pursuant to section 4.01(1)(b).

[2] The record before the court includes the Affidavits of Sharon Matthews and Dr. Frank Anderson, as well as an actuarial report prepared by Eckler Partners Ltd. and the report of Dr. Murray Krahn on medical modelling. In addition, Jack Levi of Eckler Partners Ltd. was examined on the actuarial report at the hearing.

[3] From a review of the documentary material, the testimony of Mr. Levi and the submissions of counsel, it is apparent that the seminal issue on this motion is whether the ultimate number of claimants in the Transfused class will be 6500 persons or less and whether the Hemophiliac class will be 90% of the estimated class size as presented at the settlement approval hearing in August 1999. If the court accepts these numbers, then the actuarial evidence establishes that the fund is sufficient to enable the court to issue the order sought and permit payment of the amounts previously held back from claimants pursuant to section 4.01(1)(b) of the Settlement Agreement.

[4] Counsel for the federal, provincial and territorial governments appeared at the hearing and advised the court that they support the Joint Committee's motion, as do the Fund Counsel appointed by the court.

[5] I am of the view that the estimates of ultimate class size proffered by the Joint Committee are acceptable and, in consideration of the evidence of the sufficiency of the settlement fund, the order sought will be granted. My reasons follow.

Background

[6] In reasons previously reported as *Parsons v. The Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.), this court approved the settlement of the Hepatitis C litigation for those persons infected with hepatitis C from tainted blood between January 1, 1986 and July 1, 1990. As part of the settlement agreement, the federal, provincial and territorial governments agreed to provide sufficient monies to establish a settlement fund of approximately $1.18 billion dollars. This finite fund was meant to settle the claims of all members of the class. To that end, the settlement provides for a graduated benefit program to compensate the class members. However, at the settlement approval hearing, the court was advised that the benefit program when factored against the then estimated size of the settlement class left a "present value" shortfall of approximately $58,000,000 in the fund. To ensure that the same level of benefits was available to all class members, and that latter claimants were not unfairly prejudiced, the shortfall was addressed by several provisions in the Settlement agreement. These provisions mandate partial holdbacks of certain payments and caps on other

payments. The net effect of these payment restrictions at the time of the settlement approval hearing was to create a notional surplus of approximately $34,000,000.

[7] However, it was clear from the outset and the provisions in the settlement agreement that these payment restrictions were temporary safeguards to ensure a minimum level of benefits to all claimants regardless of the timing of their claim. The court was advised at the settlement hearing that there were several factors that would influence the need to maintain the payment restrictions, including changes in the estimated class size or a take-up rate of less than 100% among the eligible class members.

[8] Thus, in conjunction with these holdbacks and caps, the Settlement Agreement also provides for a mandatory review procedure in respect of the sufficiency of the fund so that the court may periodically reassess the need to maintain the restrictions. Under section 7.03, the Joint Committee is required to bring the present motion within 180 days after December 31, 2001 to determine "whether, among other things, the restriction on the payment of $5,000 in Section 4.01(1)(b), the 70% limitation in sections 4.02 and 6.01 and the $75,000 limitation in Sections 4.02 and 6.01 should be amended (i.e., either increased or decreased) or removed in whole or in part."

[9] As noted above, on this motion, the Joint Committee is recommending to the court that only the $5,000 holdback in section 4.01(1)(b) be removed at this time. This

accords with the priority scheme for the removal of restrictions on payments set out in section 7.03(2)(a) which provides that:

> If the courts decide to amend the restrictions referred to Section 7.03(1) to increase the amount of any payments, then the amendment will be made strictly in accordance with the following priorities:
>
> > (a) Firstly, the Plan will be amended by deleting the restriction upon payment contained in Section 4.01(1)(b) requiring the postponement of payment of $5,000 and by providing that the full amount of $20,000 will be paid. Each person entitled to receive a payment that has been postponed for his or her account in accordance with Section 4.01(1)(b) will thereupon be paid the amount postponed plus interest thereon at the Prime Rate commencing on the date of payment of the $15,000 under Section 4.01(1)(b).

[10] The Executive Summary of the actuarial report prepared by Eckler Partners Ltd. provides some useful background. Eckler Partners, and in particular, Mr. Levi, provided the original actuarial evidence to the court at the time of the settlement approval hearing in August 1999. The actuarial estimates of fund sufficiency in 1999 were based on medical information with respect to number of infections and, in consideration of the graduated benefit scheme, the likely progress of the disease in those class members infected. This information was obtained from studies conducted by Dr. Robert Remis and Dr. Murray Krahn respectively.

[11] Since 1999, Dr. Remis has revised his estimates of the number of persons infected under the Transfused HCV Plan upward from 15,707 to 17,653, an increase of approximately 12.4 %. Dr. Krahn has also updated the medical modelling dealing with the progression of the disease, after consideration of the data available in respect of

claimants up to August 2001. If these revisions are accepted at face value, the Eckler report indicates that the fund will go from a modest surplus to a deficit of approximately $237,000,000 with the current restrictions in place.

[12] Eckler states that there are two major reasons for the change in the actuarial position from surplus to deficit. First, there is a significant increase in the estimated transfused cohort size. Secondly, it now appears from actual data obtained in the administration of the settlement that the claimants in the Hemophiliac class are significantly younger and at more advanced stages of the disease than were assumed from information available in 1999. Both of these factors increase the liabilities.

[13] Despite this the Joint Committee recommends that the cap in issue be lifted. They base their recommendation on the actual claims experience so far and the fact that this experience indicates that the actual number of claimants in the Transfused class will be 6500 persons or less and that the Hemophiliac class will be 90% or less of the number estimated in 1999. The Joint Committee contends that all of the evidence should be viewed as a whole by the court in assessing the reasonableness of the estimates. Given the history of the claims experience to date, this appears to be a sound approach.

Analysis

[14] As is stated in the Eckler report, in 1999, the only evidence available regarding probable or potential class size and disease progression was that provided by Dr. Remis and Dr. Krahn. At the present time however, the actual claims experience, with respect to the number of claimants and the degree of the progression of the disease, provides

valuable information to be factored into the actuarial sufficiency analysis. For example, the sufficiency analysis conducted by Eckler leading to the deficit calculation set out above results from an assumption that 100% of the Transfused and Hemophiliac class members, as estimated to exist by Dr. Remis, will present themselves for payment immediately. It is known for a fact that this is not correct. The actual experience to December 31, 2001, indicates that only 2967 claims have been submitted for payment out of a projected total of 8,238 claimants. Of these, 1762 claims were approved while 1205 claims are in process, with a certain percentage of those likely to be rejected. The average rejection rate is currently 22%, which would translate into a combined total of approximately 2700 claimants approved or likely to be approved based on those claims.

[15] Thus the claims made to December 31, 2001 represent approximately 32% of the class size estimated by Dr. Remis. This is a significant consideration on this motion. The settlement was finally approved by this court in November 1999. It has been in full claims administration since April 2000. Considering the publicity that has been generated in respect of this action and others involving the Canadian blood supply and the advertising program undertaken to date, it is significant that less than a third of the estimated claimants have come forward in that time.

[16] This experience gives credence to the Joint Committee's submission that the actual number of transfused claimants will not likely exceed 6500. This is further supported by the evidence of marked drop-off in new claims. Sharon Matthews, a partner in the firm Camp Fiorante Matthews, class counsel in related actions in British Columbia, has done

extensive analysis of the claims experience in the administration of the settlement. In her affidavit, she details the claims history as follows at paragraph 20:

> ...I analyzed the volume of transfused primarily infected claims... between May 2000 and April 2002 and made the following observations:
>
> (a) during the first 12 months, the claims volume generally increased over the first 4 months (except one summer month when it was relatively low);
>
> (b) after the first 6 months, claims volume dropped each month until July 2001, when it spiked up for one month, decreased again for 3 months, went up slightly in November 2001, dropped and then jumped up in January 2002
>
> (c) the claims volume in the first 12 months was 3,427 and it was 876 in the second 12 months, for an overall drop in volume of 74.4%;
>
> (d) during the second 12 months, the drop in claims volume averaged 15% per quarter;
>
> (e) the drop in claims volume comparing the first quarter of the second 12 months with the last quarter of the second 12 months was 36.5%; and
>
> (f) the drop in claims volume comparing the last month of the first 12 months with the last month of the second 12 months was 34.1%

[17] Ms. Matthews further analyzed the trending of new claims using declining balance drop-off figures of 40%, 30%, 20%, 10% and 0% from the new claims volume of 1,111 received in the period from January-December 2001 over the 2002-2010 period. As she states at paragraph 22, "this analysis demonstrates that unless the current declining trend drops to between 0%-10% immediately and remains constant until [the claims bar date of] June 30, 2010, the claims volume will not produce a cohort size equal to the estimated 1999 cohort let alone the new 2002 estimate...". She further states that "[a]n immediate and sustained drop to 0%-10% decrease in new claims volume is not realistic because the first 4 months of 2002 produced 252 new claims, and even if the rate of new claims stays

constant over the remaining 8 months, this would yield 756 new claims in 2002- ie: a 32% drop in new claims compared to 2001." Ms. Matthews evidence was unchallenged on the motion.

[18] Ms. Matthews also suggests that the low number of claimants to date may also be a function of a class action phenomena described as "take-up" rate. It is common experience in class action settlements that regardless of notification programs, the ease of the claims process or the quantum of the compensation available, some percentage of eligible class members will not make claims. Empirical evidence of that phenomena in this proceeding is found in the affidavit evidence of Dr. Frank Anderson, a leading specialist in the treatment of Hepatitis C in British Columbia. Dr. Anderson states at paragraph 9 of his affidavit that:

> I also see people in my practice who have been diagnosed [with Hepatitis C] and whom I believe were infected by a transfusion during the class period but they have not applied for compensation. Some of the reasons these patients give for this include that the money does not mean much to them, they believe the government will tax the money, or that they will have to pay lawyers to obtain compensation.

[19] Moreover, the two sub-groups of claimants for which the estimates of class size are the most accurate because of actual data gleaned through registration and notification programs rather than sampling analysis are the B.C. Transfused class and the Hemophiliac class. The members of these groups have been subject to intensive notification programs yet the current take-up rate for the B.C. Transfused class is less than 60% while the take-up rate for the Hemophiliac class is approximately 68%.

[20] The figures for the Hemophiliac class are, according to Ms. Matthews "surprisingly low". It was anticipated that most of the members of this class would submit claims promptly due to the notification program and the general information networks to which most Hemophiliac class members belong. Ms. Matthews offers as one possible reason for the lower than expected number of claimants the existence of alternative compensation plans that would provide better benefits to claimants at the lowest level of graduated benefits under the settlement. The lowest level of benefits under the settlement is paid to those class members who have cleared the virus but show the presence of an antibody. The evidence to date is that Hepatitis C does not develop any further in those cases, thus any claimant in this situation who has claimed under an alternative plan will be unlikely to make any further claims for compensation from the settlement.

[21] On the basis of this explanation and the established take-up rate to date, the Joint Committee contends that it is reasonable to assume that the number of Hemophiliac claimants will be 90% or less of the original estimate of 1645 claimants.

[22] A number of other assumptions utilized by Eckler in compiling its report in 1999 have been modified based on the claims experience shown to date. However, as explained in the Executive Summary, even though these changes may have created a number of "major differences" the changes in assumptions, both positive and negative, "have tended to offset one another". There were no challenges to any of the assumptions the Joint Committee instructed Eckler to use by any counsel appearing on the motion.

Accordingly, I find that the assumptions utilized as a result of actual experience are reasonable and I do not propose to deal with them in detail in these reasons.

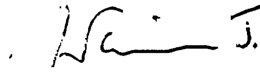
[23] As stated above, the motion turns on whether the court accepts that the Transfused class will ultimately number 6500 or less and that the Hemophiliac class will be 90% or less of the original estimate of 1645. According to the Eckler report, if those numbers are used and applied to current information regarding medical modelling for disease progression, there will be a notional surplus in the fund of approximately $123,000,000. Removing the payment restriction of $5,000 under section 4.01(1)(b) will reduce but not eliminate this notional surplus. It will still be approximately $89,000,000. More importantly however, the existence of this remaining surplus will provide a margin of error of approximately 700 claimants in the projections. There is a further margin of error inherent in the fact that the sufficiency calculations have been made on the basis that all claimants will come forward immediately. This has not been the case to date nor is it reasonable to assume that it will be the case in the future. As such, the savings from deferred claims increase the monies available in the fund by approximately $14,000,000. This translates to an additional 110 claimants prior to exhaustion of the surplus. Thus, the total margin of error on the Joint Committee estimates is approximately 810 claimants.

[24] The sizes of the Transfused and Hemophiliac cohorts are the material factors affecting the estimate of aggregate claims. The actuarial conclusion as to surplus or sufficiency is also affected by the estimated return on the invested assets of the fund. I am satisfied that the assumption employed by the actuary, namely that the annual investment

return will equal the inflation rate plus 2.8%, is reasonable having regard for the fact that a substantial portion of the assets is comprised of real return bonds. In addition, a sensitivity analysis indicates there is considerable room for variation in the rate of return before the capacity to discharge the liabilities of the fund would be jeopardized.

Conclusion and Result

[25] In consideration of the claims experience, the declining rate of claims, the evidence regarding take-up rate, the buffer provided by the margin for error inherent in the calculations and the rate of investment return of the Fund, I am satisfied that the assumptions that the Joint Committee instructed Eckler to utilize in compiling the actuarial report are reasonable. Accordingly, I find that the fund sufficiency is such that payment of the $5,000 holdback under section 4.01(1)(b) may be made to claimants so entitled.



WINKLER J.

Released: July 11, 2002

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

PARSONS *et al.*

-and-

THE CANADIAN RED CROSS SOCIETY *et al.*

And

BETWEEN

KREPPNER *et al.*

-and-

THE CANADIAN RED CROSS SOCIETY *et al.*

REASONS FOR DECISION

WINKLER J.

RELEASED: JULY 11, 2002