

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Endean v. The Canadian Red Cross Society*,
2016 BCSC 751

Date: 20160426
Docket: C965349
Registry: Vancouver

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 Hard 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

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 Nunavut and The Government of the Yukon Territory

Intervenors

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for Defendant,
Attorney General of Canada: P. Vickery, W. Knights,
J. Spencer, N. Drouin
and A. Gatti

Counsel for British Columbia: D.C. Prowse, Q.C. and K. Johnston

Counsel for the Joint Committee: J.J. Camp, Q.C., S.D. Matthews, Q.C.,
K. Podrebarac, H. Strosberg
and M. Savonitto

Counsel for the Proposed Intervenors,
Steering Committee: T.J. O’Sullivan and L.C. Moscu

Written Submissions received: Vancouver, B.C.
March 17, and 31, 2016

Place and Date of Judgment: Vancouver, B.C.
April 26, 2016

Introduction

[1] British Columbia residents who were directly or secondarily infected with the Hepatitis C virus (“HCV”) by transfusion of blood from the Canadian blood supply between January 1, 1986, and July 1, 1990, and their family members and estates brought a class action in British Columbia against the Canadian Red Cross Society and the federal and provincial governments, seeking damages for their infections. The action was settled by agreement of the parties, and a settlement agreement was approved by this Court.

[2] Similar class proceedings were commenced in Ontario and Quebec, and similarly settled and the settlement agreements approved by the Courts in those provinces.

[3] The settlement agreements in the three class actions were reached on June 15, 1998, were national in scope and were intended to be administered for over 80 years. I will refer to them collectively as “the Settlement Agreements”.

[4] The Settlement Agreements required court approval, and the court approvals addressed the matter of the treatment of any surplus, i.e., excess capital from the settlement funds that were to be made available for the benefit of the Class Members. The British Columbia approval order was granted on October 1, 1999.

[5] The allocation provisions of the BC approval order are as follows :

(b) in their unfettered discretion, the Courts may order, from time to time, at the request of any Party or the Joint Committee, that all or any portion of the money and other assets that are held by the Trustee pursuant to the Agreement and are actuarially unallocated be:

- (i) allocated for the benefit of the Class Members and/or the Family Class Members in the Class Actions;
- (ii) 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 Member;
- (iii) 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; and/or

(iv) retained, in whole or in part, within the Trust Fund;

in such manner as the Courts in their unfettered discretion determine is reasonable in all of the circumstances provided that in distribution there shall be no discrimination based upon where the Class Member received Blood or based upon where the Class Member resides.

[6] "Party" is a defined term under Article 1.01 of the Settlement Agreements as "any one of the FPT Governments or the Class Action Plaintiffs".

[7] On July 23, 2015, I ordered that as of December 31, 2013, the assets of the trust, which contains the funds to be used for the benefit of Class Members, exceeded the liabilities by an amount between \$236,341,000 and \$256,594,000 after taking into account funds to protect Class Members from major catastrophic adverse experiences.

Relief Sought

[8] The applicants are an unincorporated group of seven Canadian physicians, researchers, and scientists involved in research and the care of those suffering from Hepatitis C Virus ("HCV"). I will refer to the applicants as the Steering Committee. The Steering Committee applied in writing to be added as parties in these proceedings and as intervenors in the Ontario and Quebec class proceedings in order to participate at a joint hearing of motions before the courts of British Columbia, Ontario, and Quebec for the purpose of submitting that some \$155 million of the actuarially unallocated funds should be allocated to the "National HCV Initiative" of which the Steering Committee is the organizing group or steering committee.

[9] The motions are scheduled to be concurrently heard in Toronto on June 20–23, 2016 with video links to the courtrooms in British Columbia, and Quebec. The purpose of the motions is to determine, what if anything is to be done to actuarially unallocated funds held by the Trustee of the 1986–1990 Hepatitis C Settlement Agreement.

Discussion

[10] I have the benefit of the reasons for decision of Mr. Justice Perell of the Superior Court of Justice of Ontario, and of Madam Justice Corriveau of the Superior Court of Quebec on the companion applications for intervenor standing in those provinces. At paras. 7 – 10 of his reasons for decision indexed at 2016 ONSC 2661, Mr. Justice Perell has conveniently summarized the salient background to the application before me as follows:

[7] The Steering Committee seeks to intervene as an added party in the upcoming motion for the purpose of submitting that some of the actuarially unallocated funds should be allocated to the “National HCV Initiative” of which the Steering Committee is the organizing group or steering committee.

[8] The National HCV Initiative has two goals: (1) to improve diagnosis rates, increase treatment uptake, and optimize delivery of care to all Canadians living with HCV, i.e. not just Class Members but other Canadians, including underserved First Nations populations; and (2) to improve future prevention, care and treatment of Hepatitis C through research to eliminate the deadly disease from Canada. The estimated cost of the various projects to be advanced by the National HCV Initiative is approximately \$155 million. The Steering Committee submits that if it is denied the opportunity to participate in the allocation motion, the National HCV Initiative will not go forward.

[9] It is worth emphasizing that the National HCV Initiative is designed to benefit all those infected by the Hepatitis C virus regardless of the source or date of the infection, while the class action was about providing compensation for a particular group of those infected over a particular period of time because of the alleged wrongdoing of the Defendants.

[10] The Quebec Government opposes the participation of the Steering Committee and submits that should a grant be made to the National HCV Initiative that would constitute an amendment to the Settlement Agreement that the court has no jurisdiction to make. The Joint Committee, which represents the Class Members, opposes the participation of the Steering Committee at the allocation motion. On the motion, the Joint Committee is seeking that the funds be used to increase the entitlements of individual Class Members, The Federal Government opposes the participation of the Steering Committee at the allocation motion. On the motion, the Federal Government seeks an order that the excess capital revert to Canada.

[11] Rule 6-2(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 provides, in part, that

At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

...

- (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
 - (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding
- that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[12] The Steering Committee is not a party to the Settlement Agreement nor does it have an issue relating to the subject matter of this proceeding. Moreover, the participation of the Steering Committee is unnecessary to ensure that all matters between the parties to the existing proceeding may be effectually adjudicated upon.

[13] I respectfully agree with and adopt the views expressed by Perell J. at paras. 16 – 19 of his reasons for decision:

[16] In seeking funds to be used for all Canadians infected or possibly infected by Hepatitis C the Steering Committee is actually an opponent and in conflict with the Class Members and with the Defendants who are under no obligation to share the actuarially unallocated funds with strangers to the contract or to the litigation that was settled by a negotiated contract.

[17] It should be noted that under the court approved Settlement Agreement, the request for an allocation of excess capital must come from a "Party" to the Agreement. The Settlement Approval Orders define a "Party" to mean "any one of the FPT Governments or the Class Action Plaintiffs." The Steering Committee is not a Party as defined by the Settlement Agreement; it did not give any consideration for the Settlement Agreement; it did not give up any rights, and it did not contribute any funds. As a matter of contract interpretation and contract law, a non-contracting party does not have the legal status to enforce the contract because of the absence of privity of contract.

[18] At this time, the Steering Committee is not even a potential third party beneficiary to the contract, because no party to the Settlement Agreement has applied on its behalf for an allocation of the excess capital for the benefit of the Steering Committee or its projects. Rather, the parties to the Settlement Agreement either take no position or oppose the participation of

the Steering Committee and they oppose any allocation to the National HCV Initiative. There is no support for the Steering Committee's proposed allocation. Had a request been made by a party on behalf of the Steering Committee, the status of the Steering Committee would have changed from a stranger to the contract to that of a potential third party beneficiary under the contract - but there still would be no basis for the participation of the Steering Committee at the allocation hearing.

[19] However commendable sharing any excess capital with all Canadians who suffer from Hepatitis C may be, the parties to the litigation, the plaintiffs and the defendants to the class actions, negotiated a settlement in their own self-interest and they are under no obligation to be altruistic in enforcing the bargain they reached. The Steering Committee has no substantive right to participate in what amounts to the administration of a contract that has been approved by the court. Its participation would create an opponent to the parties to the contract, and the Steering Committee's participation would delay and potentially disturb the commencement of the long- scheduled hearing of the allocation motion.

[14] In the result, like Perell and Corriveau JJ., I dismiss the application of the Steering Committee to be added as a party to this proceeding and adopt the result stated by Perell J. with respect to any applications for costs, including the time constraints that began with the release of his reasons for decision.

“The Honourable Chief Justice Hinkson”