

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

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

**SUBMISSIONS OF THE DEFENDANT
HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA**

(Proceeding under the *Class Proceedings Act*, 1996)

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INTRODUCTION:

1. These submissions of Her Majesty the Queen in right of the Province of British Columbia ("British Columbia") respond to the Notices of Application filed by the Joint Committee and the Attorney General of Canada ("Canada")

seeking an allocation of surplus and actuarially unallocated funds within the Trust Fund established under the 1986-1990 Hepatitis C Settlement Agreement and Funding Agreement.

2. British Columbia submits that the disposition of these competing applications are subject to the following provisions and principles :
 - (i) The surplus funds in question were derived from the up front contribution of Canada to the settlement in 1999 and do not involve direct contributions from British Columbia;
 - (ii) If any or all of the surplus is allocated in the manner requested by Canada or the Joint Committee, the allocation will not result in any additional liability to British Columbia, nor will it result in the acceleration of any of its continuing contributions to the settlement fund;
 - (iii) Any allocation ordered under paragraph 5 (b) of the October 28, 1999 Settlement Approval Order of Justice Smith, must respect the integrity of the settlement agreement and cannot result in any direct or indirect substantive amendments to it.
3. British Columbia adopts the factual basis as set out in paragraphs 10-27 of the Notice of Application filed by the Attorney General of Canada on January 29, 2016.
4. British Columbia accepts that the Court has an “unfettered discretion” to order allocations under paragraph 5 of the Settlement Order. The exercise of that discretion, however, must be based on principle and be “reasonable and judicial”.

5. Paragraph 5 (c) of the British Columbia Settlement Approval Order provides a number of factors which may assist the Court in the exercise of its "unfettered discretion Those factors 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 34(5) of the Act;
- (v) whether the integrity of the Agreement will be maintained and the benefits particularized in the Plans ensured;
- (vi) whether the progress of the disease is significantly different than the medical model used in the Eckler actuarial report appended as Exhibit "A" to the affidavit of Sharon D. Matthews sworn July 9, 1999;
- (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 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.

6. British Columbia submits that these factors ought to be considered in light of the factual basis set out in Canada's Notice of Application, including;

- A. how the trust fund was created;

- B. the up front payment by Canada of \$877.82 M and the total FPT governments' contribution of \$1.18 Billion ;
 - C. the agreement of the federal, provincial and territorial governments ("FPT governments") to forego tax on the investment income earned by the Trust;
 - D. the positions taken by class counsel at the settlement hearings in 1999 that the settlement was generous and analogous to what might have been achieved in a successful tort claim;
 - E. the approving courts finding that the Settlement Agreement was fair, reasonable and in the best interest of the class as a whole;
 - F. at the time of the settlement the class was projected to be significantly greater in number than experience has demonstrated;
 - G. new drug therapies for Hepatitis C since 1999 have dramatically changed the treatment and outcomes for victims of the disease.
 - H. The assets in the trust fund exceeded the liabilities by an amount of between \$236.3 M to \$256.6 M, as at December 31, 2013.
7. British Columbia submits that when the factors in paragraph 5 (c) of the Settlement Approval Order are considered with the factual matrix above, they generally favour an allocation to Canada.
8. Canada's contribution to the trust fund in 1999 was premised on the class being much larger than it proved to be. The fact that the Trust Fund has continued to be so robust is in part a function of that initial generous contribution and the tax waivers provided by the FPT governments. The risk

that the Joint Committee assumed under the terms of the settlement, that the funds might not be sufficient has not materialized. Indeed the evidence is quite to the contrary.

9. British Columbia adopts the position of Canada in paragraph 38 of its Notice of Application. The proposals of the Joint Committee to permit late claimants to enter the settlement agreement, to cease the deduction of collateral benefits in determining loss of income, to compensate family members in the ways described, and to compensate for loss of pension all require substantive amendments to the Settlement Agreement.
10. Whether these additional benefits are paid from actuarially allocated or unallocated funds does not matter. Additional benefits which were not part of the Settlement Agreement will result in material changes.
11. The issue of whether Late Claims could be allowed under the Settlement Agreement was before the Courts in 2013. A Late Claims Request Protocol was conditionally approved by Mr. Justice Perell.¹ This was based on the view 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."² The Court's approval was based on the section of the Ontario Settlement Approval Order which is identical to paragraph 5(b)(i) of the British Columbia Order.
12. The Court distinguished between the provisions of the Settlement Agreement which stipulated a claims deadline versus the Settlement Approval Order which refers to funds which may be "allocated for the benefit of Class Members".

¹ Parsons v Canadian Red Cross Society, 2013 ONSC 3053

² paragraph 93

13. This same request was made in British Columbia in *Endean v. Canadian Red Cross Society*.³ Chief Justice Hinkson declined to approve the Protocol, conditionally or otherwise.

14. Chief Justice Hinkson found that the First Claims deadline, “was a negotiated and fundamental term of the Settlement Agreement”.⁴ He reasoned that to approve the protocol, “will defeat the bargain reached by the parties in this case”.⁵

15. Chief Justice Hinkson found support for this conclusion in *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149, and *Bodner v. Cash Store*, 2011 BCCA 384.⁶

16. Chief Justice Hinkson concluded that:

27. I find that it would be inappropriate for this Court to exercise the discretion conferred to it by Clause 5(b) of the order approving the Settlement Agreement. While that order may provide for the jurisdiction to order the relocation of assets of the trust fund that are otherwise actuarially unallocated, assuming any exist, such a reallocation in this case would amount to a fundamental alteration of the Settlement Agreement, and one detrimental to the respective governments. It is not for this Court to rewrite the Settlement Agreement to make a bargain for the parties which they did not make themselves. This is especially true in cases involving class action settlements which have already received the approval of the courts.

17. Accordingly, it makes no difference whether the money to fund Late Claims comes from the existing Trust Fund or from the actuarially unallocated surplus. That type of allocation would require a substantive amendment to a term of the Settlement Agreement, contrary to the authorities.

³ [2014] BCJ No. 651

⁴ paragraph 22


⁵ paragraph 24

⁶ paragraph 25

CONCLUSION:

18. British Columbia respectfully requests that:
- a) Any allocation ordered by the Court not result in any additional liability to British Columbia, and not result in the acceleration of any of its continuing contributions to the settlement fund;
 - b) Any allocation ordered will be consistent with the integrity of the Settlement Agreement and will not result in any direct or indirect substantive amendments to it;
 - c) This Court's exercise of its unfettered discretion based on all the facts here and the factors in paragraph 5 (c) of the Settlement Approval Order should generally favour an allocation to Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th DAY OF MAY, 2016.



D. Clifton Prowse, Q.C. and
Keith L. Johnston counsel for
the Defendant Her Majesty the Queen
in right of the Province of British Columbia

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