



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

NOTICE OF APPLICATION

Name of Applicant: British Columbia Joint Committee Member

TO: The Attorney General of Canada

AND TO: Her Majesty the Queen in Right of the Province of British Columbia

AND TO: Fund Counsel

TAKE NOTICE that an application will be made by the British Columbia Joint Committee member to Chief Justice Hinkson at 800 Smithe Street Vancouver, British Columbia on June 22 and 23, 2015 at 7:00 am PDT/10:00 am EDT linked by videoconference to a hearing with the Superior Court of Quebec and the the Ontario Superior Court of Justice to be held at 393 University Avenue, Toronto, Ontario, for the orders set out in Part 1 below.

PART 1: ORDERS SOUGHT

1. An order that the Reports listed below be filed with the Court pursuant to the provisions of Clause 10.01(1)(i) of the January 1, 1986-July 1, 1990 Hepatitis C Settlement Agreement (the "Settlement Agreement"):
 - (a) "Estimating the Prognosis of Canadians Infected with the Hepatitis C Virus Through the Blood Supply, 1986-1990", The Fifth Revision of Hepatitis C Prognostic Model Based on the Post-Transfusion Hepatitis C Compensation Claimant Cohort, September, 2014, prepared by Murray Krahn, Wendong Chen, Qilong Yi and William Wong (the "Medical Model Report");
 - (b) Actuarial Report to the Joint Committee Assessing the Financial Sufficiency of the 1986-1990 Hepatitis C Trust as at December 31, 2013, by Eckler Ltd. (Richard Border and Wendy Harrison) (the "Eckler Actuarial Report"); and
 - (c) Report of the Joint Committee Relating to Financial Sufficiency of the 1986-1990 Hepatitis C Trust as at December 31, 2013 (the "Joint Committee Sufficiency Report").collectively the "Reports".
2. An order that as at December 31, 2013, the Trust Fund was financially sufficient and that, after taking into account an allocation of assets necessary to protect the class members from future major adverse experience, the Trust assets exceeded the liabilities by \$236,341,000.
3. Directions regarding further court hearings to consider:
 - (a) whether the restriction pertaining to income loss claims ought to be removed or changed;

- (b) whether any portion of the money and other assets that are held by the Trustee pursuant to the Settlement Agreement are actuarially unallocated within the meaning of paragraph 5(b) of the order of the Supreme Court of British Columbia made October 28, 1999 (the "Settlement Approval Order")
 - (c) an order or orders pursuant to paragraphs 5(b) and (c) of the Settlement Approval Order.
4. An order for such further and other relief as counsel may request and this Honourable Court may direct.
 5. An order that the orders made pertaining to paragraphs 1 and 2 above not be effective unless and until corresponding orders are made by the Superior Court of Québec and the Ontario Superior Court of Justice.

PART 2: FACTUAL BASIS

6. The Joint Committee is charged with oversight of the 1986-1990 Hepatitis C Settlement Agreement, including the Transfused HCV Plan, the Hemophiliac HCV Plan (the "Plans"), the Trust and the Trust Fund.
7. Section 10.01(1)(i) of the Settlement Agreement requires a triennial assessment of financial sufficiency.
8. As at December 31, 2013, \$774,705,000 in benefits had been paid to class members under the terms of the Settlement Agreement and the Plans. As of the same date, the assets of the Trust were \$1,190,199,000. After taking into account an allocation of assets necessary to protect the class members from future major adverse experience, the assets exceed the liabilities by \$236,341,000.

Joint Committee Sufficiency Report, Appendix B

Affidavit #4 of Richard Border sworn March 11, 2015, Exhibit A [Border Affidavit #4, Exhibit A, Eckler Actuarial Report], paras. 20 and 247

Medical Modelling Report, Medical Evidence, Actuarial Report and Joint Committee Report

9. The evidentiary record for this financial sufficiency assessment includes a medical model and report, medical evidence and an actuarial report. The medical model and report and the actuarial report are both significantly based on data pertaining to the claims under the Settlement Agreement provided by the Administrator to the Settlement Agreement. That data has not been filed separately with the courts but it has been reviewed by the Joint Committee, the medical modeling working group and the actuaries. The pertinent conclusions drawn from it are described in the Medical Model Report and the Eckler Actuarial Report, the actuaries retained by the Joint Committee.

Joint Committee Sufficiency Report, paras. 8-9

Affidavit #4 of Murray Krahn sworn March 13, 2015, Exhibit A, [Krahn Affidavit #4, Exhibit A Medical Model Report] p.15 and 17

Border Affidavit #4, Exhibit A, Eckler Actuarial Report, Appendix J

Affidavit #1 of Vince Bain made March 11, 2015 [Bain Affidavit #1]

10. The medical model is the work of a group of epidemiologists, physicians, and statisticians, led by Dr. Murray Krahn of the University of Toronto. On settlement approval and for each financial sufficiency review under the Settlement Agreement, Dr. Krahn has convened a medical model working group (the "MMWG") to build (and then refine) an epidemiological model predicting the health outcomes of the class members over time.

Krahn Affidavit #4, Exhibit A, Medical Model Report pp. 6-7

11. In addition, the Joint Committee has filed evidence of Dr. Vince Bain, a hepatologist, describing the Hepatitis C Virus ("HCV"), HCV disease progression, the current state of the art in treatment of HCV and health outcomes of patients who clear the virus after treatment.

Bain Affidavit #1

12. Eckler Ltd. built an actuarial model using the same software on which the medical model was built. The actuarial model incorporates:

- (a) the medical model;
- (b) evidence about investment performance of the invested funds;
- (c) the basis on which the PT Governments¹ make financial contributions to the matters funded under the Settlement Agreement;
- (d) claimant data which is helpful in assessing future rates of claims and quantum of claims;
- (e) medical evidence pertaining to treatment, costs of treatment and treatment outcomes; and
- (f) information pertaining to the annual costs of service providers to the Settlement Agreement, Trust Fund and administration.

Border Affidavit #4, Exhibit A, Eckler Actuarial Report, Appendix J

13. The Joint Committee has filed a report summarizing the Joint Committee's input into the assumptions on which the Eckler Actuarial Report is based, providing a reconciliation and summing of the benefits paid under the Settlement Agreement and the Plans, highlighting issues under certain provisions of the Plans that are of significance, and describing the HIV Program under the Settlement Agreement.

Joint Committee Sufficiency Report, para. 12

14. Although the provision directs the assessment of the Trust Fund (the assets held by the Trustee), the actuarial assessment includes consideration of the Trust as a whole, which includes, in addition to the invested assets, the notional assets (PT Governments' contributions) and the liabilities.

Joint Committee Sufficiency Report, para. 18

Border Affidavit #4, Exhibit A, Eckler Actuarial Report para. 61-65

¹ The Provincial and Territorial Governments, defendants in these cases, are described as the PT Governments in the Settlement Agreement so will be described that way in this application.

15. On the 2010 financial sufficiency assessment (and to a certain extent on the 2007 financial sufficiency assessment), there were differences between the actuaries retained by the Joint Committee (Eckler Ltd.) and the actuaries retained by the Federal Government² (Morneau Shepell Inc.) which were not well understood. The cumulative quantum of these differences on the 2010 assessment was approximately \$200 million.

Joint Committee Sufficiency Report, para 16 and Appendix A

16. At the outset of the 2013 assessment, the Joint Committee and the Federal Government agreed on a process to try to eliminate the differences between the actuarial reports or to at least understand the differences that were based on disagreement in actuarial approach, philosophy or assumptions. The goal was that differences in outcome would be understood and explainable. They were encouraged to eliminate technical and modelling outcome differences if possible but to not compromise their independence. They communicated with each other throughout and with the MMWG as it developed the medical model.

Joint Committee Sufficiency Report, paras. 17

Border Affidavit #4, Exhibit A, Eckler Actuarial Report paras. 257-260 and Appendix J

Margins For Adverse Deviation

17. Actuarial analysis starts with best estimates which are based on means or statistical averages and which have a 50% probability of being too high and a 50% probability of being too low. The actuaries adjust the liabilities by margins for adverse deviation to protect against experience which is somewhat worse than the mean would predict. A margin for adverse deviation is calculated by reference to the known risks and is considered separately for each heading of compensation. The amount by which the margins for adverse deviation increase the liabilities is called the provision for adverse deviation.

Border Affidavit, Exhibit A, Eckler Actuarial Report paras. 95-98

² The Attorney General of Canada, a defendant in these cases, is described as the Federal Government in the Settlement Agreement so will be described that way in this application. All of the government defendants are described collectively as the FPT Governments.

18. The total provision for adverse deviation added to the liabilities was \$147,606,000.

Border Affidavit #4, Exhibit A, Eckler Actuarial Report paras. 95-98

19. The provision for adverse deviation is different from the buffer of assets to protect against future major adverse experience or catastrophe referenced above, also referred to as "required capital" described in more detail below. While both are protections against quantifiable risk, they differ in two main regards. First, margins for adverse deviation are calculated in relation to, and serve to increase, the liabilities while the required capital is a notional allocation of additional assets in excess of those liabilities. Second, margins for adverse deviation protect against experience that is somewhat worse than the best estimate assumption, while required capital provides protection to class members from major adverse or catastrophic events. The method of calculating each is such that there is no inappropriate duplication.

Border Affidavit #4, Exhibit A, Eckler Actuarial Report paras. 9-19, 95-96 and 216-219

Cohort Size

20. A major issue in previous financial sufficiency assessments was the number of unknown claimants: those persons who had not yet come forward to claim prior to the first claims deadline of June 30, 2010. This issue changed in complexity for the 2010 assessment because although the first claims deadline had passed, the Joint Committee had applications outstanding to extend the deadline for certain groups of claimants.

Joint Committee Sufficiency Report, paras. 19-22 and 25-26

21. These issues are now much more certain. The first claims deadline has passed. The Joint Committee's applications have been dealt with and two court approved protocols are in place pertaining to claimants whose applications after June 30, 2010 are based upon exceptions to the first claims deadline which were agreed upon under the terms of the Settlement Agreement and Plans. The remaining uncertainty is about how many will come forward under the approved protocols

and whether a third protocol to deal with late claims will ever be approved. The Joint Committee has asked Eckler to provide a sensitivity analysis pertaining to the third category of post June 30, 2010 claims in the event that issue is addressed in the future.

Joint Committee Sufficiency Report, paras. 26, 29-32

Border Affidavit #4, Exhibit A, Eckler Actuarial Report para. 253

Advances In the Nature and Efficacy of HCV Treatment

22. Advances in treatment over the last several years mean that most persons infected with HCV can receive treatment that is highly effective with fewer side effects than the treatments previously available. The sustained viral response rate ("SVR"), which is the medical term for cure in the treatment of HCV, is 95-99% for some genotypes (forms) of the virus. The lowest SVR rate is about 80% with the newest treatments.

Bain Affidavit #1, paras 33-41

23. Virtually all persons with HCV should be considered for treatment because the current treatments have fewer contraindications and incompatibilities with other drugs, fewer side effects (so ill persons can withstand the treatment) and are effective in persons who have been previously treated but did not attain an SVR.

Bain Affidavit #1, paras. 41-52

24. An SVR does not guarantee a return to baseline (pre-infection) health status, especially since class members have been infected for 10-30 years and have other health conditions. However, in many cases, attaining an SVR avoids a disability from developing or facilitates disabled persons to return to work or domestic duties. Regular medical follow up for cured HCV infection is only required for persons who had already developed cirrhosis prior to treatment.

Bain Affidavit #1, paras. 52-59

25. The costs of these treatments ranges between \$50,000 to \$80,000 depending on the duration of the treatment and the drugs prescribed. This Settlement Agreement pays for the portion of treatment not covered by private or provincial

health care plans. To date, the newer treatments are covered by some private health care plans. Provincial governments review the new treatments as they are approved, but coverage, if it is provided, lags behind approval.

Bain Affidavit #1, paras. 42 and 44

Settlement Agreement, Transfused HCV Plan clause 4.06, Hemophiliac HCV Plan, clause 4.06

26. These treatment developments have a significant effect on the medical model and the actuarial outcome. The actuarial model predicts high medical expense compensation over the next five years given the costs of the treatment and the number of class members expected to undergo treatment. Long term costs are reduced (compared to previous financial sufficiency reviews) as many class members are expected to attain an SVR improving their health (if not returning it to pre-infection status), and avoiding deteriorating health, all of which reduces the likelihood and quantum of future claims.

Krahn Affidavit #4, Exhibit A, Medical Model Report, pp. 9-10, 14-16, 27-28, 49-50

Border Affidavit #4, Exhibit A, Eckler Actuarial Report, paras. 21-25, 134-148 and 208-211

Bain Affidavit #1, paras. 52-59

27. Eckler opines that the changes in the medical model due to the advances in treatment described above will result in the liabilities decreasing by \$370 million due to reduction in benefits to be paid compared to the 2010 valuation. This will be offset by \$146 million in increased costs of treatment compared to the 2010 assessment. Due to the uncertainty of the efficacy of the new treatments, Eckler added a margin for adverse deviation to allow the efficacy to decrease to 80% of that built into the medical model. This resulted in an increase in the liabilities of \$65 million. Accordingly, the net effect to the liabilities of the advances in treatment was \$159 million.

Border Affidavit #4, Exhibit A, Eckler Actuarial Report, paras 21-25 and section 8.6, p. 43

Restriction of Loss of Income Claims in the Plans

28. When the Settlement Agreement was approved, there were restrictions on compensation amounts payable because at that time, the liabilities were projected to be greater than the assets. Section 10.01(1)(i) of the Settlement Agreement provides that the courts shall consider these limitations on the triennial financial sufficiency assessments.
29. Over the course of the administration of the Settlement Agreement and the several financial sufficiency assessments, all of the restrictions have been removed but one pertaining to a limitation on pre-claim gross income was which originally set at \$75,000 1999 dollars. The limitation on pre-claim gross income has been raised over the years but it has never been removed.

Joint Committee Sufficiency Report, paras. 38-39

30. In 2008, the Courts raised the limitation on pre-claim gross income which could be used in the calculation of a loss of income claim to a maximum of \$2.3 million (1999 dollars) with the proviso that any claim calculated on pre-claim gross income in excess of \$300,000 (1999 dollars) required express approval from the Court with jurisdiction prior to its payment. Four claims based on pre-claim gross income over \$300,000 have been approved to date.

Joint Committee Sufficiency Report, paras. 40-41

Conclusions on Financial Sufficiency

31. As at December 31, 2013, the assets of the Trust were \$1,190,199,000 consisting of \$1,028,048,000 invested assets and \$162,152,000 notional assets (obligations of the PT Governments under the terms of the Settlement Agreement and Funding Agreement). The liabilities, including a margin for adverse deviation, were \$802,646,000.

Border Affidavit #4, Exhibit A, Eckler Actuarial Report, para. 20

32. At the request of the Joint Committee, Eckler Ltd. considered the issue of whether a buffer between the assets and liabilities is necessary or appropriate

over and above the margin for adverse deviation applied to the liabilities. Eckler Ltd. opines, as it did in 2010, that the Fund is subject to significant volatility arising from a number of sources of uncertainty.

Border Affidavit #4, Exhibit A, Eckler Actuarial Report, para. 214

33. Eckler Ltd. utilizes an established actuarial methodology to establish a framework specific to the Trust to quantify the risks pertaining to investment risk and interest rate mismatching, medical model uncertainty (including the efficacy of the new treatments as well as the width of the confidence intervals in the statistical development of the medical model), individual claimant deviations from the statistical predictions, uncertainty, investment experience, uncertainty about how class members will make claims in the future based on the variability of the quantum of individual past claims.

Border Affidavit #4, Exhibit A, Eckler Actuarial Report, paras. 221-245

34. The actuarial goal is to identify the amount of capital (assets) required to protect the class members from a major adverse experience or catastrophe based on these known and quantifiable areas of risk. The difference between the invested and notional assets and the amount of assets necessary to achieve a 95% probability that the fund will still cover the liabilities if all of these risks were to materialize at the same time is referred to as required capital. As at December 31, 2013, the required capital was \$151.2 million, which was 18.8% of the liabilities.

Border Affidavit #4, Exhibit A, Eckler Actuarial Report, paras. 216-220 and 246

35. Including required capital, the assets exceeded the liabilities by \$236,341,000 at December 31, 2013.
36. Although the Eckler actuarial model and the Morneau Shepell actuarial model are different in structure, the actuaries have agreed on the development of the major assumptions and used the same medical model. The differences in results in the actuarial models are very small. Both conclude that the assets exceeded the

liabilities at December 31, 2013, that a buffer is appropriate, and that after the buffer the assets still exceeded the liabilities.

Border Affidavit #4, Exhibit A, Eckler Actuarial Report, paras. 216-220 and 246

37. The medical and actuarial evidence support a finding that the Trust was financially sufficient as at December 31, 2013.

PART 3: LEGAL BASIS

38. The Settlement Agreement requires a triennial review of financial sufficiency. The most recent review was triggered at December 31, 2013.
39. Section 10.01(1)(i) also requires the courts to consider whether any of the restrictions on payments in the Plans should be removed in whole or in part.
40. Pursuant to the Settlement Approval Orders, the courts have discretion to enhance benefits to class members if they declare portions of the money and other assets held by the Trustee to be actuarially unallocated.
41. Such further and other grounds as counsel may advise and this Honourable Court may permit.

PART 4: MATERIAL TO BE RELIED ON

42. The Reports noted above, to be filed.
43. The Settlement Approval Order of the British Columbia Supreme Court approving the settlement in this matter.
44. The Settlement Agreement and appendices including the Plans and the Funding Agreement.
45. Affidavit # 4 of Dr. Murray Krahn, made March 16, 2015;
46. Affidavit # 1 of Dr. Vince Bain, made March 11, 2015.
47. Affidavit #4 of Richard Border, made March 11, 2015.

48. Such further and other evidence as counsel may advise and this Honourable Court may permit.

The applicant estimates that the application will take: N/A.

- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: 16/Mar/2015



Signature of lawyer
for applicant

J.J. Camp
for: J.J. Camp, Q.C.

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this notice of application

with the following variations and additional terms:

.....

.....

.....

Date:

Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts