

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**

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

**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

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

Third Parties

CANADA
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

CANADA
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 APPLICATION AND RESPONSE TO THE NOTICE OF APPLICATION OF THE JOINT COMMITTEE

Name of applicant: Attorney General of Canada

TO: British Columbia Joint Committee Member

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

AND TO: British Columbia Fund Counsel

TAKE NOTICE that the Attorney General of Canada will respond to the October 16, 2015 Application of the Joint Committee and will make her own application for the orders set out in Part 1 below to the Honourable Chief Justice Hinkson on June 20, 2016 at the courthouse at 800 Smithe Street Vancouver, British Columbia, which will be video-linked to a hearing proceeding in Toronto, Ontario (Chief Justice Hinkson will be in Toronto, Ontario), at an address to be provided, at 7:00 a.m. Pacific time, 10:00 a.m. Eastern time, for the orders set out in Part 1 below.

PART 1: ORDERS SOUGHT

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 Application.
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 Ontario Superior Court of Justice.

PART 2: FACTUAL BASIS:

Settlement and funding of the Trust

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 Superior Courts of Ontario and Quebec.

Endean v. Canadian Red Cross Society, [1999] B.C. J. No. 2180 (SC)

Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (SC)

Honhon c. Canada (Procureur général), [1999] J.Q. no 4370 (CS)

Page c. Canada (Procureur général), [1999] J.Q. no 4415 (CS)

11. The Settlement Agreement provided for the creation of a trust fund (the “Trust Fund”), which was to be funded by the federal, provincial and territorial governments (“FPT Governments”) in an amount totaling \$1.118 billion plus interest from April 1, 1998 (the “Settlement Amount”). The federal government was to pay 8/11ths of the total settlement amount and the provincial and territorial governments were to pay 3/11ths.

Settlement Agreement: section 4.01 and Schedule D Funding Agreement, sections 1.01 and 4.01

12. Canada satisfied its obligation up-front, by transferring its full share, in the amount of \$877.82 million, to the Trust Fund on or about the settlement approval date in 1999. The provincial and territorial governments satisfy their obligation by periodic payments of the liability, as it arises.

Settlement Agreement: section 4.01 and Schedule D Funding Agreement, sections 4.01, 4.02

13. The FPT governments agreed to forego the collection of taxes on the investment income earned by the Trust, and on amounts allocated to Class Members under the Settlement Agreement, resulting in a significant increase in the value of the settlement funds.

Settlement Agreement: section 4.01 and Schedule D Funding Agreement, section 3.02

14. The Settlement amount and the tax free investment income generated by it are used to pay scheduled benefits, in accordance with plans incorporated into the Settlement Agreement, to Class Members over the course of their lifetimes depending on the severity of their illness and the extent of losses suffered, and to their dependents and other family class members after a class member's death due to HCV.

Settlement Agreement, Schedules A and B

Affidavit of Heather Rumble Peterson sworn October 16, 2015 at para. 20, Exhibit A

Full and fair compensation

15. The parties took the position at the time of settlement that the Settlement Agreement provided compensation that was largely analogous to, or better than, that which could be expected to be awarded to Class Members were they successful personal injury claimants under the tort model.

Affidavit of Asvini Krishnamoorthy, sworn January 29, 2016:

Exhibit B: Plaintiffs' Factum in action 98-CV-141369 for August 18, 1999 Motion in *Parsons*, at paras. 11-13 and 123 ("Parsons – Plaintiffs' Settlement Factum")

Exhibit D: Plan d'argumentation (Demandeur), 20 August 1999 in *Honhon* at p.6, Section 1(D)(1) ("Honhon – Plaintiffs' Settlement Factum")

Exhibit E: Submissions of the Representative Plaintiff on Application for Approval of the Proposed Settlement, 15 August 1999, in *Endean*, at paras. 76, 113, 127, 133 ("Endean – Plaintiffs' Settlement Factum")

16. In particular, the ability to access additional compensation on an individual basis according to the severity of the disease was seen by all parties as a significant benefit over the traditional tort model.

Endean– Plaintiffs' Settlement Factum, at paras. 134-136, 146

Parsons – Plaintiffs' Settlement Factum, at paras. 10, 127

Honhon – Plaintiffs' Settlement Factum, at p.6, Section 1(D)(1) and p.22-23, Section VI(D)

17. The three approving Courts found that the Settlement Agreement was fair, reasonable and in the best interest of the class as a whole.

Endean v. Canadian Red Cross Society, [1999] B.C. J. No. 2180 (SC) at paras. 18

Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (SC) at paras. 94, 133

Honhon c. Canada (Procureur général), [1999] J.Q. no 4370 (CS) at para. 25

Page c. Canada (Procureur général), [1999] J.Q. no 4415 (CS) at para. 27

Cohort size and advances in medicine

18. At the time of settlement, the probable number of HCV-infected class members was assumed to be 9,825 persons comprising 8,180 transfused and 1,645 hemophiliac class members.

Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (SC) at paras. 55, 56

19. Historical claims experience over the fourteen-year period ending December 31, 2013 has garnered a compensation cohort consisting of 5,563 primarily and secondarily infected persons that comprises: 3,924 known transfused claimants; 254 still unknown transfused claimants; 1,359 known hemophiliac claimants; and 26 still unknown hemophiliac claimants, amounting to approximately one half the number of transfused persons and 80% of the number of hemophiliac persons predicted to be potential class members in 1999.

Affidavit of Peter Gorham, sworn April 8, 2015, Exhibit B: "Actuarial Report Assessing the Financial Sufficiency of the 1986-1990 Hepatitis C. Trust Fund as at 31, December 2013", at p. 35, para. 147, Table 146a) and p.36, Table 146b)

20. For transfused claimants, which comprises the vast majority of the total claimants, a comparison of the projection of the original assumed cohort with the actual 2013 cohort shows that:
- a. In total, there are 4,178 claimants compared with the estimated number of 8,181.
 - b. There are 2,998 alive claimants compared with the estimated number of 6,484.
 - c. There are 1,180 deceased claimants compared with the estimated number of 1,697.

Affidavit of Peter Gorham, sworn January 29, Exhibit A, "Actuarial Report on Proposed Allocation of the Actuarially Unallocated Funds as of December 21, 2013", at para. 71.

21. The advent of new drug therapies, not known in 1999, has fundamentally changed the nature and progress of infection with Hepatitis C. These drug

therapies are dramatically increasing the percentage of Class Members who will become virus free. In addition, estimates made in 1999 as to rates of spontaneous clearance significantly underestimated actual rates.

Affidavit of Dr. Samuel S. Lee, affirmed January 26, 2016 at paras. 18-22, 25-26, 36-38.

Excess Capital

22. As of December 31, 2013, despite compensation payments of some \$776.9 million having been drawn down from the Trust Fund over the fourteen-year administration period, the Trust Fund including tax-free investment gains amounted to \$1.1902 billion that remained available to meet the present and future liabilities of the compensation plan.

Affidavit of Peter Gorham, sworn April 8, 2015, Exhibit B: "Actuarial Report Assessing the Financial Sufficiency of the 1986-1990 Hepatitis C. Trust Fund as at 31, December 2013", at p.39, Table 154

23. Actuarial forecasts by Eckler Ltd. and Morneau Shepell found that the Trust Fund assets exceed the liabilities by \$236.3 million and \$256.6 million, respectively. These amounts are not required to fund the settlement, even after taking into account an amount to protect the class members from major adverse experience or catastrophe.

Affidavit of Peter Gorham, sworn April 8, 2015, Exhibit B: "Actuarial Report Assessing the Financial Sufficiency of the 1986-1990 Hepatitis C. Trust Fund as at 31, December 2013" at p.6, Table 26 and para. 30

Affidavit of Richard Border, sworn March 11, 2015, attached report "Actuarial Report to the Joint Committee Assessing the Financial Sufficiency of the 1986-1990 Hepatitis C Trust as at December 31, 2013" at paras. 247-249

24. By its order dated July 23, 2015, this Court held that as at December 31, 2013, the assets of the Trust Fund exceeded the liabilities by an amount between \$236.3 million to \$256.6 million.

Endean v. The Canadian Red Cross Society, Order dated July 23, 2015 per Hinkson, J. (BC SC) at para. 3

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

Affidavit of Peter Gorham, sworn January 29, Exhibit A, "Actuarial Report on Proposed Allocation of the Actuarially Unallocated Funds as of December 21, 2013", at paras. 14, 36-53.

26. The Settlement Agreement 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 assets which remain in the Trust Fund are to be the sole property of and transferred to the FPT governments.

Settlement Agreement, s.10.01(1)(o) and s. 12.03

27. 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.

Settlement Agreement, s.10.01(1)(i)

Endean v. Canadian Red Cross Society, Judgment dated October 28, 1999 (entered on November 12, 1999) per Smith J. (BC SC), at para. 5(b)

Parsons v. Canadian Red Cross Society, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC), at para. 9(b)

Honhon c. Canada (Procureur général), [1999] J.Q. no 5324 (CS) at para. 16 and Annexe F

Page c. Canada (Procureur général), [1999] J.Q. no 5325 (CS) at para. 11 and Annexe F

PART 3: LEGAL BASIS

Terms of the Settlement Agreement

28. Paragraph 5 of the judgment of the Supreme Court of British Columbia dated October 28, 1999, approving the Settlement Agreement (“Paragraph 5”; “Settlement Approval Order”), which is substantially the same as provisions approved by the Superior courts in Ontario and Quebec, 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. 5(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. 5(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. 5(b)(iii)]; and/or
- d. Retained, in whole or in part, within the Trust Fund [para. 5(b)(iv)].

Endean v. Canadian Red Cross Society, Judgment dated October 28, 1999 (entered on November 12, 1999), per Smith J. (BC SC), at para. 5(b)

Parsons v. Canadian Red Cross Society, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC), at para.9(b)

Honhon c. Canada (Procureur général), [1999] J.Q. no 5324 (CS) at para. 16 and Annexe F

Page c. Canada (Procureur général), [1999] J.Q. no 5325 (CS) at para. 11 and Annexe F

29. The intent and purpose of Paragraph 5 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.

Honhon c. Canada (Procureur général), [1999] J.Q. no 5324 (CS) at para. 16 and Annexe F

Page c. Canada (Procureur général), [1999] J.Q. no 5325 (CS) at para. 11 and Annexe F

30. Canada moves under Paragraph 5(b)(iii). The Joint Committee seeks an allocation under 5(b)(i). No party has sought an allocation under 5(b)(ii).

No Substantive Amendments

31. Settlement Agreements are binding contracts whose terms must be respected by the parties and enforced by the courts. Not only are they enforceable under the general law of contract, but once judicially approved, the applicable class proceeding statutes provide that settlement agreements are binding, even on absent class members.

Robertson v. Whistler (Resort Municipality), 2012 BCSC 763 at para. 31

Olivieri v. Sherman, 2007 ONCA 491 at para. 41, reconsideration on other grounds allowed at 2009 ONCA 772

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 35

32. Courts possess a supervisory jurisdiction over the administration of settlement agreements in class proceedings, however that jurisdiction does not extend to rewriting the agreement; it is limited to implementing the terms of the agreement. Changes to material terms can only be made with the consent of all the parties concerned.

Coopérative d'habitation Village Cloverdale c. Société canadienne d'hypothèque et de logement, 2012 QCCA 57

Lavier v. MyTravel Canada Holidays Inc, 2011 ONSC 3149 at para 33

33. A material term includes a “provision of consideration in exchange for a release of further claims and dismissal of the action.” A change is a material change when it operates to the detriment of the defendant by increasing liability, or decreasing the residue in a settlement fund that the defendant can claim after the satisfaction of the settlement agreement.

Bodnar v. The Cash Store, 2011 BCCA 384 at para. 44

Lavier v. MyTravel Canada Holidays Inc, 2011 ONSC 3149 at paras. 34-35

34. Paragraph 5 does not permit substantive amendments to the Settlement Agreement. It merely permits the allocation of Excess Capital in a way not otherwise provided for in the Settlement Agreement.

35. Substantive changes to the agreement can 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.

Settlement Agreement, section 12.02

Endean v. The Canadian Red Cross Society, 2014 BCSC 621

Parsons v. Canadian Red Cross Society, 2013 ONSC 7788

Honhon c. Canada (Procureur général), 2014 QCCS 2032

36. The allocations proposed by the Joint Committee require substantive amendments to the Settlement Agreement, which are beyond the jurisdiction of the Courts.
37. 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.
38. 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

39. This Court's discretion in making the allocation under Paragraph 5 is unfettered, but such discretion must be exercised reasonably and judicially.

Endean v. Canadian Red Cross Society, Judgment dated October 28, 1999 (entered on November 12, 1999), per Smith J. (BC SC), at para. 5(b)

Parsons v. Canadian Red Cross Society, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC), at para. 9(b)

Honhon c. Canada (Procureur général), [1999] J.Q. no 5324 (CS) at para. 16 and Annexe F

Page c. Canada (Procureur général), [1999] J.Q. no 5325 (CS) at para. 11 and Annexe F

Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd., [1996] B.C.J. No. 234 (BC SC), at para. 38

Paragraph 5(c) factors

40. In making reasonable and judicial allocation of the Excess Capital, this Court should have regard for the listed criteria in paragraph 5(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 34(5) of the [British Columbia *Class Proceedings*] Act;
- (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 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 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;

Endean v. Canadian Red Cross Society, Judgment dated October 28, 1999 (entered on November 12, 1999), per Smith J. (BC SC), at para. 5(c)

Parsons v. Canadian Red Cross Society, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC), at para. 9(c)

Honhon c. Canada (Procureur général), [1999] J.Q. no 5324 (CS) at para. 16 and Annexe F

Page c. Canada (Procureur général), [1999] J.Q. no 5325 (CS) at para. 11 and Annexe F

Integrity of the Agreement

41. 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 5(c)(v).

Overcompensation

42. In order to be reasonable, an allocation must not overcompensate class members.
43. The Class Members have received full and fair compensation in accordance with the terms of the Settlement Agreement.
44. 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.

Endean– Plaintiffs’ Settlement Factum, at paras. 76,146,156

Parsons – Plaintiffs’ Settlement Factum, at paras. 10-13,123,127

Honhon – Plaintiffs’ Settlement Factum, at p.6, Section 1(D)(1) and p.22-23, Section VI(D)

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

Endean v. Canadian Red Cross Society, [1999] B.C. J. No. 2180 (SC)

at para. 18

Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (SC) at paras. 94, 133

Honhon v. The Attorney General of Canada, [1999] Q.J. No. 4370 (SC) at para. 25

Page c. Canada (Procureur général), [1999] J.Q. no 4415 (CS) at para. 27

46. 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

47. 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 5(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".
48. 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.

Settlement Agreement: section 4.01 and Schedule D Funding Agreement, section 3.02

Overfunding of Settlement

49. The past 14 years of claims experience indicates that the 1999 estimates of potential class members, which underpinned the Settlement Agreement, were significantly overstated. This is a factor the Court should consider under paragraph 5(c)(i) of the Settlement Approval Order.

Affidavit of Peter Gorham, sworn January 29, 2016, Exhibit A, "Actuarial Report on Proposed Allocation of the Actuarially Unallocated Funds as of December 21, 2013", at paras. 67-72

50. 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.

Affidavit of Dr. Samuel S. Lee, affirmed January 26, 2016 at paras. 18-22, 25-26, 28

51. 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.

Affidavit of Dr. Samuel S. Lee, affirmed January 26, 2016 at paras. 30-32

Settlement Agreement, Schedule A: "Transfused HCV Plan", s. 4.06; and Schedule B: "Hemophiliac HCV Plan", s.4.06

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

Affidavit of Dr. Samuel S. Lee, affirmed January 26, 2016 at paras. 36-38

53. 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 5(c)(vi) of the Settlement Approval Order.

Return of Excess Capital to Canada

54. For all the reasons outlined above, fairness requires that the Excess Capital be returned to Canada.
55. 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 highly effective but very costly new drug therapies.
56. 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.

PART 4: MATERIAL TO BE RELIED ON

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;

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

January 29, 2016

Department of Justice
Vancouver Regional Office
900-840 Howe Street
Vancouver, British Columbia
V6Z 2S9

Per: Andrea Gatti/ Paul B. Vickery
Tel: 604-666-4032/ 613-670-6317
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File: 3557131

Solicitor for the Defendant,
The Attorney General of
Canada