

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**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/Moving Parties**

**and**

**THE CANADIAN RED CROSS SOCIETY,  
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO  
and THE ATTORNEY GENERAL OF CANADA**

**Defendants/Respondents**

**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/Respondents**

***Proceedings under the Class Proceedings Act, 1992***

Court File No.: 98-CV-146405

BETWEEN:

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 FOURNER

Plaintiffs/Moving Parties

and

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Intervenors/Respondents

*Proceeding under the Class Proceedings Act, 1992*

**FACTUM OF THE INTERVENORS/RESPONDENTS  
(Returnable June 20, 2016)**

May 27, 2016

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**FACTUM OF THE INTERVENORS/RESPONDENTS  
(Returnable June 20, 2016)**

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## **PART I - INTRODUCTION**

1. This motion will determine how the surplus in the 1986-90 Hepatitis C settlement trust fund is allocated. The Court's task calls for a principled approach. The Governments of Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, the Yukon, the Northwest Territories, and Nunavut (together, the "PTGs") respectfully submit that the guiding principles should be twofold: avoid prejudice and focus on compensation.
2. The submissions of the PTGs are directed at the process by which surplus will be allocated. The PTGs take no position on the amount of surplus to be distributed, or the permissibility of any proposed allocation. With one exception, the PTGs also take no position on the merits of the various proposals. Generally speaking, therefore, the PTGs' position is about a way of doing things rather than what is ultimately done. However, faced with a broad discretion and difficult choices, a principled approach to procedure is vitally important.

## **PART II - FACTS**

3. The PTGs generally adopt the facts as stated by the Attorney General for Canada and do not consider that any differences are relevant to the present motion.
4. For the purposes of their argument, the PTGs note that the 1986-1990 Hepatitis C Settlement Agreement, referenced herein as the settlement agreement, establishes a trust fund. The trust fund is the recipient of funds from the Federal, Provincial, and Territorial Governments (the "FPT Governments"). The settlement agreement also establishes the Transfused HCV Plan and the Hemophiliac HCV Plan (together, the "Plans"), which are responsible for providing benefits to

qualified class members.<sup>1</sup> The Plans set out the terms for their membership, benefits, and administration.

### **PART III - ISSUES AND THE LAW**

5. The PTGs ask the Court to apply two principles in deciding the present motion. The first principle is that the Court does not have jurisdiction to amend the settlement agreement in a manner that would prejudice any of the parties. The second principle is that the settlement agreement was intended to compensate class members, and any allocation of surplus funds to class members must be consistent with this purpose.
6. With one exception, discussed further below, the PTGs take no position on the application of these principles to the allocation proposals advanced by Canada and the Joint Committee. Nevertheless, the PTGs respectfully submit that their analytical framework restricts the mechanism by which surplus may be distributed. Specifically, any allocation of surplus must be paid as a special distribution to avoid prejudicing the PTGs.

#### **The principle of neutrality**

7. In the Late Claims Motion, Perell J. stated “I accept that the court does not have the ability or the discretion to amend the Settlement Agreement without the consent of all the parties”.<sup>2</sup> His Honour continued:

I agree with Canada's submission that the court does not have the jurisdiction to rewrite the Settlement Agreement and that the court's supervisory or administrative jurisdiction cannot be used as a means for amending a settlement agreement to impose additional burdens on the defendant. I do not retract from what I said in *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149 (Ont. S.C.J.) at paragraphs 31-33:

31. Although the court's settlement approval order reserved a jurisdiction to consider applications about the administration of

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<sup>1</sup> See Schedules A and B to the Settlement Agreement.

<sup>2</sup> *Parson v. Red Cross Society*, 2013 ONSC 7788 at para. 35.

the settlement, the court does not have jurisdiction to change the nature of the settlement reached by the parties.

32. While a court has the jurisdiction to reject or approve a settlement, it does not have the jurisdiction to rewrite the settlement reached by the parties: *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (S.C.J.) at para. 10. *Harrington v. Dow Corning Corp.* 2010 BCSC 673 at para. 15. In particular, the court does not have the jurisdiction to impose burdens on the defendant that the defendant did not agree to assume: *Stewart v. General Motors*, [2009] O.J. No. 6476, (S.C.J.) unreported, September 15, 2009, per Justice Cullity at pp. 8-9.

33. ... The court has administrative jurisdiction independent of any conferral of jurisdiction. See: *Fantl v. Transamerica Life Canada*, 2009 ONCA 377 at para. 39; *Spavier v. Canada (Attorney General)*, 2006 SKQB 533 at para. 13. But after the settlement has been approved, the court's administrative and implementation jurisdiction does not include power to vary the settlement reached by the parties.<sup>3</sup>

8. The PTGs take as their starting point, therefore, the premise that Court does not have jurisdiction to vary a settlement agreement in a manner that would prejudice the defendants. Such an amendment can only be made on consent of all parties.<sup>4</sup>
9. Consequently, any distribution of surplus in this matter requires neutrality to the PTGs. This in turn requires the court to order that any amounts allocated for the benefit of class members be paid as special distributions from the trust rather than enhancements to any Plan. This would have the effect of avoiding two forms of prejudice to the PTGs, namely, the acceleration of their funding obligations and the expansion of their tax relief obligations.
10. The PTGs take no position on whether the Court can or should order any payments for the benefit of class members, but to the extent that it does, the potential prejudice to the PTGs restricts the manner in which it can implement this decision.

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<sup>3</sup> *Parson v. Red Cross Society*, 2013 ONSC 7788 at para. 35, citing *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149, at paras. 31-33. See also *Honhon c. Canada (Procureur general)*, 2014 QCCS 2032, at para. 16; *Endean v. Canadian Red Cross Society*, 2014 BCSC 621, at para. 12.

<sup>4</sup> See, for example, *Bodnar v. The Cash Store Inc.*, 2011 BCCA 384, at paras. 42-43; *Gray v. Great-West Lifeco Inc. et al.*, 2011 MBQB 13, at para. 36.

Avoiding accelerated liabilities

11. With respect to the acceleration of PTG liabilities, Articles 4.01 and 4.02 of the Funding Agreement provide that all of the Provincial and Territorial Governments (the “PT Governments”) are to make periodic payments “at the time the liability is being determined”.<sup>5</sup> The definitions in Article 1.01 of the Funding Agreement identify the specific liabilities to which the PT Governments must contribute. Article 4.04 of the Funding Agreement provides that the Administrator will give scheduled notice to the PT Governments of planned trust disbursements.
12. Further to Articles 4.02 and 4.03 of the Funding Agreement, the PT Governments must pay their 3/11 share of these disbursements, up to their aggregate liability cap. To the extent that the PT Governments do not pay all of their obligations up front, those obligations will continue to accrue interest. However, by “paying as they go”, the PT Governments may choose to make their own use of settlement funds until such time as they are required to pay trust liabilities.
13. Because the PT Governments are required to fund Plan disbursements, enhancing Plan benefits would increase the demand for funding from the PT Governments, effectively drawing down their capped contributions more quickly. This would have the effect of depriving the PTGs of the benefit of the settlement funds, which would no longer be available to fund planned program spending. Consequently, amending the Plans to enhance benefits would cause prejudice to the PTGs, and such an amendment falls beyond the jurisdiction of the Court.
14. The Joint Committee has recognized this potential prejudice and proposed that “all allocation benefits payable to Class Members and Family Class Members...shall be paid from the Invested Fund”.<sup>6</sup> The notice of motion defines “Invested Fund” as the “funds paid at the outset by the Federal Government and invested under the terms of the Settlement Agreement and the Funding

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<sup>5</sup> The Funding Agreement is Schedule D to the Settlement Agreement.

<sup>6</sup> Ontario Joint Committee Amended Notice of Motion, at para. 5.

Agreement”.<sup>7</sup> The term Invested Fund is not defined in the settlement agreement. For the sake of clarity, the PTGs use the term “special distribution” for their preferred payment mechanism, but whatever the nomenclature adopted by the Court, it should be clear that the payment of surplus funds cannot come under any of the defined costs and disbursements for with the PT Governments are responsible.

Avoiding increased tax relief obligations

15. With respect to tax relief obligations, Article 3.02 of the Funding Agreement sets out the following commitment:

(1) If any income taxes under the *Income Tax Act (Canada)* or the equivalent provisions of the income tax act of any Province or Territory are paid by the Trustee in respect of income of the Trust the FPT Government to which the taxes were paid will pay an amount equivalent to the amount so paid to the Trustee and such amount will thereafter form part of the Trust Fund.

(2) The amount of compensation paid to or received by a Class Member pursuant to a Plan will not be required to be included in the taxable income of the recipient thereof under the *Income Tax Act (Canada)* or the equivalent provisions of the income tax act of any Province or territory...[emphasis added]

16. Importantly, however, the PTGs’ obligations to provide tax relief do not extend to all payments made from the trust fund, but rather, encompass only compensation paid pursuant to a Plan. The Funding Agreement defines the Plans as the Hemophiliac HCV Plan and the Transfused HCV Plan, which are in turn defined by Schedules B and A to the settlement agreement, respectively. The tax relief obligations of the PTGs are therefore specific, and they are limited. They reflect a bargain in which the PTGs agreed to pay, and refrain from collecting taxes on, certain defined amounts for each Plan member and in respect of the trust fund itself.

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<sup>7</sup> Ontario Joint Committee Amended Notice of Motion, Grounds for the Motion, at para. 6.

17. To the extent that the Court exercises its jurisdiction under paragraph 9(b) of the order of Winkler J. of October 22, 1999 to allocate surplus funds for the benefit of class members, the potential prejudice to the PTGs in the form of increased tax relief obligations provides another reason that the Court cannot order an amendment to the Plans or to the terms on which class members might qualify for payments under any Plan.
18. In the respectful submission of the PTGs, therefore, the principle of neutrality requires that any enhanced payments to class members be distributed from the trust fund itself, and not through impermissible amendments to the Plans.

### **The principle of compensation**

19. The settlement agreement is a contract between the parties, and to the extent of any ambiguity, it must be interpreted in view of the parties' intentions at the time of contract formation.<sup>8</sup> The express purpose of the settlement agreement is to fund the Plans.<sup>9</sup> In turn, it is expressly stated that the purpose of the Plans is "to provide compensation to Class Members".<sup>10</sup> Compensation is therefore central to the parties' intentions at the time of contract formation, and this principle must guide the Court's exercise of discretion in allocating surplus pursuant to paragraph 9(b) of the Order of Winkler J. of October 22, 1999. At a bare minimum, therefore, amounts allocated to class members must be compensatory.
20. The focus on compensation is enhanced by the genesis and character of the surplus funds at issue on this motion. With respect to the character of the funds at issue, the settlement agreement expressly provides that class members do not own the trust fund's assets,<sup>11</sup> and further, that any residue upon termination of the

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<sup>8</sup> *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47.

<sup>9</sup> Settlement Agreement, Article 2.01:

The purposes of this Agreement are (i) to establish the Transfused HCV Plan and the Hemophiliac HCV Plan, (ii) to settle the Class Actions and (iii) to provide for payment by the FPT Governments of the Contribution Amount to the Trustee and the payment by the Trustee of the Disbursements, in accordance with and as provided in the Funding Agreement.

<sup>10</sup> Transfused HCV Plan, Article 2.01; Hemophiliac HCV Plan, Article 2.01.

<sup>11</sup> Funding Agreement, Article 5.03.

trust fund will revert to the FPT Governments.<sup>12</sup> With respect to the genesis of the funds at issue, the present surplus is the result of three factors: (i) the defendants' compliance with their obligations under the settlement agreement;<sup>13</sup> (ii) fewer claimants than anticipated;<sup>14</sup> and (iii) advances in the treatment of Hepatitis C.<sup>15</sup>

21. In the respectful submission of the PTGs, the nature and genesis of the surplus funds suggest that class members do not have a *de facto* right to any surplus funds. Rather, surplus funds should only be allocated for the benefit of class members to the extent that such allocations are compensatory.

Compensation must be placed in context

22. Compensation must be understood in the context of the settlement itself. This interpretive framework gives rise to two principles. First, the settlement was not necessarily intended to compensate the class for the entirety of its losses. It was conceded that the FPT Governments had strong defences, and in these circumstances, it may have been appropriate to discount the value of the class' claim.<sup>16</sup> Second, insofar as the settlement agreement adopts a non-tort mechanism for the calculation of damages, it necessarily deviates from the

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<sup>12</sup> Settlement Agreement, Articles 12.03(3) and 10.01(1)(o) and Funding Agreement, Article 10.02(2).

<sup>13</sup> Articles 4.01 and 4.02 of the Funding Agreement provide the Federal Government is to make a single payment on or prior to the approval of the settlement agreements, "in full satisfaction of all its liabilities and obligations". The Federal Government's compliance with this obligation provided funds on which the trust could earn investment income. As discussed above, the PT Governments have adhered to a "pay as you go" model, making periodic payments at the time that trust liabilities are determined. The PT Governments' compliance with this obligation has funded the liabilities of the Plans, permitting a surplus to accumulate in the trust.

<sup>14</sup> Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report, at paras. 55-56. When the settlement agreement was concluded in 1999, Eckler estimated that there were a total of 9,825 members in the Transfused and Hemophiliac classes. However, by December 2013 only 5563 claims were either approved or expected to be approved.

<sup>15</sup> New drugs have greatly increased the cure rate among class members. This has resulted in cost savings that offset the higher cost of the new drugs. Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report, at paras. 9 and 26-31.

<sup>16</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), at para. 92: "Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable at trial. Counsel for the federal government places the odds on the Crown successfully the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates".

principle of compensating each class member for actual losses.<sup>17</sup> Any allocation of surplus must be made against the backdrop of this conceptual framework.

23. With respect to the aggregate amount of the settlement agreement, Winkler J. noted that the parties all recognized that the plaintiffs bore a “high risk of failure at trial”.<sup>18</sup> This frank recognition flowed from the strong defences advanced by the FPT Governments, including the tenuous link between them, the Canadian Red Cross Society, and class members.<sup>19</sup> Insofar as class members discounted their claims to reflect this risk, they cannot now claim an entitlement to full recovery. Compensation must be assessed in respect of the risk-discounted value of the claim.
24. With respect to the distribution of the settlement among class members, it must be remembered that the parties chose an innovative non-tort model for the valuation of non-pecuniary losses. In approving the settlement, Winkler J. recognized the practical advantages of the non-tort model, which permits class members to access compensation at different predetermined levels as their disease progresses.<sup>20</sup> However, he also canvassed the drawbacks of abandoning the tort model, insofar as the suffering of two class members might differ, despite the fact that they both met the criteria for the same level of predetermined compensation.<sup>21</sup> Compensation must therefore be assessed in light of the fact that the parties chose a series of objective criteria to measure non-pecuniary losses *in lieu* of compensating class members for their actual non-pecuniary losses.
25. Applying this conceptual framework, the Court must decide whether the benefits provided by the Plans represented a reasonable risk-discounted value of class

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<sup>17</sup> Order of Winkler J. of October 22, 1999, at para. 9(c)(iii).

<sup>18</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), at para. 92.

<sup>19</sup> Affidavit of Heather Rumble Peterson, dated November 23, 1999, Exhibit C, Factum of the Attorney General of Canada on Settlement Approval in *Parsons v. Canadian Red Cross Society*, at para. 34, Joint Motion Record, vol. 13, p. 4361.

<sup>20</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), at paras. 79-91.

<sup>21</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), at para. 82: “The settlement provides for compensation on a ‘one size fits all’ to all Class Members who are grouped at each level”.



members' claims, accounting for the non-tort measure of non-pecuniary damages. In the PTGs' respectful submission, this approach is preferable to asking whether class members have uncompensated losses.

**Position on the proposals before the Court**

26. With the exception of the deductions proposal, discussed below, the PTGs do not take a position on the merits of any of the allocations proposed by Canada and the Joint Committee. Nor do they take any position on the precursor issues of (i) the quantum of the surplus to be allocated, and (ii) the Court's jurisdiction to allocate funds to class members. Rather, the PTGs urge that the Court apply the analytical framework set out above to reach a just result.

**Eliminating deductions would result in double compensation**

27. As a single exception to their neutral stance, the PTGs respectfully submit that the principle of compensation should lead the Court to refuse the Joint Committee's proposal to discontinue the deduction of certain benefits when calculating compensable income loss and loss of support.<sup>22</sup> Contrary to the principles set out above, this proposal would result in double compensation. This was not the parties' bargain, and the PTGs oppose the elimination of deductions both retroactively and prospectively.
28. The settlement agreement takes net income to be gross earned income less income taxes, CPP, and EI premiums.<sup>23</sup> Lost income is calculated by comparing pre- and post-disability net income. When calculating pre-disability net income, payments received for CPP disability, EI, disability insurance, and various HIV programs (together, "Collateral Benefits") are not included. When calculating compensable post-disability income loss, however, Collateral Benefits are included. The effect of this inclusion is to diminish the compensable loss. A similar approach is used to calculate payments for loss of support, which are determined with reference to lost income.

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<sup>22</sup> Ontario Joint Committee Amended Notice of Motion, at para. 3(e).

<sup>23</sup> See Articles 4.02 and 6.01 of the Transfused and Hemophiliac Plans.

29. The Collateral Benefits are income replacement programs. Income replacement under the settlement agreement declines in proportion to any income replacement obtained in the form of Collateral Benefits. The effect is to maintain the same net income before and after disability.
30. Where Collateral Benefits were paid pre-disability and maintained in a particular post-disability year, however, this approach results in post-disability net income that is lower than pre-disability net income, inclusive of the Collateral Benefits. It appears that there is a total of three class members in this situation.<sup>24</sup> Accordingly, there is an argument to be made that if the settlement were crafted *de novo*, pre-disability Collateral Benefits might be included in calculating pre-disability net income insofar as those same benefits continued to be paid in a particular post-disability year. The PTGs take no position on the permissibility or desirability of implementing such a solution at his juncture.
31. However, for all those who did not receive Collateral Benefits pre-disability and continue to receive them in the post-disability assessment year, excluding the Collateral Benefits from the calculation of post-disability income would simply result in double compensation.<sup>25</sup> In effect, class members would receive the Collateral Benefits to replace lost income and then receive that same lost income again from the Joint Committee's proposed allocation of surplus. This outcome cannot be justified from the perspective of compensation.
32. In light of the foregoing, the PTGs respectfully submit that the Court should reject the Joint Committee's deductions proposal. The PTGs take no position on any other proposal for the allocation of surplus.

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<sup>24</sup> Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, at para. 134 (c) and (d).

<sup>25</sup> Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, at para. 139.

**PART IV - ORDER REQUESTED**

33. The PTGs respectfully request that any payment of actuarially unallocated funds be made as a special distribution from the trust fund and expressly excluded from the PTGs' liabilities under the settlement agreement. The PTGs also request that any such payment otherwise be made without prejudice to their financial position. The PTGs seek no costs and ask that no costs be awarded against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of May, 2016.

A handwritten signature in black ink, appearing to read "Michael", is written over a horizontal line. The signature is stylized and cursive.

Caroline Zavid  
H. Michael Rosenberg  
McCarthy Tétrault LLP

Lawyers for the Intervenors/Respondents

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Parson v. Red Cross Society*, 2013 ONSC 7788
2. *Parson v. Red Cross Society*, 2013 ONSC 7788
3. *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149
4. *Honhon c. Canada (Procureur general)*, 2014 QCCS 2032
5. *Endean v. Canadian Red Cross Society*, 2014 BCSC 621
6. *Bodnar v. The Cash Store Inc.*, 2011 BCCA 384
7. *Gray v. Great-West Lifeco Inc. et al.*, 2011 MBQB 13
8. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53
9. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.)

Parsons et al v. The Canadian Red Cross Society et al v. Her Majesty the Queen et al

Court File No: 98-CV-141369

James Kreppner, et al v. The Canadian Red Cross Society et al. v. Her Majesty the Queen et al

Court File No. 98-CV-146405

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

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