Court File No. 98-CV-141369 CP00

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W 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

Court File No. 98-CV-146405

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

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

C A N A D A

PROVINCE OF QUÉBEC **SUPERIOR COURT**

DISTRICT OF MONTRÉAL **Class action**

NO : 500-06-000016-960
HONHON **DOMINIQUE**

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

C A N A D A

PROVINCE OF QUÉBEC **SUPERIOR COURT**

DISTRICT OF MONTRÉAL **Class action**

NO : 500-06-000068-987
PAGE **DAVID**

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

FACTUM OF THE ATTORNEY GENERAL OF CANADA
FOR THE MOTION TO ALLOCATE EXCESS CAPITAL

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FACTUM OF THE ATTORNEY GENERAL OF CANADA FOR THE MOTION TO ALLOCATE EXCESS CAPITAL

OVERVIEW

1. The Hepatitis C 1986-1990 Settlement Trust fund contains an estimated $256,594,000 in excess capital that is not needed in order to fully compensate all Claimants on the terms set out in the Settlement Agreement.

2. The excess capital should be returned to Canada. The public was the ultimate source of these funds. Allocating the capital to Canada ensures that the benefit of this money serves all Canadians.

3. Allocating the funds to Canada is the most fair and reasonable exercise of the discretion that the Settlement Agreement confers upon the three supervising Courts. It reflects the fact that we now know that Canada's up-front contribution allowed the Trust Fund to grow; that there were fewer Class Members than originally thought; and that the prognosis of the disease has improved so that the great majority of living infected Class Members have or will be cured. In retrospect, these developments show that Canada over-endowed the Trust in order to meet the needs of the Claimants.

4. All parties and the Courts agreed that the terms of the Settlement Agreement were fair and in the best interests of the Class. Class Counsel demonstrated in 1999 that the compensation amounts were at least as generous as those that would be available under a the tort model or extra-contractual liability model. Although the

original administration of the Fund included certain holdbacks, these hedges against insufficiency have nearly all been lifted as the settlement matured. The Claimants have had the full benefit of this bargain.

5. The Trust Fund is not the property of any one party. It was created to compensate the claimants, but the parties agreed that any residue at the end of the Trust belongs to the Federal, Provincial and Territorial governments. Now that the robust performance of the Trust has resulted in unallocated capital, this money should benefit the entire public.

PART 1: FACTS

The 1986-1990 Hepatitis C Settlement

6. Between 1996 and 1998, class actions were initiated in British Columbia, Quebec and Ontario on behalf of transfused persons and persons with hemophilia who received blood or blood products between January 1, 1986 and July 1, 1990 and were infected with the Hepatitis C virus.

7. In the fall of 1999, a pan-Canadian settlement of these actions ("Settlement Agreement") was approved by orders of the Superior Courts of Ontario, British Columbia and Quebec ("Approval Orders" and "supervising Courts", respectively).[1]

[1] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (SC); *Parsons v. Canadian Red Cross Society*, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC); *Endean v. Canadian Red Cross Society*, [1999] B.C. J. No. 2180 (SC); *Endean v. Canadian Red Cross Society*, Judgment dated October 28, 1999 (entered on November 12, 1999) per Smith J. (BC SC); *Honhon c. Canada (Procureur général),* [1999] J.Q. no 4370 (CS); *Honhon c. Canada (Procureur général),* 1999 CarswellQue 4293, REJB 1999-15380 (CS); *Page c. Canada (Procureur général),* [1999] J.Q. no 4415 (CS); *Page c. Canada (Procureur général),*[1999] J.Q. No. 5325 (CS).

8. The Settlement Agreement provided for the creation of a trust (the "Trust") 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 federal government was to pay 8/11^{ths} of this amount and the provincial and territorial governments were to pay 3/11^{ths}.[2]

9. Canada satisfied its obligation up-front, by transferring its full share in the amount of $877,818,181 to the Trust 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.[3] The FPT governments also agreed to forego the collection of taxes on the investment income earned by the Trust.[4]

10. The Trust Fund, and the tax-free investment income it generated, are used to pay compensation amounts, in accordance with plans (the "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 their losses; and to their dependents and other family class members after a class member's death due to HCV.[5]

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[2] Settlement Agreement: section 4.01 and Schedule D Funding Agreement, sections 1.01 and 4.02, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7322, 7448-7455, 7459.
[3] Settlement Agreement: section 4.01 and Schedule D Funding Agreement, sections 4.01, 4.02, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7322, 7459.
[4] Settlement Agreement: section 4.01 and Schedule D Funding Agreement, section 3.02, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7322, 7458
[5] Settlement Agreement, Schedules A and B, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7342-7437; Affidavit of Heather Rumble Peterson sworn October 16, 2015 at para. 20, Exhibit A, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 2, p.355, 390.

The Lifting of Holdbacks

11. In order to mitigate the risk that the Trust would be insufficient to satisfy the terms of the Settlement Agreement, holdback provisions (the "Holdbacks") were included in the Plans on payments to class members for certain claims, as follows:

    a. $5000 of the $20,000 payable at disease level 2;
    b. $75,000 limit on pre-claim gross income; and
    c. 70% restriction on loss of income/support payments.[6]

12. The Settlement Agreement and the Plans contemplate the removal of the Holdbacks by the supervising Courts where appropriate, on triennial review of the Trust's sufficiency.[7] As the risk of insufficient funds has never materialized, the Holdbacks have been progressively eliminated:

    a. In or about July 2002, the Courts ordered that the holdback of $5000 payable at disease level 2 be deleted, and that all funds held back be released to class members, with interest;

    b. In 2004, the Courts ordered that the 70% restriction on loss of income/support payments be deleted, and that all funds held back be released to class members with interest;

    c. In 2008 the Courts increased the $75,000 limit on pre-claim gross income to $2.3M, subject to Court approval for claims where the pre-claim gross income exceeds $300,000; and

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[6] Settlement Agreement: Schedule A, Transfused HCV Plan, sections 4.01(1)(b), 4.02, 6.01; Schedule B Hemophilicac HCV Plan, sections 4.01(1)(b), 4.02, 6.01, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7361, 7363-7364, 7370, 7410, 7418.

[7] Settlement Agreement: section 10.01; Schedule A, Transfused HCV Plan, section 7.03; Schedule B Hemophilicac HCV Plan, section 7.03, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7327-7328, 7372-7373, 7420-7421.

d. In 2008 and 2013 the Courts approved four claims based on pre-claim gross income exceeding $300,000.[8]

Excess Capital

13. As of December 31, 2013, despite $776.9 million in payments made to Class Members and their dependents over the life of the Trust, there was an accrued balance of $1.1902 billion remaining to meet the present and future liabilities of the compensation plan.[9]

14. Actuarial forecasts by Eckler 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 from major adverse experience or catastrophe.[10]

15. The Ontario, British Columbia and Quebec Superior Courts made orders, respectively, on July 10, 2015; July 23, 2015; and July 16, 2015 that as at December 31, 2013, the assets of the trust fund exceeded the liabilities by $236.3-$256.6 million (the "Excess Capital").[11]

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[8] Affidavit of Heather Rumble Peterson, dated October 16, 2016 at paras. 68-72, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 2, Tab 12, p.370-372.
[9] Affidavit of Peter Gorham, sworn April 8, 2015, Exhibit B, Actuarial Report, at p. 39, Table 154, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 20, Tab 48, p.7233.
[10] Affidavit of Peter Gorham, sworn April 8, 2015, Exhibit B, Actuarial Report, at p. 6, Table 26 and para. 30, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 20, Tab 48, p. 7200; Affidavit of Richard Border, dated March 11, 2015, attached Actuarial Report to the Joint Committee, at paras. 247-249, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 19, Tab 45, p.6795.
[11] *Parsons v. Canadian Red Cross Society*, Judgment dated July 10, 2015, per Perell J. (ONSC), at para. 3*; Endean v. The Canadian Red Cross Society,* Order dated July 23, 2015

16. Eckler has revised its estimate of Excess Capital in October 2015 to $206,920,000 to account for a higher number of claimants of the $30,000 benefit payable under section 4.01(1)(c) of the Plans.[12]

Interim Allocation

17. The Settlement Agreement states that on judicial declaration of the termination of the Agreement, once the Plans have been fully administered and all obligations satisfied, any assets which remain in the trust are to be the sole property of the FPT governments.[13]

18. In the interim, the Approval Orders require that the Courts do triennial reviews to determine the sufficiency of the Trust and the existence of any actuarially unallocated amounts. In the event of such an amount being identified at any interim point, the plaintiffs, the FPT governments or the Joint Committee may apply to the Courts to have the amount allocated:

    a. to the Class Members or Family Class Members;

    b. in any manner that may reasonably be expected to benefit Class Members and/or the Family Class Members;

    c. to the FPT Governments or some or one of them; and/or

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per Hinkson, J. (BC SC) at para. 3*; Honhon v. The Canadian Red Cross Society*, Order dated July 16, 2015 per Corriveau , J. (QSC) at para.3

[12] Affidavit of Richard Border, dated October 14, 2015, Exhibit A, Actuarial Report to the Joint Committee at para. 8, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 2, Tab 13, p.462; Affidavit of Heather Rumble Peterson, dated October 16, 2015 at paras 11-14, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 2, Tab 12, p. 353.

[13] Settlement Agreement: s.10.01 (1) (o), s. 12.03(3); and Schedule D Funding Agreement, s. 10.02(2), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7328, 7331, 7465-7466.

d. retained, in whole or in part, within the Trust Fund. [14]

The Expert Testimony of Dr. Samuel Lee

19. Dr. Samuel Lee is the medical expert retained by Canada to provide opinion evidence with respect to several aspects of this motion, including the impact of new drug therapies for Hepatitis C, the natural history of Hepatitis C from infection to cirrhosis, and the stages of the disease.[15]

New era for HCV patients

20. Since 2011, "extremely positive" advances in medicine have changed the landscape for the treatment of HCV patients. This trend is expected to continue with the result that 99% of HCV-infected people will be able to be cured with minimal side effects. Specifically:

    a. From 2000 to 2011:
        i. the standard antiviral therapy offered to patients infected with HCV was pegylated interferon plus ribavirin ("PR");
        ii. the efficacy of the treatment was often disappointing, especially among patients infected with genotype 1, which account for approximately 2/3 of all HCV-infected people in Canada ;

[14] Settlement Agreement, ss. 1.01, 10.01 (1) (i), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7314-7319, 7327-7328; *Endean v. Canadian Red Cross Society*, Judgment dated October 28, 1999 (entered on November 12, 1999) per Smith J. (BC SC), at paras. 1(mm), 5(b); *Parsons v. Canadian Red Cross Society*, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC), at paras. 2(q), 9(b); *Honhon c. Canada (Procureur général),* 1999 CarswellQue 4293, REJB 1999-15380 (CS) at para. 16 and Appendix F, para. 1, subsection p.1; *Page c. Canada (Procureur général),* [1999] J.Q. no 5325 (CS) at para. 11 and Annexe F

[15] Affidavit of Dr. Samuel S. Lee, dated January 26, 2016, para. 17, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p. 2408.

iii. as recently as 2010, clinicians relying on the PR regimen were able to achieve cure rates of only 50% for genotype 1;

iv. patients frequently experienced significant side effects over a 24- to 48-week treatment of injections, with the result that many abandoned their course of treatment prior to completion.

b. From 2011- present:

i. in 2011, Health Canada approved Telaprevir and Boceprevir, known as direct-acting anti-viral drugs (“DAA”), for the treatment of persons with chronic HCV genotype 1;

ii. with these new DAAs, the treatment burden of HCV-infected persons declined dramatically and health outcomes improved greatly; however, not all HCV genotypes responded equally well, and for some genotypes, the addition of ribavirin was required for optimal response;

iii. in 2013-2014, Health Canada approved Harvoni and Holkira-Pak, resulting in a further decline of the treatment burden, with treatment consisting of one to six pills per day, usually over the course of eight - twelve weeks, with no discernible side effects and a cure rate exceeding 90%;

iv. on January 29, 2016, Health Canada granted regulatory approval of Zepatier, another all-oral treatment for patients with HCV genotypes 1 and 4;

v. today, a course of treatment can be initiated at almost any stage in the natural history of an HCV infection without significant additional risk to the patient, and cure rates are very high.

c. Future developments:

i. Dr. Lee anticipates positive progress through the regulatory approval process by later in 2016 for another generation of DAAs that will offer even greater advantages for patient care, including those few patients infected with HCV genotypes which have been more treatment-resistant to date;

ii. should these new DAAs be approved, Dr. Lee expects there would be very few cases where the virus cannot be eradicated;
iii. within a very short time, Dr. Lee anticipates new drug therapies will be available to eradicate HCV from almost 99% of all infected patients with minimal side effects.[16]

Spontaneous viral clearance

21. The phenomenon of spontaneous viral clearance ("SVC") may occur at a rate that is higher than the 20% estimated by Eckler in its 1999 actuarial report:

a. Studies from the American blood system in the 1980s suggested an SVC rate of 30%;
b. A European study of accidental infection of pregnant women has documented clearance rates in the range of 50%;
c. Dr. Lee estimates a clearance rate of at least 25% among the persons eligible to claim compensation under the FPT Settlement, based on his own clinical experience with thousands of HCV-infected patients.[17]

Disease progression

22. Dr. Lee opines that the average time for an HCV-infected person to progress from infection to cirrhosis has not changed in his practice over the past 30 years; and that the Medical Model Working Group ("MMWG") estimate of a mean of approximately 40 years to progress from infection to cirrhosis is reasonable.

[16] Affidavit of Dr. Samuel S. Lee, dated January 26, 2016, paras. 18-26, 29, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2408 – 2413; Affidavit of Dr. Samuel S. Lee, dated April 20, 2016, Exhibit B, answers 3-5, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 11, Tab 30, p. 4071.
[17] Affidavit of Dr. Samuel S. Lee, dated January 26, 2016, paras. 36-38, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6,Tab 27, p.2416-2417.

23. With regard to the MMWG's longer estimated time-frame of 60 years for the transfused claimant cohort, which is based on actual class data, Dr. Lee speculates based on his clinical experience that the reasons for slower progression are: 1) a subset of the most critically ill who might have had faster progression to cirrhosis had died before making a claim in 1999 or later, and 2) a significant number of the 4000 claimants have had their HCV cured by antiviral therapy in the past 2 decades and thus have had no further progression of their liver disease.[18]

Patient Awareness of Infection and of the Settlement Agreement

24. Dr. Lee has expressed the following opinions about patient awareness of HCV infection and the possibility of receiving compensation through the Settlement Agreement, based on his 28 years of clinical practice and accumulated expertise:

    a. HCV-infected patients belonging to the transfused group are much more likely to be aware of their HCV infection than are members of the non-transfused general HCV population.
    b. In the general population, two-thirds to three-quarters of patients at the cirrhotic stage of HCV infection likely have sought medical attention and have been diagnosed; and 95% of patients suffering from advanced cirrhosis likely have been diagnosed due to the severity of symptoms at such an advanced stage.
    c. Of the cirrhotics who were transfused between 1986-1990 and who have claimed or are eligible to claim for compensation under the Settlement Agreement:

[18] Affidavit of Dr. Samuel S. Lee, dated January 26, 2016, at paras. 54-57, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2424-2425.

i. 70-85% of those having Level 5 HCV-derived disease will have presented as patients and been diagnosed;
ii. 90-95% of persons having Level 6 HCV-derived disease will have presented as patients and been diagnosed; and
iii. 99% of persons at end-stage liver failure will have presented as patients and been diagnosed.[19]

d. HCV-positive patients who report having received blood transfusions prior to 1993 are highly likely to be reminded that compensation may be available under the Settlement Agreement, or other settlements.[20]

The Expert Testimony of Peter Gorham

25. Peter Gorham is the actuarial expert retained (through Morneau Shepell) by Canada to provide opinion evidence with respect to numerous issues pertaining to this motion, including the implications of Canada's up-front payment, the cost of the allocations proposed by the Joint Committee and comparisons between the 1999 view of the Class and the 2013 view of the Class.

Hepatitis C Treatment

26. Based on MMWG treatment assumptions, 85% of all claimants at disease levels 3-5 will be cured by the end of 2018.[21]

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[19] Affidavit of Dr. Samuel S. Lee, dated January 26, 2016, at paras. 62, in Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2427; Affidavit of Dr. Samuel S. Lee, dated April 20, 2016, Exhibit B, answers 11 and 18, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 11, Tab 30, p.4073, 4076.
[20] Affidavit of Dr. Samuel S. Lee, dated January 26, 2016, at para. 44, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2419-2421.
[21] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at para. 21, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2309; Affidavit of Peter Gorham dated April 19, 2016, Exhibit A, answer 8, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 11, Tab 29, p.4021.

27. The Morneau Shepell Actuarial Report Assessing the Financial Sufficiency of the 1986-1990 Hepatitis C Trust Fund as at December 2013 (the "2013 Morneau Shepell Sufficiency Review") recognized the cost of treatment based on MMWG treatment assumptions to be $160M, which is $95M more than what the future costs for treatment would have been had the new DAA drugs not been developed. However, the higher costs of treatment were offset by approximately $200M in savings as a result of the higher incidence of cured class members.[22]

28. Based on new drug treatments, which Dr. Lee anticipates may be approved in 2016, only 5-10% of primarily and secondarily infected claimants alive as at 31 December 2013 are expected be left with HCV. The reduction in future claims resulting from a higher cure rate is expected to be more than enough to pay for treatment.[23]

Estimated vs. Actual Cohort of Class Members

29. Far fewer people have made claims under the Settlement Agreement than the estimated potential class members assumed to exist by Eckler in 1999. In 1999, the total cohort including transfused and hemophiliac class members was

[22] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at paras. 29-31, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2310.
[23] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at paras. 9, 26, 27, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2306, 2309; Affidavit of Peter Gorham dated April 19, 2016, Exhibit A, answers 3, 4, 7, 11, 14, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 11, Tab 29, p.4016, 4020, 4022, 4023.

estimated at 9825. By contrast, as of December 2013, there were a total of 5563 approved and expected to be approved claims under the Settlement Agreement.[24]

30. Mr. Gorham undertook an analysis of the estimated versus actual cohort, focusing on the transfused class, which accounts for the large majority of the difference (8180 estimated in 1999 vs. 4178 approved and expected claims as of December 2013). Using assumptions based on the June 22, 1998 report of Dr. Remis; the April 6, 1999 report of CASL; the 1999 Eckler Report; and the 2007 and 2013 MMWG reports, Mr. Gorham projected the estimated cohort of 15,707 transfused Hepatitis C infected people in 1986-1990 to 1999, and then to 2013. Notably, Mr. Gorham used disease transition rates developed by the MMWG in their 2013 Report, which used the greatest amount of class data and represent the greatest refinement of estimated disease progression rates.[25]

31. Mr. Gorham then compared his projections to the cohort as estimated in the 1999 Eckler Report, and to the actual number of claimants and expected claimants as of December 2013. The results of his analysis are summarized below.

Projection to 1999

32. The total number of Hepatitis C infected transfused Class members (alive and deceased from Hepatitis C) projected by Mr. Gorham to 1999 is the same as that

[24] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at paras. 55-56, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2316.
[25] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at paras. 57-72, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2316-2320.

estimated by Eckler in 1999: 8180. However, the transfused cohort estimated by Eckler in 1999, broken down by disease level, shows a significantly more advanced disease progression. Mr. Gorham notes that such an overstatement added a significant provision for adverse deviations to the initial liabilities under the Settlement Agreement, and increased the likelihood that the assets would prove more than sufficient to pay all compensation as it comes due.[26]

Projection to 2013 and Comparison with Actual Cohort

33. A comparison of the breakdown of Hepatitis C infected transfused Class members projected by Mr. Gorham to 2013 with the actual approved transfused claimants/expected to be approved transfused claimants as of December 2013 shows:

    a. 4178 total claimants vs. 8180 estimated;
    b. 2998 alive claimants vs 6477 estimated;
    c. 1180 deceased claimants vs. 1703 estimated.[27]

34. It is Gorham's opinion that the actual class is likely much smaller than the original 1999 estimate of 8180.[28]

[26] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at paras. 67-68, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2318-2319.
[27] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at paras. 68-71, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2319-2320.
[28] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at para. 72, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2320.

Contributions from the Federal and Provincial Governments

35. The estimated present value of foregone taxes on the income earned by the Trust, as at 31 December 2013, is $357,953,000.00. This is in addition to the $1.18 billion in cash contributions to the Trust. [29]

Upfront funding by the Federal Government

36. Canada contributed its entire 8/11^{ths} share of the total FPT government obligation towards the Trust upfront, in 1999. Had Canada contributed funds as compensation payments were made, the Trust would have a deficit of approximately $348,000,000 on December, 2013. In contrast, there is Excess Capital of $236,300,000 to $256,600,000, meaning that the Federal Government's up-front contribution has resulted in the Trust being approximately $600,000,000 richer than it would otherwise have been.[30]

PART 2: POINTS IN ISSUE

37. The two questions for the Court are:

    a. Should the excess capital be allocated to Canada?

    b. What is the amount of the excess capital?

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[29] Settlement Agreement: section 4.01 and Schedule D Funding Agreement, sections 1.01 and 4.01, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7322, 7448-7455, 7459. Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at para. 77, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2323.
[30] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at paras. 80-87, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2324-2325.

PART 3: SUBMISSIONS

The Principles of Contractual Interpretation in Ontario and BC

38. The Settlement Agreement is a contract between the FPT Governments and the class.[31] The fundamental principle of contract interpretation is to ascertain the intent of the parties at the time the contract was formed. As the Supreme Court of Canada held in *Sattva Capital Corp. v. Creston Moly Corp.* (2014):

> …the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding… To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning…[32] [Emphasis added]

39. This approach requires the contract to be construed as a whole.[33] In *Tercon Contractors Ltd. v. British Columbia* (2010), the Supreme Court expressed this imperative as follows: "the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context."[34]

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[31] *Olivieri v. Sherman,* 2007 ONCA 491 at para. 41, reconsideration on other grounds allowed at 2009 ONCA 772; and *Robertson v. Whistler (Resort Municipality)*, 2012 BCSC 763 at para. 31.
[32] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47.
[33] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 64.
[34] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 64.

40. This approach also requires the Courts to consider the surrounding circumstances when ascertaining the parties' intentions. As the Supreme Court noted in *Sattva*, this consideration does not violate the parol evidence rule that prohibits evidence outside the words of a written contract that vary or contradict its terms. As the Supreme Court held:

> The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting…
>
> …the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.[35]

41. Thus, evidence about the surrounding circumstances can be used to illuminate the meaning of the contract's terms, but cannot be employed to override them.

The Principles of Contractual Interpretation in Québec

42. Similarly, in Quebec, contractual interpretation is centered on the intention of the parties. Sections 1425 to 1432 of the Civil code of Quebec (CCQ) represent a complete set of rules in regard of the interpretation of contract.[36] The relevant sections are:

SECTION IV DE L'INTERPRÉTATION DU CONTRAT **1425.** Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt	**SECTION IV** INTERPRETATION OF CONTRACTS **1425.** The common intention of the parties rather than adherence to the literal meaning of the words shall

[35] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 60-61.
[36] Jean-Louis Baudoin, Les obligations, 7 e éd. par Pierre-Gabriel Jobin et Nathalie Vézina. Cowansville: Éditions Yvon Blais, 2013, p. 466.

que de s'arrêter au sens littéral des termes utilisés.	be sought in interpreting a contract.
1426. On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages.	**1426.** In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.
1427. Les clauses s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'ensemble du contrat.	**1427.** Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.
1428. Une clause s'entend dans le sens qui lui confère quelque effet plutôt que dans celui qui n'en produit aucun.	**1428.** A clause is given a meaning that gives it some effect rather than one that gives it no effect.
1429. Les termes susceptibles de deux sens doivent être pris dans le sens qui convient le plus à la matière du contrat.	**1429.** Words susceptible of two meanings shall be given the meaning that best conforms to the subject matter of the contract.
1431. Les clauses d'un contrat, même si elles sont énoncées en termes généraux, comprennent seulement ce sur quoi il paraît que les parties se sont proposé de contracter.	**1431.** The clauses of a contract cover only what it appears that the parties intended to include, however general the terms used.

43. When faced with a clear contract, the judge has a simple role of applying the provisions of the contract as written. Interpretation is only necessary where the the parties disagree about the scope of a contract clause.[37]

44. The Supreme Court of Canada held in *Quebec* (*Agence du revenu) v. Services Environnementaux AES inc.* (2013): "... the determination of the common intention, or will, of the parties represents a true exercise of interpretation."[38] This can entail an analysis of the circumstances under which the contract was written.[39] However, the judge cannot rewrite the contract by doing so.[40]

The Interpretation of the Allocation Provisions

45. The Settlement Agreement, as amended by the Courts, permits the Courts to make interim allocations of excess capital. The allocation clause ("Clause (b)") is contained for British Columbia in the Judgment dated October 28, 1999 per Smith J. at para. 5(b); for Ontario in the Judgment dated October 22, 1999, per Winkler J. at paras. 9(b); and for Québec in Section 10.01(1) (p.1) of the Settlement Agreement, as set out in the Judgment of Morneau J. dated November 19, 1999 at paragraph 16 and Annexe F.[41] It provides:

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[37] *Ibid*. at pp. 491 to 493.
[38] *Quebec (Agence du revenu) v. Services Environnementaux AES Inc.*, 2013 SCC 65 at para. 48.
[39] *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at paras. 62 to 66.
[40] Jean-Louis Baudoin, *supra*, at p. 495.
[41] *Endean v. Canadian Red Cross Society*, Judgment dated October 28, 1999 (entered on November 22, 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); Settlement Agreement, article 10.01(1) p.1 [for Québec]; and *Honhon v. The Attorney General of Canada*, 1999 CarswellQue 4293, REJB 1999-15380 (CS) at para. 16 and Appendix F, para. 1, subs. P.1
.

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 Members;
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.

46. This allocation shall be made "in such a 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." In the French version of the Settlement Agreement, the parallel provision describes the nature of the decision as "……de la manière, dans le cadre du libre excercise de leur pouvoir discrétionnaire…"[42]

[42] *Endean v. Canadian Red Cross Society*, Judgment dated October 28, 1999 (entered on November 22, 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); Settlement Agreement, article 10.01(1) p.2 [for Québec]; and *Honhon v. The Attorney General of Canada*, 1999 CarswellQue 4293, REJB 1999-15380 (CS) at para. 16 and Appendix F, para. 1, subsections p.1, p.2.
.

47. The factors guiding this exercise are set out in Clause (c). The Ontario version of Clause (c) reads:

> (c) in exercising their unfettered discretion under subparagraph 9(b), the Courts may consider, but are not bound to consider, among other things, the following:
>
> 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 26(1) of the 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… [43]

[43] *Endean v. Canadian Red Cross Society*, Judgment dated October 28, 1999 (entered on November 22, 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); Settlement Agreement, Annexe F, s.10.01(1)(p.2) [for Quebec]; and *Honhon v. The Attorney General of Canada*, 1999 CarswellQue 4293, REJB 1999-15380 (CS) at para. 16 and Appendix F, para. 1, subsection p.2(iii).

48. The unfettered discretion of a court must still be exercised judicially and in accordance with relevant factors.[44] As Clause (b) states, the goal is a decision or distribution which is "reasonable in all the circumstances" within the boundaries of the Settlement Agreement.

49. Reading the Agreement as a whole, it is clear that there is no priority in the potential beneficiaries of an allocation. Presuming a preference in the Agreement for allocating the excess capital to one party or the other would be inconsistent both with the "unfettered" discretion of the Courts and with the open-ended list of factors.

50. Similarly, there is no priority in the factors that the Courts may consider under Clause (c). This is a non-exhaustive list with no indication of relative importance. Indeed, this Clause provides that the Courts "may" consider any of them but is not bound to do so. Such an instruction is rendered meaningless if one factor automatically predominates over the others.

The Excess Capital Should be Allocated to Canada

51. Allocating the excess capital to Canada meets the preponderance of factors in Clause (c) and ensures that the entire public is served by these funds. Each of these factors should be considered in turn.

[44] *Donald Campbell & Co. v. Pollak*, [1927] A.C. 732 (H.L.) at 811-812 *per* Viscount Cave L.C.

The Source of the Money

52. Clause (c)(ix) provides that one of the relevant factors in making an allocation is "the source of the money and other assets which comprise the Trust Fund." The excess capital in the Fund exists because Canada provided an up-front cash contribution that the Trust Fund could use for long-term investments.

53. Canada's upfront cash contribution to the Settlement Fund in 1999 was $877,818,181.[45] This represented Canada's contribution of 8/11^{ths} of the settlement amount, with the Provincial and Territorial Governments providing the other 3/11^{ths} on an if-and-when basis. Additionally, the FPT Governments agreed to forgo income taxes payable by the Trust. In 1999, the value of this tax remission was estimated to be $357,000,000.[46] Mr. Gorham estimates the value of the forgone taxes on the Trust as of December 2013 to be $357,953,000 (of which amount, $226,942,000 is from Federal taxes).[47]

54. If Canada had not pre-funded the Trust Fund, but instead provided payments on the same if-and-when basis as the Provincial and Territorial Governments, the Fund would have a deficit of approximately $348,000,000 as of December 2013.[48] Indeed, the notional fund for the Provincial and Territorial Governments' contributions will be exhausted by 2026.[49]

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[45] *Parsons v. Red Cross Society,* [1999] O.J. No. 3572 (Sup. Ct.) at para. 33.
[46] *Parsons v. Red Cross Society,* [1999] O.J. No. 3572 (Sup. Ct.) at para. 34.
[47] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 77, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, 2323.
[48] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 17, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2307.
[49] Affidavit of Richard Border dated October 14, 2015, Exhibit A, Actuarial Report to the Joint Committee at para. 15, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 2, Tab 13, p.464.

55. Canada was the settlor of the Trust, as the Funding Agreement recognized.[50] A trust was a reasonable vehicle to be adopted in the circumstances of this case, given the lifetime of the Settlement Agreement (estimated to be around 80 years), the uncertainties as to cohort size and disease progression, the size of the funds, their origin as public money and their ultimate reversion to the FPT governments.[51] The creation of the Trust recognized the intention to hold the funds in a neutral vehicle pending distribution as required by the Settlement Agreement.

56. Article 5.03 of the Funding Agreement specifies that the Class has no legal ownership in the Trust.[52] This reflects the fact that the Class is not the only potential beneficiary of the Trust Fund: the FPT Governments are also beneficiaries, since they can benefit from both interim allocations under Clause (b) or at the final termination of the Trust. The separation of the Trust from the Class is further reflected by (1) the appointment of a Trustee by the Courts;[53] and (2) the fact that the parties agreed that the Trust would have its own counsel, whose role included "defending and advancing the interests of the Trust".[54]

57. It was the Trust that bore the costs of investments and administration, not the Class. The terms of the Settlement Agreement required the Trust to be invested

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[50] Settlement Agreement, Schedule D, Funding Agreement, Article 5.01, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7461.
[51] Settlement Agreement, Article 12.03(3), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p.7331.
[52] Settlement Agreement, Schedule D, Funding Agreement, Article 5.03, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7461.
[53] Settlement Agreement, Article 6.01, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p.7324.
[54] Settlement Agreement, Article 7.01(b), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7325.

under instructions from the Joint Committee and within investment guidelines approved by the Courts.[55] Thus the Agreement required investments to be made in the best interests of all the beneficiaries of the Trust, including the FPT Governments.

58. The Trustee, the Trust Counsel, the Joint Committee and the FPT Governments all did what was mandated by the Settlement Agreement. As a result, the Trust Fund enjoys the excess capital that it does. Ultimately, however, this capital would not exist without Canada's up-front payment, and the remission of income taxes. It is just for the public purse to benefit from this investment of public funds.

The Number of Class Members

59. Clause (c)(i) provides that one of the relevant factors in making an allocation is "the number of Class Members and Family Class Members." In the event, there has been a much smaller number of Claimants than was predicted in 1999.

60. This factor recognizes the fact that in 1999, the estimate for the total cohort of potential Class Members was derived from assumptions based on limited data.[56]

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[55] Settlement Agreement, Schedule D, Funding Agreement, Article 7.01, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p.7463-7464.

[56] Affidavit of Asvini Krishnamoorthy, sworn May 10, 2016:
Exhibit G, Remis Report dated June 1998, at Section 2.2, p. 3, para. 1; Section 2.2.1.4, p. 6,paras. 1-2; Section 2.2.2.2, p. 9, para.6; Section 2.2.3.1, p. 10, para. 2 & p. 11, par. 2; Section 2.3, p. 12, para. 1; Section 4, p. 15, para. 5, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p. 2799
Exhibit I, Remis Report dated July 1999, at Section 1, p. 1, para.1; Section 1.1, p.1, para. 5 & p. 2, para. 1; Section 2, p.3, paras.2-3; Section 2.1.1, p.3, para. 3, 4 and 6; Sections 2.1.2, p. 4, para. 4 & p. 5, paras. 1-2 & p. 6 para. 2; Section 2.2, p. 7, paras. 2 and 4 & p. 8, para. 2, 3; Section 3.1, p.8 para. 4 & p. 9, para. 4; Section 4, p. 11, paras. 3-4; Section 6, p. 14, para. 1 and 3, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p. 2868; and

In 1999, the total cohort of class members was estimated to be 9825 (both alive and deceased). However, as of December 2013, there were only 5563 approved and expected to be approved claims under the Settlement Agreement.[57] Following his analysis of this discrepancy, Canada's actuarial expert, Peter Gorham, concluded that the actual class is likely much smaller than the original 1999 estimate.[58]

61. It is improbable that there is a large number of Class Members who are still unaware of their status. Dr. Lee has a clinical practice in the field of viral Hepatitis that spans 27 years, during which he has seen at least 3000 patients infected with Hepatitis C.[59] In his expert report, he states that it is "highly likely" that any patients at his clinics who reported receiving blood transfusions prior to 1993 would be notified about the 1986-1990 or the "Pre-Post" Settlements.[60]

62. The over-estimation of the Class in 1999 indicates that, in retrospect, the fitting amount for the Settlement Fund was also over-estimated. The experience of the settlement demonstrates that Canada overpaid. This factor militates in favour of Canada receiving an allocation of the excess capital now.

Exhibit K, Eckler Report dated 1999, Section 2, p. 3, paras. 1-2, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 8, p. 2945.

[57] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at paras. 55-56, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2316.

[58] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at para. 72, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2320. His analysis focuses on the size of the Transfused Class, which is the source of the discrepancy – as opposed to the Hemophiliac Class.

[59] Affidavit of Dr. Samuel Lee, dated January 26, 2016, at para. 4, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2402.

[60] Affidavit of Dr. Samuel Lee, dated January 26, 2016, at para. 44, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2420.

Experience of Trust Fund

63. Clause (c)(ii) provides that one of the relevant factors in making an allocation is "the experience of the Trust Fund." This factor also favours allocating the excess capital to Canada because the Fund has proven capable of fulfilling all its responsibilities to the Claimants under the terms of the Settlement Agreement.

64. The expert actuarial evidence for both the Joint Committee and Canada agree that the Fund is sufficient to cover all liabilities, including a buffer for extreme events or catastrophe.[61] And as the administration of the Settlment has progressed, the holdbacks that hedged against insufficiency have been lifted.

65. In sum, the Claimants have received the benefit of their bargain and will continue to do so throughout the lifetime of the Trust.

Not the Tort Model or the Extra-Contractual Model

66. In English, Clause (c)(iii) provides that one of the relevant factors in making an allocation is "the fact that the benefits provided under the Plans do not reflect the tort model." In French, this clause provides "le fait que les indemnités prévues par les régimes peuvent, dans certains cas, ne pas refléter le régime de responsabilité en matière extra-contractuelle."[62]

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[61] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 53, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2315; Affidavit of Richard Border dated October 14, 2015, Exhibit A, Actuarial Report to the Joint Committee at para. 11, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 2, Tab 13, p.463.
[62] *Honhon c. Canada,* 1999 CarswellQue 4293, REJB 1999-15380 (CS) at Appendix F, para. 1, subsection p.2(iii).

67. This factor favours allocating the excess capital to Canada because (1) the primary difference between the Plans' payment structure and the tort model is that there is less risk of under-compensation under the Plans; and (2) allocating the excess capital to the Class fails to reduce any unfairness between Class Members.

68. In his reasons on the approval hearing of the Settlement Hearing, Winkler J. discussed the differences between the Plans and the traditional tort model.[63] The tort model is limited to a single, forward looking award of damages that must estimate the victim's prognosis. But the tort model also allows for an in-depth analysis of the individual victim's circumstances. On the other hand, the compensation model under the Plans allows for an ongoing assessment of the progress of the Class Member's disease in accordance with predetermined levels. However, within each level, there may be unfairness as between Class Members, since (for example) a Class Member with intense symptoms may be accorded the same amount as a Class Member with less intense symptoms if they are both at Level 3. As Winkler J. held:

> The "once-and-for-all" lump sum award is the common form of compensation for damages in tort litigation… Of necessity, there is a great deal of speculation involved in determining future losses. <u>There is also the danger that the claimant's future losses will prove to be much greater than are contemplated by the award</u>… This risk is especially pronounced when dealing with a disease or medical condition with an uncertain prognosis or where the scientific knowledge is incomplete.[64]

[63] *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 (Sup. Ct.) at paras. 79-91.
[64] *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 (Sup. Ct.) at para. 86.

> The present settlement is imaginative in its provision for periodic subsequent claims should the class member's condition worsen. [65] [Emphasis added.]

69. At the time that the Settlement Agreement was made, the parties took the position that it provided compensation that was largely analogous to, or better than, that which could be expected to be awarded to Class Members were they successful in litigation.[66] For example, in their submissions to the Ontario Superior Court on the settlement approval motion, Class Counsel stated:

> It is submitted that the amount paid for non-pecuniary general damages at each level under the Plans approximates, even exceeds, the amount that would be assessed at trial.[67]

70. Similarly, in their submissions on the settlement approval motion in *Endean,* Class Counsel stated that they "strived for a compensation package which would equate to likely damages handed down by our courts on a full liability basis. Class Counsel believe we have largely succeeded in this endeavour."[68] Later in their submissions, Class Counsel compared the Plans' compensation with other awards

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[65] *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 (Sup. Ct.) at para. 87.
[66] Affidavit of Asvini Krishnamoorthy, sworn May 10, 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"), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p.2489, 2528;
Exhibit D, Plan d'argumentation (Demandeur), 20 August 1999 in *Honhon* at p. 6, Section 1(D)(1) ("Honhon – Plaintiffs' Settlement Factum"), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p.2578-2579;
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"), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p. 2638, 2654, 2664, 2668.
[67] Affidavit of Asvini Krishnamoorthy, sworn May 10, 2016, Exhibit B, Parsons – Plaintiffs' Settlement Factum at para. 123, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p.2528.
[68] Affidavit of Asvini Krishnamoorthy, sworn May 10, 2016, Exhibit E, Endean – Plaintiffs' Settlement Factum at para. 76, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p. 2638.

"made by our courts in cases of chronic illnesses" and concluded that the Plans "are adequate if not generous at each compensation level."[69]

71. In particular, the ability to access increasing levels of compensation according to the severity of the disease was seen by all parties as a significant benefit over the traditional tort model.[70] And ultimately, the three approving Courts found that the Settlement Agreement was fair, reasonable and in the best interest of the class as a whole.[71] For example, Winkler J. concluded that the forward-looking nature of the Settlement Agreement was more advantageous than the tort model:

> …while a claimant may not be perfectly compensated at any particular level, the edge to be gained by a scheme which terminates the litigation while avoiding the pitfalls of an imperfect, one-time-only lump sum settlement is compelling.[72]

72. Thus, the primary divergence of the Settlement Agreement from the tort model is not a lack of compensation. Rather, it is a progressive increase in payments as a Class Member's disease worsens. This forward-looking scheme significantly decreases the risk that a Class Member will be undercompensated for future losses. This "imaginative" structure for dealing with a serious and debilitating condition has meant that Class Members have or will be adequately compensated

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[69] *Ibid*. at para. 127.
[70] Affidavit of Asvini Krishnamoorthy, sworn May 10, 2016:
Exhibit B, Parsons – Plaintiffs' Settlement Factum at paras. 10 and 127, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p. 2488, 2530;
Exhibit E, Endean – Plaintiffs' Settlement Factum at paras 134-136 and 146, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p. 2668-2669;
Exhibit D, Honhon – Plaintiffs' Settlement Factum" at p.6, Section 1(D)(1) and p.22-23, Section VI(D), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p. 2578-2579, 2595-2596.
[71] *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; *Endean v. Canadian Red Cross Society*, [1999] B.C. J. No. 2180 (SC) at paras. 18; and *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (SC) at paras. 94, 133.
[72] *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 (Sup. Ct.) at para. 102.

under the Plans. As a result, this factor does not favour further enhancing the benefits by allocating the excess capital to the Class.

73. Second, as Winkler J. noted, there is a potential for unfairness in this scheme between Class Members:

> Here, although the settlement is structured to account for Class Members with differing medical Conditions by establishing benefits on an ascending classification scheme, no allowances are made for the spectrum of damages which individual class members within each level of the structure may suffer. The settlement provides for compensation on a "one-size fits all" basis to all Class Members who are grouped at each level. However, it is apparent from the evidence before the court on this motion that the damages suffered as a result of HCV infection are not uniform, regardless of the degree of progression.[73] [Emphasis added.]

74. Merely enhancing all compensation payments to Class Members by a certain percentage does not remedy this potential for unfairness, since the “one-size fits all” approach is still maintained. Thus, this factor cannot support allocating the excess capital to the Class in the manner recommended by the Joint Committee.

The Class Proceedings Regimes

75. The factor in Clause (c)(iv) varies depending on the province from which it comes:

a. In Ontario, Clause (c)(iv) reads “section 26(1) of the [Ontario *Class Proceeding*] Act.”

This section provides “The court may direct any means of distribution of amounts awarded under section 24 [regarding aggregate awards] or 25 [regarding individual awards] that it considers appropriate.”[74]

[73] *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 (Sup. Ct.) at para. 82.
[74] *Class Proceedings Act*, 1992, S.O. 1992, c. 6 at s. 26(1).

b. In British Columbia, it reads "section 34(5) of the [British Columbia *Class Proceedings*] Act." This section provides: "If any part of an [undistributed] award… is to be divided among individual class or subclass members remains unclaimed or otherwise undistributed after a time set by the court, the court may order that that part of the award (a) be applied against the cost of the class proceeding,(b) be forfeited to the government, or (c) be returned to the party against whom the award was made."[75]

c. In Quebec, it reads "l'article 1036 du *Code de procédure civile du Québec.*" In French, this article provides: "Le tribunal dispose du reliquat de la façon qu'il détermine et en tenant compte notamment de l'intérêt des membres, après avoir donné aux parties et à toute autre personne qu'il désigne l'occasion de se faire entendre." In English, it provides "the court disposes of the balance in the manner it determines, taking particular account of the interest of the members, after giving the parties and any other person it designates an opportunity to be heard."[76]

76. This is a neutral factor that does not favour any specific allocation. This is because this provision is different in each jurisdiction, reflecting different class action legislation.[77]

<u>The Integrity of the Settlement Agreement</u>

77. Clause (c)(v) provides that one of the relevant factors in making an allocation is "whether the integrity of the Agreement will be maintained and the benefits particularized in the Plans ensured."

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[75] *Class Proceedings Act*, [RSBC 1996] CHAPTER 50 at s. 34(5).
[76] *Code of Civil Procedure*, CQLR c C-25, Article 1036.
[77] In Québec, in the event that Section 1036 of the Code of Civil Procedure is applicable, it should only be considered on an application to terminate the Settlement Agreement.

78. Allocating the excess capital to Canada reinforces the integrity of the Settlement Agreement. Article 12 of the Settlement Agreement already stipulates that the FPT governments shall receive the residue in the Trust Fund at the termination of the Agreement.[78] Article 10.02(2) of the Funding Agreement establishes an obligation on the Trustee at the termination of the agreement to revert the assets to the FPT governments in proportion to their respective "contribution account balances" (upon which interest is added at the Treasurey Bill Rate according to the concept of "Proportionate Interest Amount").

79. The parties understood at the time of making the contract that the Crown possessed the ultimate reversionary interest in the Fund. In order to implement this objective, the parties also established an accounting methodology with a "separate journal for each FPT".[79]

80. Nor is there any jeopardy to the continued maintenance of the compensation paid out to Class Members. The actuaries for both Class Counsel and Canada have agreed that there is actuarially unallocated capital, and the supervising Courts have accepted this testimony at the sufficiency hearings for 2013. The compensation that the Class Members bargained for will be maintained even in the event of adverse deviation or catastrophe.

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[78] Settlement Agreement, Article 12.03(3), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p.7331.
[79] Settlement Agreement, Annex D, Funding Agreement at Articles 4.03(1) and (2), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p.7460.

The Progress of the Disease

81. Clause (c)(vi) provides that one of the relevant factors in making an allocation is "whether the progress of the disease is significantly different than the medical model used in the Eckler actuarial report found at Volume 3 of the Motion Record, Tab 5, page 508 and following." This factor also favours allocating the excess capital to Canada because Hepatitis C has become a less deadly disease, and the prospect of many Class Members has improved.

82. Since 1999 and continuing to this day, new medications have evolved that have radically changed the prognosis of Hepatitis C, making it a largely curable disase. As Dr. Lee explained in his expert report:

> Developments in this area [of HCV therapy] have been extremely positive since 2011 when Health Canada granted regulatory approval to the first of a new class of drugs described collectively as DAA agents. The past five years have witnessed tremendous advances in HCV management and therapy.[80]
>
> In my opinion, within a very short time, new drug therapies will be available to eradicate HCV from almost 99% of all infected patients with minimal side effects arising during the course of treatment.[81]

83. As the medication has improved, the adverse side effects that were common in the earlier drug therapies have decreased:

> From 2000 to approximately 2011, the standard anti-viral therapy offered to patients infected with HCV was peglyated interferon plus ribavirin ("PR"). The efficacy of PR treatment often was disappointing, especially among patients infected with the most common HCV genotype in Canada, genotype 1. PR treatment also imposed a heavy health burden on many patients. Such patients

[80] Affidavit of Dr. Samuel Lee, dated January 26, 2016, at para. 20, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2409.
[81] Affidavit of Dr. Samuel Lee, dated January 26, 2016, at para. 18, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2408.

> frequently experienced significant side effects over a 24- to 48-week course of medication.

84. The new DAA agents impose a lighter burden on the patient, with fewer side effects and improved health outcomes.[82] These treatment regimes have only continued to improve.[83] As Dr. Lee says, "very few cases will be seen where the virus cannot be eradicated."[84]

85. Dr. Lee notes how different the current state of affairs is from the prospect that faced the parties to the Settlement in 1999:

> Under the Agreement the parties created a benefits structure that reflects therapeutic management of HCV infections in 1999. That was a different therapeutic era for HCV-infected persons. Clinical diagnosis and management of the disease in 2015, or in 2014, or even in 2011 when DAA therapies first became available, have benefitted from a series of substantial advances achieved in the treatment of viral hepatitis since 1999… Under today's treatment regimes, cure rates are very high and associated pain and discomfort correspondingly low.[85] [Emphasis added.]

86. Dr. Lee notes that the average progress from infection to cirrhosis has remained roughly constant in the last thirty years.[86] One area of difference is in the rate of spontaneous viral clearance. In the 1999 Eckler actuarial report, this rate was estimated to be at 20%. Dr. Lee estimates a clearance rate of at least 25% among

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[82] Affidavit of Dr. Samuel Lee, dated January 26, 2016, at para. 21, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2410.
[83] Affidavit of Dr. Samuel Lee, dated January 26, 2016, at paras. 22-25, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2410-2411.
[84] Affidavit of Dr. Samuel Lee, dated January 26, 2016, at para. 25, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2411.
[85] Affidavit of Dr. Samuel Lee, dated January 26, 2016, at para. 26, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2412.
[86] Affidavit of Dr. Samuel Lee, dated January 26, 2016, at para. 57, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2425.

Class Members, based on his own clinical experience with thousands of Hepatitis C infected patients.[87]

87. Another area of difference with previous studies (like the Krahn Report dated 2011) that Dr. Lee raised is the leap in cure rates since 2011. The increased cure rates mean that is is “very unlikely” that many patients alive in 2010 will progress to cirrohosis or liver death.[88]

88. As Mr. Gorham has observed, based on new drug treatments which Dr. Lee anticipates may be approved in 2016, only 5-10% of primarily and secondarily infected claimants alive as at 31 December 2013 are expected be left with Hepatitis C.[89]

89. It is clear that the medical treatment of Hepatitis C has entered a different era from that which existed in 1999. The treatment burden on patients is lighter and the cure rates are vastly higher. This better picture suggests that an expansion in funding for the Class would not serve the ends of justice as well as would returning the excess capital to the public purse.

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[87] Affidavit of Dr. Samuel Lee, dated January 26, 2016, at paras. 36-38, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2416-2417.
[88] Affidavit of Dr. Samuel Lee, dated January 26, 2016, at para. 58, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 27, p.2425-2426.
[89] Affidavit of Peter Gorham, dated January 29, 2016, Exhibit A, Actuarial Report at paras. 9, 26, 27, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2306, 2309-2310; Affidavit of Peter Gorham, dated April 19, 2016, Exhibit A, answers 3, 4, 7, 11, 14, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 11, Tab 29, p.4016-4017, 4020, 4022, 4023.

The Risk of Insufficiency

90. Clause (c)(vii) provides that one of the relevant factors in making an allocation is "the fact that the Class Members and Family Class Members bear the risk of insufficiency of the Trust Fund." Examined in context, this factor does not militate against allocating the excess capital to Canada. At the time of the Settlement Agreement, the parties and the Courts agreed that the risk of insufficiency was minimal.

91. It is important not to exaggerate retrospectively the risk of insufficiency. The Class agreed to bear this risk as part of the bargain between the parties. In particular, JJ Camp's letter dated May 28, 1998 proposing settlement terms expressed that he was "reasonably confident that the $1.1B offer will be sufficient to meet all demands on it", in part because he believed the cohort size to be much smaller than what was, at that time, forecasted. Indeed, it was class counsel who vigorously negotiated that, in exchange for a pledge of $1.1B, the class would assume the risk of insufficiency.[90]

92. Class Counsel expressed confidence that the risk was manageable when seeking court approval of the settlement. Class counsel stated that their actuaries had spent "well over 700 hours" assessing the settlement.[91] They stated that the

[90] Affidavit of Asvini Krishnamoorthy, sworn May 10, 2016, Exhibit O, Affidavit of JJ Camp, dated November 23, 1999, at paras. 79, 82, 106 and at Exhibit OO, para. 38, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 9, p. 3423, 3424, 3433, 3634.
[91] Affidavit of Asvini Krishnamoorthy, sworn May 10, 2016, Exhibit B: Parsons – Plaintiffs' Settlement Factum at para. 97, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p. 2520.

central risk of insufficiency emanated from the assumption of a 100% take-up rate among the class – an assumption that Class Counsel adopted for the sake of prudence *but did not think was likely*. As Ontario Class Counsel explained in their submissions on settlement approval:

> When analyzing and estimating the amount of Trust Fund assets and the amount of Trust Fund liabilities, the actuaries assumed the largest number of transfused persons and hemophiliacs and a 100% take-up rate. Based on these assumptions, the actuaries have concluded that:
>
> (a) Before payment of the holdbacks, the Trust Fund would have a surplus of $34,173,000; and that
>
> (b) After payment of holdbacks of $92,706,000, the Trust Fund would have a $53,300,000 deficit.
>
> Class Action Counsel designed the Plans intending that the estimated amount of Trust Fund liabilities would exceed Trust Fund assets assuming a 100% takeup rate, because counsel believe that the takeup rate would not be 100%. To design the Plans otherwise would be to pay less to Class Members and Family Class Members.[92] [Emphasis added.]

93. Additionally, as this quote makes clear, the Class agreed to mitigate the risk of insufficiency through the use of holdbacks – holdbacks that have been eliminated as the settlement administration has matured.[93]

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[92] Affidavit of Asvini Krishnamoorthy, sworn May 10, 2016, Exhibit B: Parsons – Plaintiffs' Settlement Factum at paras. 98-99, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p. 2520-2521.

[93] Settlement Agreement: Schedule A, Transfused Plan, Article 7.03 and Schedule B, Hemophiliac Plan, Article 7.03, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7372-7372, 7420-7421.

94. The Courts exercised "the highest degree of court scrutiny" in reviewing the settlement agreement,[94] and were satisfied that the risk was within acceptable limits. Winkler J. appeared to be most pessimistic about sufficiency but nevertheless concluded that "In my view, the risk that the Fund will be completely depleted for latter claimants is minimal."[95] Morneau J.S.C. noted that the actuarial and medical reports were based on "the worst-case scenarios, although they were at all times realistic" and still found that they "made it possible for us to accept that the fund was sufficient."[96] And finally, Smith J. found that the Class had adopted a balanced approach between ensuring sufficiency and ensuring adequate compensation:

> …the adoption of conservative assumptions provides a reasonable balance between first the objective of ensuring that all claimants receive the prescribed benefits and secondly the risks of insufficiency of the fund, on the one hand, and of undercompensation of individual claimants, on the other.[97]

95. Furthermore, by paying its contribution up-front, allowing the Fund to be invested and forgoing taxes on these investments, Canada assisted in mitigating the risk of insufficiency. In the event, the experience of the Settlement has proved that the Fund was over- and not under-funded.

96. In all these circumstances, risk of insufficiency is a minimal factor and not a compelling reason to withhold a fair allocation from Canada.

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[94] *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 (Sup. Ct.) at para. 76.
[95] *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 (Sup. Ct.) at para. 113.
[96] *Honhon c. Canada (Procureur général),* [1999] J.Q. no 4370 (CS) at para. 14.
[97] *Endean v. Canada (Attorney General),* Reasons for Judgment dated Oct. 1, 1999 at para. 22.

The Fact that FPT Contributions were Capped

97. Clause (c)(viii) provides that one of the relevant factors in making an allocation is "the fact that the FPT Governments' contributions under the Agreement are capped." When analyzed in the context of the evidence before the Courts, this factor does not militate against allocating the excess capital to Canada.

98. Although the FPT Governments' contribution was capped, it was a generous settlement totalling $1.118 billion plus tax remission. In the event, it is now clear that this amount was greatly in excess of what was necessary to create a fair settlement that approximated what the Class could have recovered in a court action.

99. Nor are caps unusual in class action settlements. As the authors of *Class Action Law and Practice* write:

> …unless the defendant has fairly precise information about the universe of claims, it is unlikely that [an ongoing] settlement will adequately address the defendant's need for certainty. One approach which combines the features of the fund-based settlement with features of the [ongoing] settlement involves setting a cap on the defendant's exposure. Such a settlement would establish a process for the valuation of claims… The defendant's exposure, however, would be capped… with the result that the class members' claims would be subject to pro-rating ("ratcheting down") in the event that the total value of claims exceed the predetermined cap."[98]

100. In the case at bar, no reduction in benefits was necessary and nearly all holdbacks have been lifted. Additionally, the fact that federal liability is capped must be

[98] Eizenga, Peerless, Callaghan and Agarwal, *Class Actions Law and Practice*, LexisNexis, Toronto; 2016 (looseleaf) at 9.10.

considered in conjunction with the other terms of the contract, including Canada's release from liability,[99] and the provision allocating return of any ultimate residue in the Fund to the Crown.[100]

101. In conclusion on all the factors in Clause (c): The excess capital is not needed to sustain the ongoing and generous benefits provided by the Settlement Agreement. Indeed, the evidence indicates that the Settlement Agreement was over-funded in 1999, because we now know that the Class is smaller and its prognosis is much better than when the Settlement was reached. This excess capital came from public money, and should now be returned to the public purse.

Response to the Joint Committee's Proposals

102. Since the preponderance of factors in Clause (c) favour the allocation of the excess capital to Canada, it follows that the Joint Committee's proposed distribution should be dismissed.

103. The Settlement Agreement and the Funding Plans resulted in a full and fair disposition of the Class Action against the defendants. This was the position of the Class at the time of the settlement,[101] and this view was endorsed by the

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[99] Settlement Agreement, Article 11.01, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7328-7329.
[100] Settlement Agreement, Article 12.03(3), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7331.
[101] Affidavit of Asvini Krishnamoorthy, sworn May 10, 2016:
Exhibit B, Parsons - Plaintiffs' Settlement Factum at paras. 11-13 and 123, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p.2489, 2528;
Exhibit D, Honhon – Plaintiffs' Settlement Factum, at p. 6, Section 1(D)(1), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p. 2578-2579;
Exhibit E, Endean – Plaintiffs' Settlement Factum, at paras. 76, 113, 127, 133, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 7, Tab 28, p. 2638, 2654, 2664, 2668.

Courts.[102] The Class has and will continue to have the benefit of these Plans, including the lifting of holdbacks that hedged against the risk of insufficiency. Since the compensation Plans are fair and reasonable, it follows that exceeding the agreed upon amounts risks overcompensation.

104. Further, some of the Joint Committee's proposals (1) impermissibly alter the Settlement Agreement itself; and (2) would result in double recovery for some Class Members. These proposals must be specifically rejected.

No Alterations to the Settlement Agreement

105. It is well-settled that in exercising their ongoing supervisory jurisdiction of class actions, the courts may not vary the agreement reached by the parties by adding, deleting or modifying any material term.[103] Changes to material terms can only be made with the consent of all of the parties concerned.[104] A change is a material change when it operates to the detriment of the defendant by increasing liability,[105] or decreasing the residue in a settlement fund that the defendant can claim after the satisfaction of the settlement agreement.[106]

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[102] *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; *Endean v. Canadian Red Cross Society*, [1999] B.C. J. No. 2180 (SC) at paras. 18; and *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (SC) at paras. 94, 133.
[103] *Parson v. Red Cross Society,* 2013 ONSC 7788 at para. 90; *Endean v. Red Cross Society*, 2014 BCSC 621 at para. 12; and *Honhon v. Canada*, 2014 QCCS 2032 at para. 16.
[104] *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.
[105] *Bodnar v. The Cash Store,* 2011 BCCA 384 at para. 44.
[106] *Lavier v. MyTravel Canada Holidays Inc*, 2011 ONSC 3149 at paras. 34-35.

106. As wide as the Courts' discretion is under Clause (b), it does not allow the Settlement Agreement to be re-written. Clause (b)(i) merely permits the distribution of excess capital to "Class Members and/or the Family Class Members". This provision cannot be used to change the architecture of the Settlement Agreement by restructuring how and to whom contractual benefits are paid under that Agreement. A distribution order under Clause (b) is simply that: a distribution separate from the other compensation payments mandated by the Settlement Agreement.

107. In Perell J.'s decision on the Late Claims Protocol in 2014, he noted that Clause (b)(i) could be used to expand payments under the Settlement Agreement because Clause (b)(i) gives the court jurisdiction to accord "benefits".[107] This reasoning hinges upon the fact that Clause (b)(i) permits the excess capital to be "allocated *for the benefit* of the Class Members". As a matter of contractual interpretation, allocating funds "for the benefit" of Class Members in Clause (b)(i) is not the same thing as receiving "benefits" under the Settlement Agreement. These are apples and oranges.

108. The Settlement Agreement itself does not employ the term "benefit" when describing the money payable to Claimants – rather, it uses the terms "compensation" or "payments" or "compensation payments".[108] This reflects the

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[107] *Parson v. Red Cross Society,* 2013 ONSC 7788 at para. 95.
[108] Settlement Agreement: Article 2.01; Schedule A, Transfused Plan, Articles 3-8; and Schedule B, Hemophiliac Plan, Articles 3-8, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p.7321, 7354-7376, 7401-7424.

fact that the Settlement Agreement's purpose is "to provide compensation to Class Members".[109] Besides the Court ordered amendments that are the subject of this motion, the only use of the word "benefits" in the Settlement Agreement or the Plans is to connote social security and medical payments emanating from sources *outside* the class action (such as insurance benefits or social security benefits).[110]

109. The use of the term "for the benefit of the Class Members" in Clause (b)(i) merely means that payments will *advantage* the Class Members: this is the ordinary and grammatical meaning of the phrase. This expression is mirrored in Clause (b)(ii), which provides that excess capital may be allocated in a manner that "may reasonably be expected *to benefit Class Members*… even though the allocation does not provide for monetary relief to individual Class Members…". Clause (b)(ii) clearly is not referring to any expansion of existing payments under the Settlement Agreement; rather it contemplates some program that would assist Class Members without giving them money directly. The use of the word "benefit" in both (b)(i) and (b)(ii) reflects a simple, common intention: the payments accrue to the advantage of Class Members. This use also reflects the fact that money paid out to Class Members is being administered by a Trust Fund, and that the Class Members have no ownership rights of the Trust itself.[111]

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[109] Settlement Agreement: Schedule A, Transfused Plan, Article 2.01; and Schedule B, Hemophiliac Plan, Article 2.01, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7454, 7400.
[110] Settlement Agreement: Schedule A, Transfused Plan, Articles 8.02 and 8.03; and Schedule B, Hemophiliac Plan, Articles 8.02 and 8.03, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7374-7375, 7422-7423.
[111] Settlement Agreement, Schedule D, Funding Agreement, Article 5.03; see also Article 11.02, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7461, 7473.

110. When a provision of the Settlement Agreement was intended to allow for amendments to compensation levels, the provision states so explicitly. This is the case in the amending formula,[112] or in the provisions dealing with the lifting of holdbacks.[113] The fact Clause (b) does not include such an explicit statement is further evidence that it cannot be used to change the material terms of the Settlement Agreement.

111. Thus, read in full context, it was not the intent of the parties that Clause (b) could be used to change the terms and structure of compensation payments under other provisions of the Settlement Agreement. This is how the British Columbia Supreme Court interpreted this provision in the 2014 Late Claims Protocol Hearings.[114] As Chief Justice Hinkson held:

> I find, therefore, that it would be inappropriate for this Court to exercise the discretion conferred on it by Clause 5(b) of the order approving the Settlement Agreement. <u>While that order may provide for the jurisdiction to order the reallocation 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</u>, 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.[115] [Emphasis added.]

112. Thus, the sole function of Clause (b) is to permit allocations of excess capital. The fundamental question that the Courts must ask is whether any proposal under

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[112] Settlement Agreement, Article 12.02, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7331.
[113] Settlement Agreement, Schedule A, Transfused Plan, Article 7.03; and Schedule B, Hemophiliac Plan, Article 7.03, in in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 21, Tab 49, p. 7372-7372, 7420-7421.
[114] *Endean v. Red Cross Society*, 2014 BCSC 621 at para. 27; and *Honhon v. Canada*, 2014 QCCS 2032 at para. 16.
[115] *Endean v. Red Cross Society*, 2014 BCSC 621 at para. 27.

clause (b) requires the Settlement Agreement to be rewritten or overridden. If the answer to this question is “yes”, then the proposal is beyond the scope of clause (b) and outside the jurisdiction of the Courts. Such is not an allocation – it is an amendment.

No Late Claims are Permitted

113. The Joint Committee is requesting that the Courts approve “the Court Approved Protocol for Late Claims Requests” attached as Appendix A to their Notices of Motion/Application. This Protocol would permit Class Members who missed the June 30, 2010 First Claims Deadline to be admitted into the Settlement Agreement in certain proscribed situations.

114. All three supervising Courts have already ruled on this issue in 2013-2014. All three judges agreed that the proposed Protocol amounts to an impermissible alteration of the bargain struck by the parties. As Perell J. held (in words that both Rolland C.J. and Hinkson C.J.S.C. adopted):

> …however reasonable and fair the proposed protocol may be, the court does not have the jurisdiction to make an agreement for the parties and that I may not add, delete, or modify the terms of the Settlement Agreement by approving the Late Claim Requests Protocol. I further conclude that the Settlement Agreement in the case at bar included a firm claims deadline that does not admit of extension by the court and that I cannot use the court's jurisdiction over the administration of a class action settlement to extend the First Claims deadline.[116] [Emphasis added.]

[116] *Parsons v. Canadian Red Cross Society*, 2013 ONSC 7788 at para. 91; *Honhon c. Canada (Procureur general)*, 2014 QCCS 2032 at para. 16; and *Endean v. Canadian Red Cross Society*, 2014 BCSC 621 at para. 12.

115. It would be improper to allow the Joint Committee to accomplish indirectly what they could not do directly.

116. As noted above, Perell J. went on to hold that the allocation provision in Clause (b) could be used to adopt the Protocol. The Attorney General of Canada respectfully submits that the preferable view is the one expressed by Hinkson C.J.S.C. who held that Clause (b) can only be used for the reallocation of assets, and cannot be used to make a "fundamental alteration" to the bargain such as a claims deadline.[117] Clause (b) does not permit the Settlement Agreement to be re-written simply because there is excess capital in the Trust Fund.

117. Approving the Late Claims Protocol goes beyond a mere allocation of assets and would instead change the way the Settlement Agreement functions by admitting new claimants to the full panoply of compensation offered by the Plans. This threatens the integrity of the Settlement Agreement, contrary to clause (b)(v), and should be denied.

Ceasing Deduction on Collateral Benefits

118. The Joint Committee is requesting a retroactive payment of the amounts deducted for the Canada Pension Plan disability payments, disability insurance (CPP), Employment Insurance, (EI) and Multi-Provincial and Territorial Assistance Program (MPTAP) from loss of income and loss of support claims in Article 4.02 and 6.01 of the Transfused Plan and Articles 4.02 and 6.01(1) of the Hemophiliac

[117] *Endean v. Canadian Red Cross Society*, 2014 BCSC 621 at para. 27.

Plan. The Joint Committee is also seeking the discontinuance of such deductions from loss of income and loss of support claims going forward.

119. This is also a direct and impermissible amendment to the structure of the Settlement Agreement. The deductions in question are embedded in the Plans, and form part of the bargain struck by the parties. They can only be changed by amending the Agreement, which is impermissible.

120. Moreover, the Joint Committee's proposal would permit many Claimants to recover more for loss of income than their actual loss. In essence, these Claimants would benefit from a double recovery. Absent certain exceptions which do not apply in this case, it is trite law that double recovery is improper.[118] For example, in *Cunningham v. Wheeler* (1994), the Supreme Court stated the fundamental principle in the following terms:

> At the outset, it may be well to state once again the principle of recovery in an action for tort. Simply, it is to compensate the injured party as completely as possible for the loss suffered as a result of the negligent action or inaction of the defendant. <u>However, the plaintiff is not entitled to a double recovery for any loss arising from the injury</u>.[119] [Emphasis added]

121. The double recovery in this case is clear. As Peter Gorham explains in his expert report, Article 4.02 and 6.01 of the Transfused Plan and Articles 4.02 and 6.01(1) of the Hemophiliac Plan allow for compensation for loss of income (and loss of support) based on the Claimant's pre-infection net income. This is already a

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[118] *Kosanovic v. The Wawanesa Mutual Insurance Company* (2004), 70 O.R. (3d) 161 (C.A.) at para. 9; *Skelding (Guardian ad litem of) v. Skelding*, [1994] B.C.J. No. 1992 (C.A.) at para. 17.
[119] *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 at para. 75 (per the majority) and 5 (per the dissent in part, which concurred on this point).

generous provision insofar that the calculation of net income excludes certain expenses such as pension contributions or union dues.[120] As drafted, the calculation of compensation deducts from the net income the Claimants' current income from CPP, EI, *et cetera*, thus preventing the Claimants from benefiting from two forms of compensation for one loss of income.

122. The Joint Committee's proposal to eliminate these deductions would have a disparate impact on Class Members. Mr. Gorham analyzes a number of scenarios for potential claimants and concludes that the proposed amendment to the Settlement Agreement results in overcompensation in most cases where the Claimant is receiving a collateral benefit like CPP:

> For most or all claimants who are in receipt of Collateral Benefits, removing the deduction of those Collateral Benefits will result in payment of significantly more than the actual loss in income.[121]

123. Mr. Gorham notes that there is one possible exception to this overpayment: any amount of collateral benefit that was also payable during the period used to determine pre-disability income.[122] However, Mr. Gorham notes that this scenario is remote:

> We believe that the likelihood of this situation arising is extremely small, since it would require an ongoing disability for other than HCV at the same time as the person was earning an income, followed by a separate loss of income due to HCV.[123]

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[120] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 130, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2338.
[121] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 133 , in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2339.
[122] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 133, , in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p. 2339.
[123] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 138, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2341-2342.

124. Payments for Loss of Support suffer from the same spectre of double-recovery as do the payments for Loss of Income.[124]

125. The Joint Committee's proposal is not only unfair to the FPT Governments (by permitting double recovery) but it creates unfairness within the Class, since some Class Members will benefit from a windfall, whereas those Class Members without collateral benefits will not. This change to the Settlement Agreement should not be approved.

Pension Loss

126. The Joint Committee is requesting a 10% increase on Loss of Income and Loss of Support payments in order to provide compensation for diminished pension due to disability. This increase would be applied retroactively and prospectively.

127. As with the deduction of Loss of Income and Loss of Support that was discussed above, this proposal requires a substantive amendment to the Settlement Agreement. Compensation for loss of pension was not part of the contract between the parties.

128. Additionally, this proposal risks over-compensating some Claimants (as well as under-compensating others). As Peter Gorham explains in his expert testimony, this uneven treatment arises from the fact that not all employers provide a retirement savings plan, and for those that do, the contribution rates and benefits

[124] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, paras. 142-143, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2342.

can vary significantly.[125] There are few statistics on this issue that can assist actuaries.[126] The actuarial reports submitted by both the Joint Committee and Canada agree that the administrative complexity makes it impractical for the Fund to investigate on a case-by-case basis whether a given Claimant was participating in a pension plan and that nature of that plan.[127]

129. As a result, Mr. Gorham's analysis demonstrates that this proposal will only accurately compensate approximately 1/3 of Claimants:

> The Joint Committee has recommended compensation be paid equal to 10% of gross lost earnings. For the approximately 1/3rd of claimants who (a) did not have a workplace retirement savings plan, (b) have pre-disability income of less than the maximum C/QPP [Canada or Quebec Pension Plan] earnings and (c) are not in receipt of C/QPP disability income, 10% compensation will be almost exactly their loss. For the other 2/3rd of claimants, it will likely overcompensate or undercompensate.[128] [Emphasis added.]

130. Thus, this proposal is inappropriate because it would require a substantive amendment and would result in double recovery for some Claimants.

Alternative Position on the Joint Committee's Proposals

131. 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

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[125] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 152, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2346.
[126] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 153, , in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p. 2346.
[127] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 157, , in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2347; Affidavit of Richard Border dated October 14, 2015, Exhibit A, Actuarial Report to the Joint Committee at para. 52, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 2, Tab 13, p.476.
[128] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 159, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2347.

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.

132. Such allocations may be based on amounts already payable under the Plans, but they should be kept distinct from the pre-existing compensation payments. 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.

133. In the event that the Courts allocate funds to the Class for loss of pension, Canada takes no position on the argument made by the hemophiliac Class Member represented by Mr. Polley with respect to the $200,000 cap on the calculation of this loss.

Amount of the Excess Capital for Distribution

134. The expert actuarial opinion submitted by Canada indicates that the amount of Excess Capital that may be allocated remains at $256,594,000.

135. In the 2013 Sufficiency Hearings, the Courts issued consent orders that, as of December 31, 2013, the Trust assets exceeded liabilities – even after taking into account major adverse experiences or catastrophe – by an amount between $236,341,000 and $256,594,000.

136. $256,594,000 was the amount calculated by Canada's expert, Peter Gorham (of Morneau Shepell), whereas $236,341,000 was the amount calculated by the Joint Committee's expert, Richard Border (of Eckler).

137. In the present motion, the Joint Committee have reduced their calculation of the excess capital to $206,920,000. This reduction results from Eckler's understanding that a Claimant at Level 2 can claim the Level 3 lump sum payment of $30,000 by merely qualifying for a treatment protocol, whether or not that treatment is actually taken.[129] It is unclear whether Eckler took into account the fact that this lump sum payment only becomes available when the Claimant has (1) actually taken Ribavirin or Interferon, or (2) meets certain medical criteria.[130]

138. In any case, the view of Canada's expert is that this issue should not result in a revision of the Excess Capital. First, the claims data from the Settlement Administrator indicates that no Claimant at level 2 appears to have received drug treatment in the past.[131] More importantly, any increase on the liabilities of the Fund by Level 2 Claimants accessing the $30,000 lump sum payment is already accounted for within the buffer for adverse deviation. As Mr. Gorham says in his report:

> The potential cost is not recognized in our 2013 best estimate sufficiency liabilities but is covered by the 2013 sufficiency liabilities

[129] Affidavit of Richard Border dated October 14, 2015, Exhibit A, Actuarial Report to the Joint Committee at para. 8, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 2, Tab 13, p.462.
[130] Affidavit of Heather Rumble Peterson, sworn April 1, 2016, Exhibit F, Revised Court Approved Protocol for Medical Evidence for Section 4.01(1) and 4.01 (2) of Article 4 of the Transfused HCV Plan and the Hemophiliac HCV Plan, at Disease Level 3, criteria (c) and (d), in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing),Volume 5, Tab 18, p. 1936-2937.
[131] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 41, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2312.

> including provision for adverse deviations. Consequently, it is our opinion that any lump sum payment has already been adequately recognized in the provision for adverse deviations liabilities and no adjustment to the result presented in the 2013 Morneau Shepell Sufficiency Report is required…[132]

139. As a result, Canada's position is that the Excess Capital available for distribution remains at $256,594,000.

PART 4: ORDER SOUGHT

140. The Attorney General of Canada requests:

a. An order allocating the Excess Capital to Canada.

b. 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.

c. 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.

d. 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

[132] Affidavit of Peter Gorham dated January 29, 2016, Exhibit A, Actuarial Report, para. 50, in: Joint Record (Fund Sufficiency 2013 – Allocation Hearing), Volume 6, Tab 26, p.2314.

Hemophiliac Plan, as previously varied, not be varied or removed in whole or in part at this time.

e. 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.

f. 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.

g. An order that any unallocated Excess Capital shall be retained by the Trustee subject to any further application by Canada or the Joint Committee.

h. Such further and other relief as counsel may request and this Honourable Court may direct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 27, 2016

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APPENDIX A

List of Authorities

1. *Bodnar v. The Cash Store,* 2011 BCCA 384
2. *Coopérative d'habitation Village Cloverdale c. Société canadienne d'hypothèque et de logement*, 2012 QCCA 57
3. *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359
4. *Donald Campbell & Co. v. Pollak*, [1927] A.C. 732 (H.L.)
5. Eizenga, Peerless, Callaghan and Agarwal, *Class Actions Law and Practice*, LexisNexis, Toronto; 2016 (looseleaf)
6. *Endean v. Canada (Attorney General),* Reasons for Judgment dated Oct. 1, 1999
7. *Endean v. Canadian Red Cross Society*, [1999] B.C.J. No. 2180 (SC)
8. *Endean v. Canadian Red Cross Society*, Judgment dated October 28, 1999 (entered on November 12, 1999) per Smith J. (BC SC)
9. *Endean v. Red Cross Society*, 2014 BCSC 621
10. *Endean v. The Canadian Red Cross Society,* Order dated July 23, 2015 per Hinkson, J. (BC SC)
11. *Honhon c. Canada (Procureur général),* [1999] J.Q. no 4370 (CS)
12. *Honhon c. Canada (Procureur général),* 1999 CarswellQue 4293, REJB 1999-15380 (CS)
13. *Honhon v. Canada (Attorney General),* Judgment dated Sept. 21, 1999
14. *Honhon v. Canada*, 2014 QCCS 2032
15. *Honhon v. The Canadian Red Cross Society*, Order dated July 16, 2015 per Corriveau, J. (QSC)
16. Jean-Louis Baudoin, Les obligations, 7 e éd. par Pierre-Gabriel Jobin et Nathalie Vézina. Cowansville: Éditions Yvon Blais, 2013

17. *Kosanovic v. The Wawanesa Mutual Insurance Company* (2004), 70 O.R. (3d) 161 (C.A.)

18. *Lavier v. MyTravel Canada Holidays Inc*, 2011 ONSC 3149

19. *Olivieri v. Sherman,* 2007 ONCA 491

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

21. *Page c. Canada (Procureur général),* [1999] J.Q. no 5325 (CS)

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

23. *Parsons v. Canadian Red Cross Society*, Judgment dated July 10, 2015, per Perell J. (ONSC)

24. *Parsons v. Canadian Red Cross Society*, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC)

25. *Parsons v. Red Cross Society,* 2013 ONSC 7788

26. *Quebec (Agence du revenu) v. Services Environnementaux AES Inc.*, 2013 SCC 65

27. *Robertson v. Whistler (Resort Municipality)*, 2012 BCSC 763

28. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53

29. *Skelding (Guardian ad litem of) v. Skelding*, [1994] B.C.J. No. 1992 (C.A.)

30. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4

31. *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35

APPENDIX B

Text of Statutes, Regulations and By-laws

***Civil Code of Quebec*, CQLR c C-1991**

SECTION IV DE L'INTERPRÉTATION DU CONTRAT	**SECTION IV** INTERPRETATION OF CONTRACTS
1425. Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés.	**1425.** The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
1426. On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages.	**1426.** In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.
1427. Les clauses s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'ensemble du contrat.	**1427.** Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.
1428. Une clause s'entend dans le sens qui lui confère quelque effet plutôt que dans celui qui n'en produit aucun.	**1428.** A clause is given a meaning that gives it some effect rather than one that gives it no effect.
1429. Les termes susceptibles de deux sens doivent être pris	**1429.** Words susceptible of two meanings shall be given

dans le sens qui convient le plus à la matière du contrat.	the meaning that best conforms to the subject matter of the contract.
1431. Les clauses d'un contrat, même si elles sont énoncées en termes généraux, comprennent seulement ce sur quoi il paraît que les parties se sont proposé de contracter.	**1431.** The clauses of a contract cover only what it appears that the parties intended to include, however general the terms used.

***Code of Civil Procedure*, CQLR c C-25**
*replaced by CQLR c C-25.01 as of 2016-01-01

CHAPITRE II LE RECOUVREMENT COLLECTIF	**CHAPTER II** COLLECTIVE RECOVERY
1036. Le tribunal dispose du reliquat de la façon qu'il détermine et en tenant compte notamment de l'intérêt des membres, après avoir donné aux parties et à toute autre personne qu'il désigne l'occasion de se faire entendre.	**1036.** The court disposes of the balance in the manner it determines, taking particular account of the interest of the members, after giving the parties and any other person it designates an opportunity to be heard.

***Class Proceedings Act*, 1992, SO 1992, c 6**

26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate. 1992, c. 6, s. 26 (1).

Idem

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court. 1992, c. 6, s. 26 (2).

Idem

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant. 1992, c. 6, s. 26 (3).

Idem

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order. 1992, c. 6, s. 26 (4).

Idem

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined. 1992, c. 6, s. 26 (5).

Idem

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding. 1992, c. 6, s. 26 (6).

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate. 1992, c. 6, s. 26 (7).

***Class Proceedings Act*, RSBC 1996, c 50**

Undistributed award

34 (1) The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even though the order does not provide for monetary relief to individual class or subclass members.

(2) In deciding whether to make an order under subsection (1), the court must consider

(a) whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass, and

(b) any other matter the court considers relevant.

(3) The court may make an order under subsection (1) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.

(4) The court may make an order under subsection (1) even if the order would benefit

(a) persons who are not class or subclass members, or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

(5) If any part of an award that, under section 32 (1), is to be divided among individual class or subclass members remains unclaimed or otherwise undistributed after a time set by the court, the court may order that that part of the award

(a) be applied against the cost of the class proceeding,

(b) be forfeited to the government, or

(c) be returned to the party against whom the award was made.