

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DIANNA LOUISE PARSONS, MICHAEL HERBERT CRUICKSHANKS,
DAVID TULL, MARTIN HENRY GRIFFEN, ANNA KARDISH,
ELSIE KOTYK, Executrix of the Estate of HARRY KOTYK, deceased
and ELSIE KOTYK, personally

Plaintiffs

-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

Interveners

Proceeding under the Class Proceedings Act, 1992

Court File No.: 98-CV-146405

BETWEEN:

JAMES KREPPNER, BARRY ISAAC, NORMAN LANDRY, as Executor
of the Estate of the late SERGE LANDRY,
PETER FELSING, DONALD MILLIGAN
ALLAN GRUHLKE, JIM LOVE and PAULINE FOURNIER
as Executrix of the Estate of the late PIERRE FOURNER

Plaintiffs

-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 NOR'THWEST TERRI'TORIES,
THE GOVERNMENT OF NUNAVUT AND THE GOVERNMENT OF
THE YUKON TERRITORY

Interveners

Proceeding under the Class Proceedings Act, 1992

**FACTUM OF THE RESPONDING PARTY,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

May 27, 2016

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The Attorney General of Canada

PART I – OVERVIEW

1. This factum responds to the motions brought by the Joint Committee and the Attorney General for Canada (“Canada”) for distribution of the actuarially unallocated money and assets (the “Surplus”) in the Trust Fund constituted under the 1986-1990 Hepatitis C Settlement Agreement and Funding Agreement (the “Settlement Agreement”).

2. Her Majesty the Queen in Right of Ontario (“Ontario”) takes no position on the motions of the Joint Committee and Canada, except to the extent of urging the Court to adopt the following principles in making its determination:

- a. Any order made should not adversely affect Ontario’s obligations to make payments under the Settlement Agreement; and
- b. Any order made should not affect the integrity of the settlement agreement.

PART II – FACTS

3. Ontario adopts and relies on the facts as set out in the factum filed on behalf of the Attorney General for Canada (“Canada”). Ontario relies on the additional facts set out below.

Ontario’s Payment Obligations under the Settlement Agreement

4. Under the Funding Agreement, the Provinces and Territories agreed to fund 3/11th of the Settlement Agreement.

5. Under the terms of the Funding Agreement, and unlike Canada, the Provinces and Territories, including Ontario, did not make a lump sum payment into the Trust Fund created by the Settlement Agreement.

6. Rather, in accordance with Articles 4.01 and 4.02 of the Funding Agreement, Ontario pays out its share of the settlement as the claims made by Ontario claimants arise. In accordance with Article 4.04, the proportion of Ontario's obligations in relation to the obligations of the other Provincial and Territorial Governments is reassessed from time to time.

The Surplus

7. By Order dated July 10, 2015, this Court ordered that the assets of the Trust Fund exceed the liabilities by \$236.3 million to \$256.6 million. These amounts are based on actuarial forecasts contained in reports prepared by Eckler and Morneau Shepell, commissioned by the Joint Committee and Canada respectively. Both reports have concluded that the remaining contributions to the settlement to be made by Ontario (and the other Provinces and Territories) will be fully paid out sometime between 2021 and 2026, and accordingly that the Surplus does not include any contributions from the Provincial and Territorial "notional fund".¹ Therefore, Ontario (and the other Provinces and Territories) do not have a financial interest in the Surplus.

¹ Eckler "Actuarial Report to the Joint Committee" dated October 14, 2015, p.7, and Morneau Shepell "Actuarial Report Assessing the Financial Sufficiency of the 1986-1990 Hepatitis C Trust Fund as at December 31, 2013", p. 7.

8. In its notice of motion, the Joint Committee confirms that it is asking that any amounts sought for the Class Members on this motion “be paid from excess capital only and not from the provincial and territorial notional fund” ... “in order to maintain the integrity of the fund”.

PART III – ISSUES AND THE LAW

9. The issue on these motions is whether, to whom and in what manner the Surplus should be distributed.

10. Ontario does not take a position on how the surplus should be specifically distributed. However, Ontario urges the Court to adopt principles in deciding this issue that respect the integrity of the agreement negotiated between the parties and that do not adversely affect Ontario’s current obligations to make payments under the Settlement Agreement.

11. As a general principle and as confirmed by this Court in its earlier decision addressing the Joint Committee’s request for approval of a Late Claim Protocol, the Court does not have the authority to vary a settlement agreement reached between the parties. This principle applies equally to settlement agreements made in the context of a class proceeding, unless the parties have explicitly conferred such authority on the Court as part of the settlement. In particular, the Court does not have the jurisdiction to impose burdens on the defendant that the defendants did not agree to assume:

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

31. Although the court's settlement approval order reserved a jurisdiction to consider applications about the administration of the settlement, the court does not have jurisdiction to change the nature of the settlement reached by the parties.

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

33. ... The court has administrative jurisdiction independent of any conferral of jurisdiction. *See: Fantl v. Transamerica Life Canada*, 2009 ONCA 377 at para. 39; *Spavier v. Canada (Attorney General)*, 2006 SKQB 533 at para. 13. But after the settlement has been approved, the court's administrative and implementation jurisdiction does not include power to vary the settlement reached by the parties.²

12. In this case, the Court derives its authority to distribute the Surplus from section 9 of the Judgment made October 22, 1999, approving the settlement. In that provision, the Court found that the Funding Agreement was fair, reasonable and in the best interests of the Class. However, the Court retained jurisdiction to distribute money or assets “held by the Trustee” that are “actuarially unallocated”. Amongst the factors the Court is to consider in exercising its discretion to distribute the surplus is “whether the integrity of

² *Parson v. Red Cross Society*, 2013 ONSC 7788 at para. 35, citing *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149, at paras. 31-33. See also *Honhon c. Canada (Procureur general)*, 2014 QCCS 2032, at para. 16; *Endean v. Canadian Red Cross Society*, 2014 BCSC 621, at para. 12.

the Agreement will be maintained and the benefits particularized in the Plan ensured”. Accordingly, in deciding how to distribute the Surplus, the Court must refrain from altering the Settlement Agreement, and confine its decision to the issue of how to exercise its discretion to distribute the actuarially unallocated funds in the Trust Fund.

13. In this case, the parties agreed that the Provinces and Territories would pay their share of the settlement as the liabilities under the Settlement Agreement arose. Accordingly, in the event the Court decides to approve part or all of the Surplus distributions proposed by the Joint Committee, any such payments must be made out of the Surplus and not out of the amounts still to be paid out by Ontario (and the other Provinces and Territories). Otherwise, the amounts to paid out by Ontario would be accelerated which would have the effect of modifying the agreement made by the parties that the obligations of the Provinces and Territories under the Settlement Agreement would be paid as they arose, and based on a proportionate calculations made from time to time between the Provinces and Territories.

14. In conclusion, in deciding how to distribute the Surplus, the Court must refrain from making any order that affects the integrity of the Agreement and that has the effect of altering the bargain struck between the parties. In particular, the Court should avoid making an order that has the effect of accelerating the payments to be made by Ontario (and the other Provinces and Territories).

PART IV – ORDER SOUGHT

14. Ontario respectfully requests that any payment of actuarially unallocated funds be made as a distribution from the Trust Fund, and be expressly excluded from the Ontario's liabilities under the settlement agreement. Ontario also requests that any such payment otherwise be made without prejudice to its financial or other obligations under the Settlement Agreement. Ontario does not seek any costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: May 27, 2016



ATTORNEY GENERAL OF ONTARIO
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Lawyers for the Respondent,
Her Majesty the Queen in right of Ontario

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Parson v. Red Cross Society*, 2013 ONSC 7788
2. *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149
3. *Honhon c. Canada (Procureur general)*, 2014 QCCS 2032
4. *Endean v. Canadian Red Cross Society*, 2014 BCSC 621

Parsons et al.
Kreppner et al.

- and -

The Canadian Red Cross Society et al.

Plaintiffs (Moving Parties)

Defendants (Respondents)

Court File No. 98-CV-141369

***ONTARIO
SUPERIOR COURT OF JUSTICE***

Proceeding Commenced at Toronto

**FACTUM OF THE RESPONDING PARTY,
HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO**

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