

**CITATION:** Parsons v. Canadian Red Cross Society, 2023 ONSC 3267  
**COURT FILE NO.:** 98-CV-141369CP  
**COURT FILE NO.:** 98-CV-146405CP  
**DATE:** 20230531

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N :**

**DIANNA LOUISE PARSONS, deceased by her Estate Administrator, William John Forsyth, 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, HIS MAJESTY THE KING IN RIGHT OF ONTARIO and THE ATTORNEY GENERAL OF CANADA**

Defendants

**and**

**HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF ALBERTA, HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF SASKATCHEWAN, HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF MANITOBA, HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF NEW BRUNSWICK, HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF PRINCE EDWARD ISLAND, HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF NOVA SCOTIA, HIS MAJESTY THE KING 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

**AND 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 FOURNIER**

Plaintiffs

**and**

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

Defendants

and

**HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF ALBERTA,  
HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF  
SASKATCHEWAN, HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE  
OF MANITOBA, HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE OF  
NEW BRUNSWICK, HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE  
OF PRINCE EDWARD ISLAND, HIS MAJESTY THE KING IN THE RIGHT OF THE  
PROVINCE OF NOVA SCOTIA, HIS MAJESTY THE KING 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***

- *Kathryn Podrebarac, Reider Mogerman, David Loukidelis, Heather Rumble Peterson, Michel Savonitto, and Martine Trudeau* for the Joint Committee
- *John E. Callaghan* for Fund Counsel for Ontario
- *Victor Paolone, Adam Giliani and Nathalie Drouin* for the Attorney General of Canada
- *Erin Rizok* for the Province of Ontario
- *H. Michael Rosenberg and Armanda Iarusso* for the Intervenors representing Provinces and Territories
- *Louisa Ritacca*, Court Monitor

**PERELL, J.**

**REASONS FOR DECISION**

**A. Introduction**

[1] These are the Reasons for Decision in an applications in the administration of a settlement under Ontario's *Class Proceedings Act, 1992*,<sup>1</sup> in two national class actions, *Parsons v. The Canadian Red Cross Society*, the "Transfused Action" and *Kreppner v. The Canadian Red Cross Society*, the "Hemophiliac Action."

[2] Identical applications are being made in parallel class actions, namely: *Endean v. The Canadian Red Cross Society*, in British Columbia under the *Class Proceedings Act*,<sup>2</sup> and *Honhon c. Canada (Procureur général)* and *Page v. Canada (Procureur général)* in Québec under the *Code of Civil Procedure*.<sup>3</sup> All the applications were heard in a virtual hearing organized in Toronto

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<sup>1</sup> S.O. 1992, c. 6.

<sup>2</sup> R.S.B.C. 1996, c. 50.

<sup>3</sup> CQLR c C-25, Article 1036.

at a special joint-hearing of the Superior Courts of British Columbia, Ontario, and Québec.

[3] The Joint Committee brings these unopposed applications, requesting the supervising Courts to exercise their unfettered discretion to allocate about \$160 million (2020 dollars) in actuarially unallocated assets, i.e., “Excess Capital”, for the benefit of approved class members and family members.

[4] More particularly, the Joint Committee makes four recommendations as to how to allocate the Excess Capital; namely:

- a. Increase all lump sum payments by 6.8%.
- b. Increase loss of guidance, care and companionship payments to approved family members by 50%.
- c. Increase compensation for lost pension benefits by 4% from 10% to 14% of net loss of income (to a maximum pension of \$28,000 per year, indexed from 2014).
- d. Increase loss of services rate from \$12/hour to \$13/hour (1999 dollars) at and after 2019. (No changes to the pre-2019 rate.)

[5] For the reasons that follow, the application is granted.

## **B. Factual Background to the Recommendations**

[6] The class actions in British Columbia, Ontario, and Québec were brought on behalf of: (a) persons who received blood transfusions between January 1, 1986 and July 1, 1990 and who were infected with Hepatitis C Virus (“HCV”); and (b) persons with hemophilia who received blood or blood products between January 1, 1986 and July 1, 1990 and who were infected with HCV. The claims in the actions arose because The Canadian Red Cross Society, which was in charge of Canada’s national blood supply system, did not conduct testing of blood donations for HCV notwithstanding that a test was in widespread use in the United States. The class members asserted claims based in negligence, breach of fiduciary duty, and strict liability in tort.

[7] In 1999, all the actions settled pursuant to the the 1986-1990 Hepatitis C Settlement Agreement.

[8] As of December 31, 2019, there were: (a) 5,369 class members approved under the Regular Benefit Plans. Of those, 3,282 were alive, 487 had died before January 1, 1999 and 1,600 had died subsequently; (b) 9,383 approved family members under the Regular Benefit Plans; (c) 16 approved class members under the HCV Late Claims Benefit Plan; and (d) 108 approved family members under the HCV Late Claims Benefit Plan.

[9] By the end of 2021, an additional 3 class members and 142 family members were approved under the Regular Benefit Plans and an additional 25 class members and 58 family members were approved under the HCV Late Claims Benefit Plan. In total, there are 5,413 approved class members and 9,691 approved family members under the Plans as of December 31, 2021.

[10] Since inception, the benefit payments processed under the Plans and as 2013 Special Distribution are as follows:

Year-End	Regular Benefit Account	Special Distribution Benefit Account	Late Claims Benefit Account	Total since inception
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Dec 31, 2019	\$1,022,196,868	\$93,505,782	\$1,824,461	\$1,117,527,111
Dec 31, 2021	\$1,080,109,858	\$102,082,181	\$14,223,298	\$1,196,415,337

[11] As of December 31, 2022, approximately \$1,221,876,852 in benefits had been paid to class members and their family members. This is about \$104 million or about 9.3% more than the \$1.118 billion capped liability of the governments under the Settlement Agreement and this was possible because with prudent investments, the settlement fund grew over time.

[12] The applications now before the courts are to apply a provision of the Settlement Agreement, known as the Excess Capital Allocation Provision. There was a similar set of applications about the Excess Capital Allocation Provision in 2016.<sup>4</sup>

[13] Paragraph 2.01 of the Settlement Agreement identifies the purpose of the Settlement Agreement; paragraph 2.01 states:

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

[14] The Settlement Agreement assigns a supervisory role over implementing and enforcing its provisions to the Superior Courts of British Columbia, Ontario, and Québec. Section 10.01 (1) of the Settlement Agreement states:

10.01 (1) The Courts will issue judgments or orders in such form as is necessary to implement and enforce the provisions of this Agreement and will supervise the ongoing performance of this Agreement including the Plans and the Funding Agreement. Without limiting the generality of the foregoing, the Courts will: ....

(h) approve, rescind or amend the protocols submitted by the Joint Committee or any Class Action Counsel;

(i) on application of any Party or the Joint Committee made within 180 days after the 31 December 2001 and

(ii) each third anniversary of such date, and on application of the Joint Committee or any Class Action Counsel or the Fund Counsel made at any time, assess the financial sufficiency of the Trust Fund and determine, among other things,

(A) whether the restrictions on payments of amounts in full in the Plans should be varied or removed in whole or in part, and

(B) whether the terms of the Plans should be amended due to a financial insufficiency or anticipated financial insufficiency of the Trust Fund;

[...]

<sup>4</sup> *Parsons v. Canadian Red Cross Society*, 2016 ONSC 4809. The Courts allocated \$163,532,000 of the 2013 Excess Capital for the benefit of approved class members and family members for the creation of seven discrete benefits payable by way of special distribution; and ejected two other allocations requested by the Joint Committee

(l) on application of the Administrator, Fund Counsel, the Auditors, any Class Action Counsel, the Joint Committee or the Trustee, provide advice and direction;

(m) approve any amendment or supplement to, or restatement of, this Agreement agreed to in writing by the FPT Governments and the Joint Committee;

[...]

(o) declare this Agreement to be terminated and, if applicable, order that any assets remaining in the Trust Fund be the sole property of and transferred to the FPT Governments.

[15] The Excess Capital Allocation Provision is found in paragraph 9 of the Settlement Agreement, which states:

9. THIS COURT ORDERS AND ADJUDGES that the Agreement, annexed hereto as Schedule 1, and the Funding Agreement, annexed hereto as Schedule 2, both made as of June 15, 1999 are fair, reasonable, adequate, and in the best interests of the Ontario Class Members and the Ontario Family Class Members in the Ontario Class Actions and this good faith settlement of the Ontario Class Actions is hereby approved on the terms set out in the Agreement and the Funding Agreement, both of which form part of and are incorporated by reference into this judgment, subject to the following modifications, namely:

[...]

(b) 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 [Federal, Provincial and Territorial] 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;

in such 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.

[16] Under the Allocation Provision, there are only two restrictions on the court's otherwise unfettered discretion to allocate actuarially unallocated assets. The allocation must be reasonable and must not discriminate based upon where the Class Member resides or received blood. Absent the consent of the parties, an allocation must not involve an amendment to the Settlement Agreement.

[17] The Approval Orders for the settlement set out ten factors the courts could consider, but are not bound to consider, in exercising their unfettered discretion under the allocation provision. For example, the Ontario Approval Order reads:

(c) in exercising their unfettered discretion under subparagraph 9(b) [5(b) in the BC Approval Order and Schedule F, para 1 p.2 in Québec], 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(10) of the *Act* [section 34(5) of the British Columbia *Class Proceedings Act*, section 1036 of the Québec *Code of Civil Procedure*];
- (v) whether the integrity of the Agreement will be maintained and the benefits particularized in the Plans ensured;
- (vi) whether the progress of the disease is significantly different than the medical model used in the Eckler actuarial report ...;
- (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 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.

[18] The triennial financial sufficiency review giving rise to these applications was triggered as at December 31, 2019. Following completion of their phase one financial sufficiency work, the actuaries retained by the Joint Committee, Eckler, and the actuaries retained by the Federal Government, Morneau Shepell both expressed the opinion that overall, the Trust was financially sufficient to meet its expected liabilities as at December 31, 2019.

[19] They also both expressed the opinion that, after taking into account sufficient monies to protect the approved class members from major adverse experience or catastrophe ("Required Capital"), the Trustee of the settlement funds held Excess Capital. Eckler opined that there was an \$197,596,000 excess, while Morneau opined there was \$203,578,000 Excess Capital.

[20] By orders/judgment granted between January and March 2021 among other things, the Courts: (a) declared the Trust Fund to be financially sufficient overall as at December 31, 2019; (b) declared that the HCV Regular Benefit Account and the HCV Special Distribution Benefit Account had excess assets while the HCV Late Claims Benefit Account had insufficient assets as at December 31, 2019; (c) ordered \$22,981,000 of excess assets to be transferred from the HCV Special Distribution Benefit Account to the HCV Late Claims Benefit Account as at January 1, 2020 to eliminate the insufficiency; (d) declared that as at December 31, 2019 the Trustee held actuarially unallocated assets of between \$197,596,000 and \$203,578,000; and (e) ordered the 25% holdback on benefits payable under the HCV Late Claims Benefit Plan to be removed and directed the immediate payout of amounts that were held back (plus interest) and the payment of full benefits going forward.

[21] After the 2019 Financial Sufficiency Phase One Orders were issued, it was discovered that the previous Administrator mistakenly did not issue retroactive 2013 Special Distribution Benefits to some

approved class members and/or family members, creating an additional sufficiency liability to the class members in the amount of \$2,559,000. In its initial 2019 Phase Two applications, the Joint Committee requested the liabilities of the Trust in the Phase One orders/judgment be restated.

[22] The Joint Committee recently requested the Courts to consider its restatement request in advance of the 2019 Phase Two allocation hearing. The Courts did so and restated the Trust's liabilities as of December 31, 2019. With the liabilities restated, the Trust Fund held actuarially unallocated assets in excess of liabilities of between \$195,037,000 and \$201,019,000 as at December 31, 2019 and the notional account balances were adjusted accordingly.

[23] Financial markets declined after the 2019 Phase One Financial Sufficiency Review was completed, substantially reducing the value of the Trust Fund's invested assets. For that reason, the Joint Committee asked Eckler to extrapolate the results of the 2019 Phase One Financial Sufficiency Review of the Trust to June 30, 2022. Eckler concluded that the amount of 2019 Excess Capital as at June 30, 2022 is about \$174,000,000 in 2022 dollars, equivalent to \$161,000,000 in 2020 dollars.

[24] Given the reduced amount of 2019 Excess Capital available in 2022, the Joint Committee amended its applications and now requests the Courts to allocate only \$159,914,000 (2020 dollars) of the 2019 Excess Capital.

## **C. Recommendations**

### **1. First Recommendation**

[25] On this application, under the first recommendation, a discrete benefit of 6.8% on fixed payments would be provided to approved class members at every disease level.<sup>5</sup> With this increase, the cumulative compensation for a class member reaching disease level 6 would still be below the cap on general damages for pain and suffering imposed by the Supreme Court of Canada in its trilogy of cases.

[26] It is also proposed that the death benefit fixed payments to estates, and/or shared by family members and dependents of approved class members who died before January 1, 1999 as a result of Hepatitis C Virus ("HCV"), as well as the fixed payment to hemophiliacs co-infected with HIV who are unable to establish their disease level, would also be subject to a 6.8% discrete benefit.

[27] If approved, the combined benefits payable based on cumulative disease levels would be \$387,797 (2020 dollars), nearing the SCC Trilogy Cap of \$389,744.

[28] This recommended allocation would benefit 4,926 approved class members (or their estates) eligible for disease level payments under the Plans through December 2021, who would receive retroactive payments. The allocation would also benefit prospectively those approved class members

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<sup>5</sup> Under the Plans, approved class members alive on January 1, 1999 are entitled to fixed payments for non-pecuniary general damages based upon their disease level at the time of their approval and the subsequent progression of their disease (sections 4.01, 4.08, 5.02). Estates, family members and dependents of approved class members who died before January 1, 1999 are entitled to death benefits if the death was caused by HCV (section 5.01). Non-pecuniary general damages seek to compensate for intangible losses, like pain and suffering arising from the injury, loss of enjoyment and loss of expectation of life.

whose disease continues to progress, as well as those claimants with in-progress claims and/or future claimants who are subsequently approved.

[29] Other payments included within the recommended 6.8% allocation are:

- a. a \$50,000 alternative to disease level payments for approved living hemophiliac class members co-infected with HIV who may be unable to establish that their disease level is caused by HCV because of their co-infection;
- b. two death benefit options for estates, dependants, and family members of approved class members whose death prior to January 1, 1999 was caused by HCV:
  - i. a fixed payment of \$50,000 to the estate with independent loss of guidance, care and companionship claims for family members and dependants; or,
  - ii. a fixed payment of \$120,000 to be shared among the estate, family members and dependants (sections 5.01(1),(2) Plans); and
- c. the \$72,000 alternative death benefit option to be shared among the estates, dependants and family members of approved hemophiliac class members co-infected with HIV whose death prior to January 1, 1999 is not proven to be caused by HCV

[30] This recommended allocation would benefit the estates of all approved class members whose death before January 1, 1999 was caused by hepatitis C, and/or their approved family members and dependants who elected the joint fixed payment options. All co-infected hemophiliac class members who did not initially elect or subsequently re-elect to receive the disease level fixed payments would also be eligible to benefit from this recommendation. This equates to approximately 487 estates, 1,816 family members and 30 co-infected hemophiliac class members eligible for these other fixed payment options under the Plans through December 2021. The allocation would also benefit prospectively those claimants with in-progress claims and/or future claimants who are subsequently approved and elect in favour of these options.

## **2. Second Recommendation**

[31] The second recommendation is designed to provide a discrete benefit for approved Family Members who are entitled to Loss of Guidance, Care and Companionship Awards. Damages for loss of guidance, care and companionship are awarded to give recognition and compensation for the seriousness of the family's loss.

[32] Under the Plans, approved Family Members of an approved Class Member whose death was caused by his or her infection with Hepatitis C are entitled to be paid loss of guidance, care and companionship awards, provided they do not choose one of the joint fixed payment options.

[33] The loss of guidance, care and companionship awards under the Plans were another area of compromise for the majority of family members. These benefit levels were set below the amounts often awarded under this head of damages across the country.

[34] To partially address this compensatory shortfall, the Joint Committee recommended, and the Courts approved, the creation of a discrete benefit of \$4,600, indexed, for parents and children ages 21



years or older for loss of guidance, care and companionship as one of the 2013 Special Distribution Benefits. The Joint Committee's recommendation was limited to parents and adult children since the benefits payable to these two categories of family members were out of step with the grid of benefits payable to the other groups of family members. The fixed amount of excess capital available and competing interests of other benefits did not permit the broader compensatory shortfalls to be addressed for other categories of family members at that time.

[35] The Joint Committee recommends that the Courts allocate \$71,812,000 of the 2019 Excess Capital to create a discrete benefit for approved Family Members entitled to loss of guidance, care and companionship awards under section 6.02 of the Plans in an amount equal to 50% of the combined value of their award under that section and any applicable 2013 Special Distribution Benefit, indexed to January 1, 2020, payable retroactively and prospectively as a special distribution.

[36] This recommended allocation would benefit about 7,874 approved family members eligible for loss of guidance, care and companionship awards through December 2021. The group of family members who would benefit from this recommended allocation will also continue to grow as approved class members die from their infections and the claims of their family members are approved and as current in-progress and future claimants subsequently qualify.

[37] Under the second recommendation, every category of family member approved for the fixed payment for the loss of guidance, care and companionship of a class member whose death was caused by HCV would receive a discrete benefit equivalent to 50% of the currently applicable award. This would bring these payments closer to but still below average awards for family members under statute and case law.

### **3. Third Recommendation**

[38] The third recommendation is an increase to the discrete pension benefit equivalent to 4% calculated on the approved class member's actual annual net income loss of up to \$200,000 per annum, indexed from and after 2014 (making the maximum pension benefit increase \$8,000 per annum, indexed from 2014). This increase would achieve a total of 14% of pre-tax loss of income, which Eckler Ltd., the actuary retained by the Joint Committee, previously opined was an appropriate proxy for compensation for diminished pension due to disability, but which could not be afforded at the time the 2013 Allocation Benefits were awarded. Eckler remains of the opinion that this additional 4% is reasonable.

[39] Under the Plans, class members who reach disease level 4 bridging fibrosis or the more severe medical conditions at higher disease levels are entitled to recover their loss of income caused by their HCV infection to age 65, provided that they are not claiming loss of services in the home for the same time period (section 4.02). Persons at disease level 3 who are at least 80% disabled due to their infection with HCV can elect to recover loss of income earlier if they forfeit the \$30,000 disease level 3 fixed payment.

[40] Loss of income awards under the Settlement Agreement were an area of significant compromise for virtually all of the approved class members who suffered an income loss. In particular, the failure to compensate lost pension and employment benefits as well as the deductions from income required

in the calculations of the loss departed from ordinary damages principles. The loss of income and loss of support benefits available under the Plans represented the single largest compromise from the tort model.

[41] In its report prepared for the 2013 allocation hearings, Eckler opined that 14% of income would be a reasonable proxy for lost or diminished pension benefits, based on a 10% employer's share of a pension benefit and a 4.95% employer's share of Canadian Pension Plan ("CPP") contribution or similar provisions under the Québec Pension Plan. Given the amount of excess capital available and the competing interests of other benefits, the Joint Committee only recommended, and the Courts approved as one of the 2013 Special Distribution Benefits, the creation of a discrete benefit in an amount equal to 10% of an approved class member's annual loss of income, capped at \$20,000 per year maximum pension benefit.

[42] In its report prepared for the 2019 allocation hearing, Eckler notes that the employer's contribution rate to CPP has risen to 5.45% since the last allocation hearing and is set to increase yet again in 2025. Eckler opines that 14% of income continues to be a reasonable and appropriate proxy for lost or diminished pension benefits, having regard for the very wide range of pension arrangements offered by employers.

[43] The Joint Committee recommends that the Courts allocate \$6,653,000 of 2019 Excess Capital to increase the discrete benefit created to compensate for lost or diminished pension benefits by an amount equal to an additional 4% of an approved class member's actual annual net loss of income payment which is capped at \$200,000 per annum, indexed from 2014, for this loss of pension benefit calculation, payable retroactively and prospectively as a special distribution benefit. For greater certainty, based on this formula, the additional annual lost or diminished pension benefit would be an amount of up to \$8,000, indexed from 2014, depending on the actual amount of a claimant's annual net income loss payment.

[44] If the recommended allocation is granted, based on the net income loss payments currently being paid under the Plans about 75% of those with current income loss claims would be entitled to up to an additional \$2,000 per annum, 15% would be entitled to an additional amount between \$2,000 and \$4,000 per annum, and 10% would be entitled to an additional amount between \$4,000 and \$8,000 per annum for loss or diminishment of pension benefits. About 338 approved loss of income claimants under the Plans would be entitled to benefit retroactively and, to the extent their loss is ongoing, prospectively from this recommended increase to the lost or diminished pension benefit. This allocation may also benefit prospectively approximately 1,397 living approved class members under the age of 65 who are either at disease levels 2 and 3 whose disease level may yet progress and cause them to suffer income loss or those at disease level 4 or higher who have not yet claimed or yet experienced income loss, as well as in progress and future claimants.

#### **4. Fourth Recommendation**

[45] The fourth recommendation also addresses loss of services and provides for an hourly rate increase, bringing the rate closer to but still below the median national hourly cost for housekeeping services. Loss of services claims are payable to approved class members for their lifetime so long as they remain disabled, and thereafter to their dependents until the earlier of the statistical lifetime of the

deceased calculated without regard to their HCV infection or the death of their last dependent. One of the 2013 Special Distribution Benefits extends the timeframe benefits are payable for permanently disabled dependents.)

[46] Under the Plans, approved class members at disease level 4 or higher may seek compensation for the services that they can no longer provide in the home if they are disabled from doing so because of their HCV. These may also be claimed earlier at disease level 3 if the class member is at least 80% disabled and forfeits the \$30,000 fixed payment for that disease level. Approved dependants who were living with the approved class member at the time of the class member's death may claim lost services if the death was caused by the infection with HCV.

[47] Under the Regular Benefit Plans, loss of services in the home are compensated to a maximum of 20 hours per week at the rate of \$12 per hour (1999 dollars). The current rate in 2020 dollars is \$17.85/hr. Before the 2013 allocation hearings, about 95% of approved class members provided more than 20 hours per week of services in the home and, on average, provided about 47 hours of services in the home per week prior to their disability.

[48] The Joint Committee proposed, and the Courts approved as one of the 2013 Special Distribution Benefits, a 2 hour per week discrete benefit to supplement loss of services in the home under all Plans, payable retroactively and prospectively. In their written and oral submissions made at the 2013 Allocation applications, class members and their family members continued to stress the vitality of these payments to their existence and that this benefit falls short, both in terms of the number of hours compensated and the rate paid.

[49] The Joint Committee recommends that the Courts allocate \$25,365,000 of the 2019 Excess Capital as a special distribution to create a discrete benefit for approved class members and dependants who are entitled to loss of services in the home under section 4.03 and 6.01 for the compensable hours of lost services under those sections and any applicable 2013 Special Distribution Benefit, equal to \$1.00 per hour (1999 dollars), indexed to January 1, 2020, incurred at and after 2019.

[50] In its report prepared for the 2019 allocation hearing, Eckler reviewed the Government of Canada's Job Bank website, which publishes wage data by occupation and region. It sets out low, median and high hourly wages for home support workers, housekeepers and related occupations across the country. Eckler noted that fees charged by housekeeping agencies typically allow for administration costs, Employment Insurance, CPP/QPP, workers compensation insurance premiums, vacation pay and other employee benefit costs, which it estimated to add at least 20% to the wage costs. When these fees are added, the median hourly wage nationally was \$20.22 (2020 dollars). As the rate under the Plans is \$17.85 (2020 dollars), Eckler concluded that it is insufficient to cover the worker's wages in many jurisdictions. It further noted that these hourly wages do not include sales tax on invoices for these services, which range from 5-15% across the country.

[51] It is Eckler's opinion that the proposed benefit of a \$1 per hour increase, equivalent to an hourly rate of \$13 (1999 Dollars) or \$19.34 (2020 dollars) is reasonable.

[52] The reasonableness of the proposed hourly rate increase finds further support in the data published by Brown Economic Consulting Inc., an economic consulting firm in Alberta. It publishes annually a survey of Canadian "Housekeeping Replacement Rates" by jurisdiction (excluding Québec)

and a “Housekeeping Damages Calculator” to assist with estimating pecuniary loss. Brown also specifically notes that the rates in its published table do not include provincial sales tax or GST payable on these services. The rates published by Brown in 2021 dollars are somewhat higher than the median range for most jurisdictions and, in some jurisdictions, are above the high range noted in Eckler’s 2019 Allocation Report. The national average under Brown’s data is \$23.58, excluding tax.

[53] It is noteworthy that in the three provinces where the supervising courts are located, the housekeeping replacement costs (excluding taxes) still exceed the hourly rate payable for loss of services, even after the recommended increase is applied.

[54] Approximately 96% of loss of service claimants receive the maximum 20 hour loss of services benefit and the 2013 Special Distribution Benefit of 2 hours per week. As such, most loss of service claimants would be entitled to approximately an additional \$1,700 a year (2020 dollars).

[55] About 575 approved loss of services claimants will be entitled to benefit from this modified recommendation. This allocation may also benefit prospectively about 1,537 approved class members who are (1) at disease level 4 or higher not currently receiving the loss of services or loss of income benefit, some of whom may yet experience loss of services and claim in the future or whose dependants may claim following their death; (2) at disease levels 2 and 3 whose disease level may yet progress and loss of services may be claimed by them, or by their dependants following their death if it is caused by HCV; (3) currently receiving loss of income or loss of support, who may switch to loss of services once the class member reaches or would have reached age 65. In addition, an as yet undetermined number of dependents of approved class members, some of whom may subsequently die as a result of their HCV infection, as well as in progress and future claimants who may later qualify and experience loss of services.

[56] The operative provision under the Plans further limits the majority of claimants from recovering the full measure of the actual hours of services that they have lost, which militates against any argument that approved class members and dependants will be overcompensated if the Courts grant this recommended allocation.

## **5. Administration of the Recommendations**

[57] The recommended allocations address many of the same compensatory shortfalls partially addressed by the 2013 Special Distribution Benefits,

[58] For the four recommendations, the same methodologies and systems that have already been implemented can be largely employed, making implementation simpler and more cost-effective. Standard operating procedures created for implementing the 2013 Special Distribution Benefits would largely apply and any required adjustments are relatively minor.

[59] For the majority of approved class members and family members, no additional action would be required. The Administrator would identify, calculate and distribute the discrete benefits based on data already contained in the claims database. Experience with administering the 2013 Special Distribution Benefits has shown, however, that some approved class members and family members will need to be located and deaths and other changed circumstances will require additional steps to facilitate the distribution.

[60] The Administrator estimated the administration costs to implement, calculate and distribute the appropriate retroactive payments for the recommended allocations based on the current fee per service structure approved by the Courts in 2017 for the ongoing administration of the retroactive 2013 Special Distribution Benefits.

[61] Eckler has estimated the present value of the administration fees for prospective payments to be \$127,000 based on the fixed fee of \$5,000 per annum approved by the Courts for the prospective component of the 2013 Special Distribution Benefits in place since 2017. Eckler has compiled an implementation budget that includes these estimated administration costs as well as the additional costs.

[62] The structural accommodations previously made to the CLASS database to accommodate the 2013 Special Distribution Benefits will accommodate the allocations under consideration. Minimal dedicated programming time would be required to create additional coding to ensure the integrity of the payment records in the database.

[63] The provisions of the Plans, the court approved protocols and the Administrator's standard operating procedures have been used in respect of claims for deceased class members and family members across the country over the course of the administration, including for the implementation of the 2013 Special Distribution Benefits. The Joint Committee and the Administrator believe that they are adequate for the most part to address the various scenarios that will arise if these recommendations are implemented. However, there will be those who have died in circumstances where their estates have been wound up, where the executor of the estate may be deceased, or where they may have died intestate. As a precaution, a line item totalling \$75,000 has been included in the implementation budget to address additional costs that may arise in this regard.

[64] Since the 2019 Allocation Benefits will be created from Excess Capital, none of the associated administrative costs would be borne by the provinces and territories. All administration costs associated with the 2019 Allocation Benefits will be charged to the existing Special Distribution Benefit Account.

## **6. Responses from Class Members**

[65] Notice of the applications has been provided by the Administrator to class members through mail, email and the settlement website. Class members were advised of their ability to comment upon the Joint Committees' recommendations and to make written submissions and convey their own requests prior to the hearings.

[66] Hundreds of responses were received from class members. The overwhelming response was highly favourable and supportive of the recommendations. Some of the responses were heart rendering about the continuing suffering, struggles and needs of the class members and their families. These responses urged that the recommendations be accepted and even augmented if possible by the court. Some class members misunderstood that the Joint Committee was making four recommendations and thus they wrote to support the recommendation of their choice but raised no opposition to the other recommendations. Some class members suggested other alternatives but these alternatives had been or were rejected by the Joint Committee for amongst other good reasons that the expenditures were not feasible, too expensive, too idiosyncratic, or

contrary to the terms of the settlement agreement and the court's interpretation of the scope of the excess capital allocation provision.

**D. Discussion and Analysis**

[67] Each of the recommendation extends the allocations made in 2016 in relation to the court's 2016 decision about the capital allocation provision.

[68] Taken together the four recommendations are within the financial parameters of the Allocation Provision.

[69] The proposed allocations are overwhelming supported by the overwhelming majority of the class members who responded to the notice of this hearing.

[70] The proposed allocations do not discriminate and do not require an amendment to the Settlement Agreement. The four recommendations are precisely the type of allocations the Courts have already concluded were permissible and appropriate under the Allocation Provision and follow in those footsteps.

[71] The proposed allocations are also demonstrably reasonable and fulfil one of the purposes of the Allocation Provision that I identified at the previous allocation motion, i.e., to bridge compensatory gaps or obtain other additional compensation up to the limits available at law. In my reasons for decision, I stated:

As described above, virtually every head of compensation, and most particularly the compensation for income losses, was below what would have been recoverable as a head of damage had the Class Members' individual claims been successfully litigated against other than the Canadian Red Cross. For some Class Members, compensation available under tort or statute law was not made available under the contract law of the Settlement Agreement. Contrary to the submission of Canada, while from its perspective, the provision's purpose was to provide an opportunity to obtain excess capital early, from the perspective of the Class Members, the purpose of the excess capital allocation provision was not to preserve the gaps in compensation, its purpose was to provide an opportunity to bridge those compensatory gaps or to obtain other additional compensation up to the limits that might have been available at law.

[72] Each of the proposed discrete benefits addresses compensatory shortfalls in the Settlement Agreement and remain within the limits of the law.

[73] A consideration of the optional factors favours the Courts exercising their discretion in favour of approving the proposed allocations.

[74] The Joint Committee and the actuaries have performed diligent and careful work. They should be commended for their hard work and careful deliberations. The recommendations are reasonable and indeed worthwhile improvements to the benefits provide by the Settlement Agreement.

[75] For the above reasons, I grant the application as requested.

*Reed, J.*

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Released: May 31, 2023

**CITATION:** Parsons v. Canadian Red Cross Society, 2023 ONSC 3267  
**COURT FILE NO.:** 98-CV-141369CP  
**COURT FILE NO.:** 98-CV-146405CP  
**DATE:** 20230531

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N :**

**DIANNA LOUISE PARSONS, deceased by her Estate Administrator,  
et al**

Plaintiffs

**and**

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

Defendants

**and**

**HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE  
OF ALBERTA, et al**

Intervenors

**AND BETWEEN:**

**JAMES KREPPNER, et al**

Plaintiffs

**and**

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

Defendants

**and**

**HIS MAJESTY THE KING IN THE RIGHT OF THE PROVINCE  
OF ALBERTA, et al** Intervenors

**REASONS FOR DECISION**

**PERELL J.**

Released: May 31, 2023