Court File No. 98-CV-141369 CP00

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

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 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*

No. C965349
Vancouver Registry

In the Supreme Court of British Columbia

Between

Anita Endean, as representative plaintiff

Plaintiff

and

The Canadian Red Cross Society,
His Majesty the King 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, His Majesty the King in Right of Canada, and
His Majesty the King in Right of the Province of BC

Third Parties

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

C A N A D A

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

SUPERIOR COURT

Class action

NO : 500-06-000016-960

DOMINIQUE HONHON

Plaintiff

-vs-

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF QUÉBEC
THE CANADIAN RED CROSS SOCIETY

Defendants

-and-

MICHEL SAVONITTO, in the capacity of the Joint Committee member for the province of Québec

PETITIONER

-and-

FONDS D'AIDE AUX RECOURS COLLECTIFS

-and-

LE CURATEUR PUBLIC DU QUÉBEC

Mis-en-cause

C A N A D A

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

SUPERIOR COURT

Class action

NO : 500-06-000068-987

DAVID PAGE

Plaintiff

-vs-

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF QUÉBEC
THE CANADIAN RED CROSS SOCIETY

Defendants

-and-

FONDS D'AIDE AUX RECOURS COLLECTIFS

-and-

LE CURATEUR PUBLIC DU QUÉBEC

Mis-en-cause

JOINT MOTION RECORD
VOLUME VIII OF VIII
(Joint Committee Motion to Allocate 2019 Excess Capital**)**

May 8, 2023

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Parsons v. Canadian Red Cross Society

PROCEEDING UNDER the Class Proceedings Act, 1992
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 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 Her Majesty the Queen in Right of Ontario, defendants

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Court File Nos. 98-CV-141369 and 98-CV-146405

Ontario Superior Court of Justice

Winkler J.

Heard: August 19-21, 1999.
Judgment: September 22, 1999.

(133 paras.)

Practice -- Class proceedings -- Settlements -- Court approval.

Motion by various parties for approval of a settlement in two companion class proceedings commenced under the Class Proceedings Act. One plaintiff class was persons who were infected with hepatitis C from blood transfusions between January 1, 1986 and July 1, 1990. The other plaintiff class was persons

infected with hepatitis C from the taking of blood or blood products during the same time period. In both proceedings, there was also a family class consisting of family members of persons in the other main classes. The defendants in the two actions were the Canadian Red Cross Society, the Queen in Right of Ontario, and the Attorney General of Canada. The plaintiff classes were national in scope. As such, the other provincial and territorial governments except Quebec and British Columbia also moved to be included in the two actions as defendants, but only if the settlement was approved. The claims in these actions were founded on the decision by the CRCS and its government's overseers not to conduct testing of blood donations to the Canadian blood supply after a test for the hepatitis C virus became available and had been put into widespread use in the U.S. On this motion, the parties presented a comprehensive settlement package to the court. It consisted of a settlement agreement, a funding agreement, and plans for distribution of the settlement funds in the two actions. However, there were over 80 written objections to the settlement proposal from individuals afflicted with hepatitis C. The objections related to a number of issues, specifically, the adequacy of the total value of the settlement amount, the extent of compensation provided through the settlement, the sufficiency of the settlement fund to provide the proposed compensation, the reversion of any surplus, and the costs of administering the plans.

HELD: Motion dismissed. The settlement proposal was within the range of reasonableness having regard to the risks inherent in carrying the matter through to trial. The level of benefits ascribed within the settlement were acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighed any deficiencies which might have existed in the levels of benefits. However, there were two areas which required modification in order for the settlement to receive court approval. The first area related to access to the fund by opt-out claimants, specifically, the benefits provided from the fund for an opt-out claimant could not exceed those available to a similarly injured class member who remained in the class. The second area related to the surplus provisions of the settlement proposal.

Statutes, Regulations and Rules Cited:

Class Proceedings Act 1992, S.O. 1992, c. 6, ss. 5(2), 8(3), 29(2).

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Counsel:

Harvey Strosberg, Q.C., Heather Rumble Peterson and Patricia Speight, for the plaintiffs.
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Michèle Smith and R.F. Horak, for Her Majesty the Queen in Right of Ontario.
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Wilson McTavish, Q.C., Linda Waxman and Marian Jacko, for the Office of the Children's Lawyer.
Laurie Redden, for the Office of the Public Guardian and Trustee.
Beth Symes, for the Thalassemia Foundation of Canada, Friend of the Court.
William P. Dermody, for the Intervenors, Hubert Fullarton and Tracey Goegan.
L. Craig Brown, for the Hepatitis C Society of Canada, Friend of the Court.
Pierre R. Lavigne, for Dominique Honhon, Friend of the Court.
Bruce Lemer, for Anita Endean, Friend of the Court.
Elizabeth M. Stewart, for the Provinces and Territories other than British Columbia and Quebec.
Bonnie A. Tough and David Robins, for the plaintiffs.
Janice E. Blackburn and James P. Thomson, for the Canadian Hemophilia Society, Friend of the Court.

WINKLER J.:--

Nature of the Motion

1 This is a motion for approval of a settlement in two companion class proceedings commenced under the Class Proceedings Act 1992, S.O. 1992, c. 6, the "Transfused Action" and the "Hemophiliac Action", brought on behalf of persons infected by Hepatitis-C from the Canadian blood supply. The Transfused Action was certified as a class proceeding by order of this court on June 25, 1998, as later amended on May 11, 1999. On the latter date, an order was also issued certifying the Hemophiliac Action. There are concurrent class proceedings in respect of the same issues before the courts in Quebec and British Columbia. The Ontario proceedings apply to all persons in Canada who are within the class definition with the exception of any person who is included in the proceedings in Quebec and British Columbia. The motion before this court concerns a Pan-Canadian agreement intended to effect a national settlement, thus bringing to an end this aspect to the blood tragedy. Settlement approval motions similar to the instant proceeding have been contemporaneously heard by courts in Quebec and British Columbia with a view to bringing finality to the court proceedings across the country.

The Parties

2 The plaintiff class in the Transfused Action are persons who were infected with Hepatitis C from blood transfusions between January 1, 1986 to July 1, 1990. The plaintiff class in the Hemophiliac Action are persons infected with Hepatitis C from the taking of blood or blood products during the same time period.

3 The defendants in the Ontario actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario, and the Attorney General of Canada. The Ontario classes are national in scope. Therefore, the other Provincial and Territorial Governments of Canada, with the exception of Quebec and British Columbia, have moved to be included in the Ontario actions as defendants but only if the settlement is approved.

4 The court has granted intervenor status to a number of individuals, organizations and public bodies, namely, Hubert Fullarton and Tracy Goegan, the Canadian Hemophilia Society, the Thalassemia Foundation of Canada, the Hepatitis C Society of Canada, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee of Ontario.

5 Pursuant to an order of this court, Pricewaterhouse Coopers received and presented to the court over 80 written objections to the settlement from individuals afflicted with Hepatitis-C. In addition, 11 of the objectors appeared at the hearing of the motion to proffer evidence as to their reasons for objecting to the settlement.

6 The approval of the settlement before the court is supported by class counsel and the Ontario and Federal Crown defendants. In addition to these parties, the Provincial and Territorial governments who seek to be included if the settlement is approved, and the intervenors, the Canadian Hemophilia Society, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee made submissions in support of approval of the settlement. The Canadian Red Cross Society ("CRCS") appeared, but did not participate, all actions against it having been stayed by order of Mr. Justice Blair dated July 28, 1999, pursuant to a proceeding under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36. The other intervenors and individual objectors voiced concerns about the settlement and variously requested that the court either reject the settlement or vary some of its terms in the interest of fairness.

Background

7 Both actions were commenced as a result of the contamination of the Canadian blood supply with infectious viruses during the 1980s. The background facts are set out in the pleadings and the numerous affidavits forming the record on this motion. The following is a brief summary.

8 The national blood supply system in Canada was developed during World War II by the CRCS. Following WWII, the CRCS was asked to carry on with the operation of this national system, and did so as part of its voluntary activities without significant financial support from any government. As a result of its experience and stewardship of system, the CRCS had a virtual monopoly on the collection and distribution of blood and blood products in Canada.

9 Over time the demand for blood grew and Canada turned to a universal health care system. Because of these developments, the CRCS requested financial assistance from the provincial and territorial governments. The governments, in turn, demanded greater oversight over expenditures. This led to the formation of the Canadian Blood Committee which was composed of representatives of the federal, provincial and territorial governments. The CBC became operational in the summer of 1982. Other than this overseer committee, there was no direct governmental regulation of the blood supply in Canada.

10 The 1970s and 80s were characterized medically by a number of viral infection related problems stemming from contaminated blood supplies. These included hepatitis and AIDS. The defined classes in these two class actions, however, are circumscribed by the time period beginning January 1, 1986 and ending July 1, 1990. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The viral infection at the center of these proceedings is now known as Hepatitis C.

11 Hepatitis is an inflammation of the liver that can be caused by various infectious agents, including contaminated blood and blood products. The inflammation consists of certain types of cells that infiltrate the tissue and produce by-products called cytokines or, alternatively, produce antibodies which damage liver cells and ultimately cause them to die.

12 One method of transmission of hepatitis is through blood transfusions. Indeed, it was common to contract hepatitis through blood transfusions. However, due to the limited knowledge of the effects of contracting hepatitis, the risk was considered acceptable in view of the alternative of no transfusion which would be, in many cases, death.

13 As knowledge of the disease evolved, it was discovered that there were different strains of hepatitis. The strains identified as Hepatitis A ("HAV") and Hepatitis B ("HBV") were known to the medical community for some time. HAV is spread through the oral-fecal route and is rarely fatal. HBV is blood-borne and may also be sexually transmitted. It can produce violent illness for a prolonged period in its acute phase and may result in death. However, most people infected with HBV eliminate the virus from their system, although they continue to produce antibodies for the rest of their lives.

14 During the late 1960s, an antigen associated with HBV was identified. This discovery led to the development of a test to identify donated blood contaminated with HBV. In 1972, the CRCS implemented this test to screen blood donations. It soon became apparent that post-transfusion hepatitis continued to occur, although much less frequently. In 1974, the existence of a third form of viral hepatitis, later referred to as Non-A Non-B Hepatitis ("NANBH") was postulated.

15 This third viral form of hepatitis became identified as Hepatitis C ("HCV") in 1988. Its particular features are as follows:

(a) transmission through the blood supply if HCV infected donors are unaware of their

infected condition and if there is no, or no effective, donor screening;
(b) an incubation period of 15 to 150 days;
(c) a long latency period during which a person infected may transmit the virus to others through blood and blood products, or sexually, or from mother to fetus; and
(d) no known cure.

16 The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after a "surrogate" test for HCV became available and had been put into widespread use in the United States.

17 In a surrogate test a donor blood sample is tested for the presence of substances which are associated with the disease. The surrogate test is an indirect method of identifying in a blood sample the likelihood of an infection that cannot be identified directly because no specific test exists. During the class period, there were two surrogate tests capable of being used to identify the blood donors suspected of being infected with HCV, namely, a test to measure the ALT enzyme in a donor's blood and a test to detect the anti-HBc, a marker of HBV, in the blood.

18 The ALT enzyme test was useful because it highlights inflammation of the liver. There is an increased level of ALT enzymes in the blood when a liver is inflamed. The test is not specific for any one liver disease but rather indicates inflammation from any cause. Elevated ALT enzymes are a marker of liver dysfunction which is often associated with HCV.

19 The anti-HBc test detects exposure to HBV and is relevant to the detection of HCV because of the assumption that a person exposed to HBV is more likely than normal to have been exposed to HCV, since both viruses are blood-borne and because the populations with higher rates of seroprevalence were believed to be similar.

20 The surrogate tests were subjected to various studies in the United States. Among other aspects, the studies analyzed the efficacy of each test in preventing NANBH post-transfusion infection and the extent to which the rejection of blood donations would be increased. The early results of the studies did not persuade the agencies responsible for blood banks in the U.S. to implement surrogate testing as a matter of course. However, certain individuals, including Dr. Harvey Alter, a leading U.S. expert on HCV, began a campaign to have the U.S. blood agencies change their policies. In consequence, in April 1986 the largest U.S. blood agency decided that both surrogate tests should be implemented, and further, that the use of the tests would become a requirement of the agency's standard accreditation program in the future. This effectively made surrogate testing the national standard in the U.S. and by August 1, 1986, all or virtually all volunteer blood banks in the U.S. screened blood donors by using the ALT and anti-HBc tests.

21 This course was not followed in Canada. Although there was some debate amongst the doctors involved with the CRCS, surrogate testing was not adopted. Rather, in 1984 a meeting was held at the CRCS during which a multi-centre study was proposed. The purpose of the study was to determine the incidence of NANBH in Canada. The CRCS blood centres proposed to take part in the study were those in Toronto, Montreal, Ottawa, Edmonton and Vancouver.

22 Prior to the 1984 meeting however, Dr. Victor Feinman of Mount Sinai Hospital had already begun a study to determine the incidence of NANBH in those who had received blood transfusions. This study had a significant limitation in that it did not measure the effectiveness of surrogate testing. Although the limitation was known to the CRCS, the medical directors agreed at their meeting on March 29-30, 1984 to review Dr. Feinman's research to determine whether the proposed CRCS multi-centre study was still required. Ultimately, the CRCS did not conduct the multi-centre study.

23 The CRCS was aware of the American decision to implement surrogate testing in 1986 but opted instead to await a full assessment of the results of the Dr. Feinman study and the impact of testing for the Human-Immunodeficiency Virus ("HIV") and "self-designation" as possible surrogates to screen for NANBH.

24 This decision was criticized by Dr. Alter. In an article published in the Medical Post in February 1988, Dr. Alter was quoted as stating that:

> "while the use of surrogate markers is far from ideal, the lack of any specific test to identify [NANBH], coupled with the serious chronic consequences of the disease, makes the need for these surrogate tests essential."

25 The CRCS never implemented surrogate testing. In late 1988, HCV was isolated. The Chiron Corporation developed a test for anti-HCV for use by blood banks. In March 1990, the CRCS blood centres began implementing the anti-HCV test, and by June 30, 1990, all centres had implemented the test. Hence the class definitions stipulated in the two certification orders before this court, covers the period between January 1, 1986 and July 1, 1990, which corresponds to the interval between the widespread use of surrogate testing in the U.S. and the universal adoption of the Chiron HCV test in Canada. The classes are described fully below.

The Claims

26 It is alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidence of HCV infection from contaminated blood would have been reduced by as much as 75% during the class period. Consequently, they bring the actions on behalf of classes described as the Ontario Transfused Class and the Ontario Hemophiliac Class. The plaintiffs assert claims based in negligence, breach of fiduciary duty and strict liability in tort as against all of the defendants.

The Classes

27 The Ontario Transfused Class is described as:

(a) all persons who received blood collected by the CRCS contaminated with HCV during the Class Period and who are or were infected for the first time with HCV and who are:

(i) presently or formerly resident in Ontario and receive blood in Ontario and who are or were infected with post-transfusion HCV;
(ii) resident in Ontario and received blood in any other Province or Territory of Canada other than Quebec and who are or were infected with post-transfusion HCV;
(iii) resident elsewhere in Canada and received blood in Canada, other than in the Provinces of British Columbia and Quebec, and who are or were infected with post-transfusion HCV;
(iv) resident outside Canada and received blood in any Province or Territory of Canada, other than in the Province of Quebec, and who are or were infected with post-transfusion HCV; and
(v) resident anywhere and received blood in Canada and who are or were infected with post-transfusion HCV and who are not included as class members in the British Columbia Transfused Class Action or the Quebec Transfused Class

Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to in subparagraph (a) or (b) who is or was infected with HCV by such person.

28 The Ontario Hemophiliac Class is described as:

(a) all persons who have or, had a congenital clotting factor defect or deficiency, including a defect or deficiency in Factors V, VII, VIII, IX, XI, XII, XIII or von Willebrand factor, and who received or took Blood (as defined in Section 1.01 of the Hemophiliac HCV Plan) during the Class Period and who are:

(i) presently or formerly a resident in Ontario and received or took Blood in Ontario and who are or were infected with HCV;
(ii) resident in Ontario and received or took Blood in any other Province or Territory of Canada other than Quebec and who are or were infected with HCV;
(iii) resident elsewhere in Canada and received or took Blood in Canada other than in the Provinces of British Columbia and Quebec and who are or were infected with HCV;
(iv) resident outside Canada and received or took Blood in any Province or Territory in Canada, other than in the Province of Quebec, and who are or were infected with HCV; and
(v) resident anywhere and received or took Blood in Canada and who are not included as class members in the British Columbia Hemophiliac Class Action or the Quebec Hemophiliac Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to subparagraph (a) or (b) who is or was infected with HCV by such person.

29 In addition in each of the actions, there is a "Family" class described, in the Ontario Transfused Class, as follows:

(a) the Spouse, child, grandchild, parent, grandparent or sibling of an Ontario Transfused Class Member;
(b) the spouse of a child, grandchild, parent or grandparent of an Ontario Transfused Class Member;
(c) a former Spouse of an Ontario Transfused Class Member;
(d) a child or other lineal descendant of a grandchild of an Ontario Transfused Class Member;
(e) a person of the opposite sex to an Ontario Transfused Class Member who cohabitated for a period of at least one year with that Class Member immediately before his or her death;
(f) a person of the opposite sex to an Ontario Transfused Class Member who was cohabitating with that Class Member at the date of his or her death and to whom that

Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and

(g) any other person to whom an Ontario Transfused Class Member was providing support for a period of at least three years immediately prior to his or her death.

There is a similarly described Family Class in the Hemophiliac Action.

The Proposed Settlement

30 The parties have presented a comprehensive package to the court. Not only does it pertain to these actions, but it is also intended to be a Pan-Canadian agreement to settle the simultaneous class proceedings before the courts in Quebec and British Columbia. The settlement will not become final and binding until it is approved by courts in all three provinces. It consists of a Settlement Agreement, a Funding Agreement and Plans for distribution of the settlement funds in the Transfused Action and the Hemophiliac Action.

31 The Settlement Agreement creates the following two Plans:

(1) the Transfused HCV Plan to compensate persons who are or were infected with HCV through a blood transfusion received in Canada in the Class Period, their secondarily-infected Spouses and children and their other family members; and

(2) the Hemophiliac HCV Plan to compensate hemophiliacs who received or took blood or blood products in Canada in the Class Period and who are or were infected with HCV, their secondarily-infected Spouses and children and their other family members.

32 To fund the Agreement, the federal, provincial and territorial governments have promised to pay the settlement amount of $1,118,000,000 plus interest accruing from April 1, 1998. This will total approximately $1,207,000,000 as of September 30, 1999.

33 The Funding Agreement contemplates the creation of a Trust Fund on the following basis:

(i) a payment by the Federal Government to the Trust Fund, on the date when the last judgment or order approving the settlement of the Class Actions becomes final, of 8/11ths of the settlement amount, being the sum of approximately $877,818,181, subject to adjustments plus interest accruing after September 30, 1999 to the date of payment; and

(ii) a promise by each Provincial and Territorial Government to pay a portion of its share of the 3/11ths of the unpaid balance of the settlement amount as may be requested from time to time until the outstanding unpaid balance of the settlement amount together with interest accruing has been paid in full.

34 The Governments have agreed that no income taxes will be payable on the income earned by the Trust, thereby adding, according to the calculations submitted to the court, a present value of about $357,000,000 to the settlement amount.

35 The Agreement provides that the following claims and expenses will be paid from the Trust Fund:

(a) persons who qualify in accordance with the provisions of the Transfused HCV Plan;

(b) persons who qualify in accordance with the provisions of the Hemophiliac HCV Plan;

(c) spouses and children secondarily-infected with HIV to a maximum of 240 who

qualify pursuant to the Program established by the Governments (which is not subject to Court approval);

(d) final judgments or Court approved settlements payable by any FPT Government to a Class Member or Family Class Member who opts out of one of the Class Actions or is not bound by the provisions of the Agreement or a person who claims over or brings a third-party claim in respect of the Class Member's receiving or taking of blood or blood products in Canada in the Class Period and his or her infection with HCV, plus one-third of Court-approved defence costs;

(e) subject to the Courts' approval, the costs of administering the Plans, including the costs of the persons hereafter enumerated to be appointed to perform various functions under the Agreement;

(f) subject to the Courts' approval, the costs of administering the HIV Program, which Program administration costs, in the aggregate, may not exceed $2,000,000; and

(g) subject to Court approval, fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel.

Class Members Surviving as of January 1, 1999

36 Other than the payments to the HIV sufferers, which I will deal with in greater detail below, the plans contemplate that compensation to the class members who were alive as of January 1, 1999, will be paid according to the severity of the medical condition of each class member. All class members who qualify as HCV infected persons are entitled to a fixed payment as compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical condition at the time of qualification under the Plan. However, the class member will be subsequently entitled to additional compensation if and when his or her medical condition deteriorates to a medical condition described at a higher compensation level. This compensation ranges from a single payment of $10,000, for a person who has cleared the disease and only carries the HCV antibody, to payments totaling $225,000 for a person who has decompensation of the liver or a similar medical condition.

37 The compensation ranges are described in the Agreement as "Levels". In addition to the payments for loss of amenities, class members with conditions described as being at compensation Level 3 or a higher compensation Level (4 or above), and whose HCV caused loss of income or inability to perform his or her household duties, will be entitled to compensation for loss of income or loss of services in the home.

38 The levels, and attendant compensation, for class members are described as follows:

(i) Level 1

Qualification	Compensation
A blood test demonstrates that the HCV antibody is present in the blood of a class member.	A lump sum payment of $10,000 plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(ii) Level 2

Qualification	Compensation
A polymerase chain reaction test (PCR) demonstrates that HCV is present in the blood of a class member.	Cumulative compensation of $30,000 which comprises the the $10,000 payment at level 1, plus a payment of $15,000 immediately and another $5000 when the court determines that the Fund is sufficient to do so, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iii) Level 3

Qualification	Compensation
If a class member develops non-bridging fibrosis, or receives compensable drug therapy (i.e. Interferon or Ribavirin), or meets a protocol for HCV compensable treatment regardless of whether the treatment is taken, then the class member qualifies for Level 3 benefits.	Option 1 - $60,000 comprised of the level 1 and 2 payments plus an additional $30,000 Option 2 - $30,000 from the Level 1 and 2 benefits, and if the additional $30,000 from Option 1 is waived, compensation for loss of income or loss of income or loss of services in the home, subject to a threshold qualification.

In addition, at this level, the class member is entitled to an additional $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(iv) Level 4

Qualification	Compensation
If a class member develops bridging fibrosis, he or she qualifies as a Level 4 claimant	There is no further fixed payment beyond that of Level 3 at this level. In addition to those previously defined benefits, the claimant is entitled to compensation for loss of income or

	loss of services in the home, $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(v) Level 5

Qualification	Compensation
A class member who develops (a) cirrhosis; (b) unresponsive porphyria cutanea tarda which is causing significant disfigurement and disability; (c) unresponsive thrombocytopenia (low platelets) which result in certain other conditions; or (d) glomerulonephritis not requiring dialysis, he or she qualifies as a Level 5 claimant.	$125,000 which consists of the prior $60,000, if the claimant elected Option 1 at Level 3, plus an additional $65,0000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(vi) Level 6

Qualification	Compensation
If a class member receives a liver transplant, or develops: (a) decompensation of the liver; (b) hepatocellular cancer; (c) B-cell lymphoma; (d) symptomatic mixed cryoglobullinemia; (e) glomerulonephritis requiring dialysis; or (f) renal failure, he or she qualifies as a Level 6 claimant.	$225,000 which consists of the $125,000 available at at the prior levels plus an additional $100,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses. The claimant is also entitled to reiumbursement for costs of care up to $50,000 per year.

39 There are some significant "holdbacks" of compensation at certain levels. As set out in the table above, a claimant who is entitled to the $20,000 compensation payment at level 2 will initially be paid $15,000 while $5,000 will be held back in the Fund. If satisfied that there is sufficient money in the Fund, the Courts may then declare that the holdback shall be removed in accordance with Section 10.01 (1)(i) of the Agreement and Section 7.03 of the Plans. Claimants with monies held back will then

receive the holdback amount with interest at the prime rate from the date they first became entitled to the payment at Level 2. In addition, any claimant that qualifies for income replacement at Level 4 or higher will be subjected to a holdback of 30% of the compensation amount. This holdback may be removed, and the compensation restored, on the same terms as the Level 2 payment holdback.

40 There is a further limitation with respect to income, namely, that the maximum amount subject to replacement has been set at $75,000 annually. Again this limitation is subject to the court's review. The court may increase the limit on income, after the holdbacks have been removed, and the held benefits restored, if the Fund contains sufficient assets to do so.

41 Payment of loss of income is made on a net basis after deductions for income tax that would have been payable on earned income and after deduction of all collateral benefits received by the Class Member. Loss of income payments cease upon a Class Member reaching age 65. A claim for the loss of services in the home may be made for the lifetime of the Class Member.

Class Members Dying Before January 1, 1999

42 If a Class Member who died before January 1, 1999, would have qualified as a HCV infected person but for the death, and if his or her death was caused by HCV, compensation will be paid on the following terms:

(a) the estate will be entitled to receive reimbursement for uninsured funeral expenses to a maximum of $5,000 and a fixed payment of $50,000, while approved family members will be entitled to compensation for loss of the deceased's guidance, care and companionship on the scale set out in the chart at paragraph 82 below and approved dependants may be entitled to compensation for their loss of support from the deceased or for the loss of the deceased's services in the home ("Option 1"); or

(b) at the joint election of the estate and the approved family members and dependants of the deceased, the estate will be entitled to reimbursement for uninsured funeral expenses to a maximum of $5,000, and the estate and the approved family members and dependants will be jointly entitled to compensation of $120,000 in full settlement of all of their claims ("Option 2").

43 Under the Plans when a deceased HCV infected person's death is caused by HCV, the approved dependants may be entitled to claim for loss of support until such time as the deceased would have reached age 65 but for his death.

44 Payments for loss of support are made on a net basis after deduction of 30% for the personal living expenses of the deceased and after deduction of any pension benefits from CPP received by the dependants.

45 The same or similar holdbacks or limits will initially be imposed on the claim by dependants for loss of support under the Plans as are imposed on a loss of income claim. The $75,000 cap on pre-claim gross income will be applied in the calculation of support and only 70% of the annual loss of support will be paid. If the courts determine that the Trust Fund is sufficient and vary or remove the holdbacks or limits, the dependants will receive the holdbacks, or the portion the courts direct, with interest from the time when loss of support was calculated subject to the limit.

46 Failing agreement among the approved dependants on the allocation of loss of support between them, the Administrator will allocate loss of support based on the extent of support received by each of the dependants prior to the death of the HCV infected person.

Class Members Cross-Infected with HIV.

47 Notwithstanding any of the provisions of the Hemophiliac HCV Plan, a primarily infected hemophiliac who is also infected with HIV may elect to be paid $50,000 in full satisfaction of all of his or her claims and those of his or her family members and dependants.

48 Persons infected with HCV and secondarily-infected with HIV who qualify under a Plan (or, where the person is deceased, the estate and his or her approved family members and dependants) may not receive compensation under the Plan until entitlement exceeds the $240,000 entitlement under the Program after which they will be entitled to receive any compensation payable under the Plan in excess of $240,000.

49 Under the Hemophiliac HCV Plan, the estate, family members and dependants of a primarily-infected hemophiliac who was cross-infected with HIV and who died before January 1, 1999 may elect to receive a payment of $72,000 in full satisfaction of their claims.

The Family Class Claimants

50 Each approved family class member of a qualified HCV infected person whose death was caused by HCV is entitled to be paid the amount set out below for loss of the deceased's guidance, care and companionship:

Relationship	Compensation
Spouse	$25,000
Child under 21 at time of death of class member	$15,000
Child over 21 at time of death of class member	$5,000
Parent or sibling	$5,000
Grandparent or Grandchild	$500

51 If a loss of support claim is not payable in respect of the death of a HCV infected person whose death was caused by, his or her infection with HCV, but the approved dependants resided with that person at the time of the death, then these dependants are entitled to be compensated for the loss of any, services that the HCV infected person provided in the home at the rate of $12 per hour to a maximum of

20 hours per week.

52 The Agreement and/or the Plans also provide that:

(a) all compensation payments to claimants who live in Canada will be tax free;
(b) compensation payments will be indexed annually to protect against inflation;
(c) compensation payments other than payments for loss of income will not affect social benefits currently being received by claimants;
(d) life insurance payments received by or on behalf of claimants will not be taken into account for any purposes whatsoever under the Plans; and
(e) no subrogation payments will be paid directly or indirectly.

The Funding Calculations

53 Typically in settlements in personal injury cases, where payments are to be made on a periodic basis over an extended period of time, lump sum amounts are set aside to fund the extended liabilities. The amount set aside is based on a calculation which determines the "present value" of the liability. The present value is the amount needed immediately to produce payments in the agreed value over the agreed time. This calculation requires factoring in the effects of inflation, the return on the investment of the lump sum amount and any income or other taxes which might have to be paid on the award or the income it generates. Dealing with this issue in a single victim case may be relatively straightforward. Making an accurate determination in a class proceeding with a multitude of claimants suffering a broad range of damages is a complex matter.

54 Class counsel retained the actuarial firm of Eckler Partners Ltd. to calculate the present value of the liabilities for the benefits set out in the settlement. The calculations performed by Eckler were based on a natural history model of HCV constructed by the Canadian Association for the Study of the Liver ("CASL") at the request of the parties. As stated in the Eckler report at p. 3, "the results from the [CASL] study form the basis of our assumptions regarding the development of the various medical outcomes." However, the Eckler report also notes that in instances where the study was lacking in information, certain extensions to some of the probabilities were supplied by Dr. Murray Krahn who led the study. In certain other situations, additional or alternative assumptions were provided by class counsel.

55 The class in the Transfused Action is comprised of those persons who received blood transfusions during the class period and are either still surviving or have died from a HCV related cause. The CASL study indicates that the probable number of persons infected with HCV through blood transfusion in the class period, the "cohort" as it is referred to in the study, is 15,707 persons. The study also estimates the rates of survival of each infected person. From these estimates, Eckler projects that the cohort as of January 1, 1999 is 8,104 persons. Of those who have died in the intervening time, 76 are projected to be HCV related deaths and thus eligible for the death benefits under the settlement.

56 In the case of the Hemophiliac class, the added factor of cross-infection with HIV, and the provisions in the plan dealing with this factor, require some additional considerations. Eckler was asked to make the following assumptions based primarily on the evidence of Dr. Irwin Walker:

(a) the Hemophiliac cohort size is approximately 1645 persons
(b) 15 singularly infected and 340 co-infected members of this cohort have died prior to January 1, 1999; the 15 singularly infected and 15 of those co-infected will establish HCV as the cause of death and claim under the regular death provisions (but there is no $120,000 option in this plan); the remaining 325 co-infected will take the $72,000

option.

(c) a further 300 co-infected members are alive at January 1, 1999; of these, 80%, i.e. 240, will take the $50,000 option;

(d) 990 singularly infected hemophiliacs are alive at January 1, 1999

(e) the remaining 60 co-infected and the 990 singularly infected hemophiliacs will claim under the regular provisions and should be modeled in the same way as the transfused persons, i.e. apply the same age and sex profiles, and the same medical, mortality and other assumptions as for the transfused group, except that the 60 coinfected claimants will not have any losses in respect of income.

57 Because of the structure of this agreement, Eckler was not required to consider the impact of income or other taxes on the investment returns available from the Fund. With respect to the rate of growth of the Fund, Eckler states at p. 10 that:

> A precise present value calculation would require a formula incorporating the gross rate of interest and the rate of inflation as separate parameters. However, virtually the same result will flow from a simpler formula where the future payments are discounted at a net rate equal to the excess of the gross rate of interest over the assumed rate of inflation. Eckler calculates the annual rate of growth of the Fund will be 3.4% per year on this basis. This is referred to as the "net discount rate".

58 There is one other calculation that is worthy of particular note. In determining the requirements to fund the income replacement benefits set out in the settlement, Eckler used the average industrial aggregate earnings rate in Canada estimated for 1999. From this figure, income taxes and other ordinary deductions were made to arrive at a "pre-claim net income". Then an assumption is made that the class members claiming income compensation will have other earnings post-claim that will average 40% of the pre-claim amount. The 60% remaining loss, in dollars expressed as $14,500, multiplied by the number of expected claimants, is the amount for which funding is required. Eckler points out candidly at p. 20 that:

> [in regard to the assumed average of Post-claim Net Income] ... we should bring to your attention that without any real choice, the foregoing assumed level of 40% was still based to a large extent on anecdotal input and our intuitive judgement on this matter rather than on rigourous scientific studies which are simply not available at this time. There are other assumptions and estimates which will be dealt with in greater detail below.

59 The Eckler conclusion is that if the settlement benefits, including holdbacks, and the other liabilities were to be paid out of the Fund, there is a present value deficit of $58,533,000. Prior to the payment of holdbacks, the Fund would have a surplus of $34,173,000.

The Thalassemia Victims

60 Prior to analyzing the settlement, I turn to the concerns advanced by The Thalassemia Foundation of Canada. The organization raises the objection that the plan contains a fundamental unfairness as it relates to claims requirements for members of the class who suffer from Thalassemia.

61 Thalassemia, also known as Mediterranean Anemia or Cooley's Anemia, is an inherited form of anemia in which affected individuals are unable to make normal hemoglobin, the oxygen carrying protein of the red blood cell. Mutations of the hemoglobin genes are inherited. Persons with a thalassemia mutation in one gene are known as carriers or are said to have thalassemia minor. The

severe form of thalassemia, thalassemia major, occurs when a child inherits two mutated genes, one from each parent. Children born with thalassemia major usually develop the symptoms of severe anemia within the first year of life. Lacking the ability to produce normal adult hemoglobin, children with thalassemia major are chronically fatigued; they fail to thrive; sexual maturation is delayed and they do not grow normally. Prolonged anemia causes bone deformities and eventually will lead to death, usually by their fifth birthday.

62 The only treatment to combat thalassemia major is regular transfusions of red blood cells. Persons with thalassemia major receive 15 cubic centimeters of washed red blood cells per kilogram of weight every 21 to 42 days for their lifetime. That is, a thalassemia major person weighing 60 kilograms (132 pounds) may receive 900 cubic centimeters of washed red blood cells each and every transfusion. Such a transfusion corresponds to four units of blood. Persons with thalassemia major have not been treated with pooled blood. Therefore, in each transfusion a thalassemia major person would receive blood from four different donors and over the course of a year would receive 70 units of blood from potentially 70 different donors. Over the course of the Class Period, a class member with thalassemia major might have received 315 units of blood from potentially 315 different donors.

63 Over the past three decades, advances in scientific research have allowed persons with thalassemia major in Canada to live relatively normal lives. Life expectancy has been extended beyond the fourth decade of life, often with minimal physical symptoms. In Canada approximately 300 persons live with thalassemia major.

64 Of the 147 transfused dependent thalassemia major patients currently being treated in the Haemoglobinopathy Program at the Hospital for Sick Children and Toronto General Hospital, 48 have tested positive using HCV antibody tests. Fifty-one percent of the population at TGH have tested positive; only 14% of the population of HSC have tested positive. The youngest of these persons was born in 1988; 9 of them are 13 years of age or older but less than 18 years of age; the balance are adults. Nine thalassemia major patients in the Haemoglobinopathy Program have died since HCV testing was available in 1991. Seven of these persons were HCV positive. The Foundation estimates that there are approximately 100 thalassemia major patients across Canada who are HCV positive.

65 The unfairness pointed to by the Thalassemia Foundation is that class members suffering from thalassemia are included in the Transfused Class, and therefore must follow the procedures for that class in establishing entitlement. It is contended that this is fundamentally unfair to thalassemia victims because of the number of potential donors from whom each would have received blood or blood products. It is said that by analogy to the hemophiliac class, and the lesser burden of proof placed on members of that class, a similar accommodation is justified. I agree.

66 This is a situation where it is appropriate to create a sub-class of thalassemia victims from the Transfused Class. Sub-classes are provided for in s. 5(2) of the CPA and the power to amend the certification order is contained in s. 8(3) of the Act. The settlement should be amended to apply the entitlement provisions in the Hemophiliac Plan mutatis mutandis to the Thalassemia sub-class.

Law and Analysis

67 Section 29(2) of the CPA provides that:

> A settlement of a class proceeding is not binding unless approved by the court.

68 While the approval of the court is required to effect a settlement, there is no explicit provision in the CPA dealing with criteria to be applied by the court on a motion for approval. The test to be applied was, however, stated by Sharpe J. in Dabbs v. Sun Life Assurance, [1998] O.J. No. 1598 (Gen. Div.)

(Dabbs No. 1) at para. 9:

> ... the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

69 In the context of a class proceeding, this requires the court to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular member. As this court stated in Ontario New Home Warranty Program v. Chevron Chemical Co., [1999] O.J. No. 2245 (Sup. Ct.) at para. 89:

> The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

70 Sharpe J. stated in Dabbs v. Sun Life Assurance (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd 41 O.R. (3d) 97 (C.A.). leave to appeal to S.C.C. dismissed October 22, 1998, (Dabbs No. 2) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

71 Generally. in determining whether a settlement is "fair, reasonable and in the best interests of the class as a whole", courts in Ontario and British Columbia have reviewed proposed class proceeding settlements on the basis of the following factors:

1. Likelihood of recovery, or likelihood of success;
2. Amount and nature of discovery evidence;
3. Settlement terms and conditions;
4. Recommendation and experience of counsel;
5. Future expense and likely duration of litigation;
6. Recommendation of neutral parties if any;
7. Number of objectors and nature of objections; and
8. The presence of good faith and the absence of collusion.

See Dabbs No. 1 at para. 13, Haney Iron Works Ltd v. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565 (B.C.S.C.) at 571, See also Conte, Newberg on Class Actions, (3rd ed) (West Publishing) at para. 11.43.

72 In addition to the foregoing, it seems to me that there are two other factors which might be considered in the settlement approval process: i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and ii) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation. These two additional factors go hand-in-glove and provide the court with insight into whether the bargaining was interest-based, that is reflective of the needs of the class members, and whether the parties were bargaining at equal or comparable strength. A reviewing court, in exercising its supervisory jurisdiction is, in this way, assisted in appreciating fully whether the concerns of the class have been adequately addressed by the settlement.

73 However, the settlement approval exercise is not merely a mechanical seriatim application of each

of the factors listed above. These factors are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process.

74 Moreover, the court must take care to subject the settlement of a class proceeding to the proper level of scrutiny. As Sharpe J. stated in Dabbs No. 2 at 439-440:

> A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.

75 The preceding admonition is especially apt in the present circumstances. Class counsel described the agreement before the court as "the largest settlement in a personal injury action in Canadian history." The settlement is Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years. It cannot be seriously contended that the tragedy at the core of these actions does not have a present and lasting impact on the class members and their families. While the resolution of the litigation is a noteworthy aim, an improvident settlement would have repercussions well into the future.

76 Consequently, this is a case where the proposed settlement must receive the highest degree of court scrutiny. As stated in the Manual for Complex Litigation, 3rd Ed. (Federal Judicial Centre: West Publishing, 1995) at 238:

> Although settlement is favoured, court review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties - even those with the best intentions - to give insufficient weight to the interests of at least some class members. The court's responsibility is particularly weighty when reviewing a settlement involving a non-opt-out class or future claimants. (Emphasis added.)

77 The court has been assisted in scrutinizing the proposed settlement by the submissions of several intervenors and objectors. I note that some of the submissions, as acknowledged by counsel for the objectors, raised social and political concerns about the settlement. Without in any way detracting from the importance of these objections, it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

78 However, although there may have been social or political undertones to many of the objections, legal issues raised by those objections, either directly or peripherally, are properly considered by the court in reviewing the settlement. Counsel for the objectors described the legal issues raised, in broad terms, as objections to:

(a) the adequacy of the total value of the settlement amount;
(b) the extent of compensation provided through the settlement;
(c) the sufficiency of the settlement Fund to provide the proposed compensation;
(d) the reversion of any surplus;
(e) the costs of administering the Plans; and
(f) the claims process applicable to Thalassemia victims.

I have dealt with the objection regarding the Thalassemia victims above. The balance of these objections will be addressed in the reasons which follow.

79 It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscient wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The CPA mandates that class members retain, for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the, class.

80 This settlement must be reviewed on an objective standard, taking into account the need to provide compensation for all of the class members while at the same time recognizing the inherent difficulty in crafting a universally satisfactory settlement for a disparate group. In other words, the question is does the settlement provide a reasonable alternative for those Class Members who do not wish to proceed to trial?

81 Counsel for the class and the Crown defendants urged this court to consider the question on the basis of each class member's likely recovery in individual personal injury tort litigation. They contend that the benefits provided at each level are similar to the awards class members who are suffering physical manifestations of HCV infection approximating those set out in the different levels of the structure of this settlement would receive in individual litigation. In my view, this approach is flawed in the present case.

82 An award of damages in personal injury tort litigation is idiosyncratic and dependent on the individual plaintiff before the court. 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.

83 The evidence of Dr. Frank Anderson, a leading practitioner working with HCV patients in Vancouver, describes in detail the uncertain prognosis that accompanies HCV and the often debilitating, but unevenly distributed, symptomology that can occur in connection with infection. He states:

> Once infected with HCV, a person will either clear HCV after an acute stage of develop chronic HCV infection. At present, the medical literature establishes that approximately 20-25% of all persons infected clear HCV within approximately one year of infection. Those persons will still test positive for the antibody and will

probably do so for the rest of their lives, but will not test positive on a PCR test, nor will they experience any progressive liver disease due to HCV.

Persons who do not clear the virus after the acute stage of the illness have chronic HCV. They may or may not develop progressive liver disease due to HCV, depending on the course HCV takes in their body and whether treatment subsequently achieves a sustained remission. A sustained remission means that the virus is not detectable in the blood 6 months after treatment, the liver enzymes are normal, and that on a liver biopsy, if one were done, there would be no inflammation. Fibrosis in the liver is scar tissue caused by chronic inflammation, and as such is not reversible, and will remain even after therapy. It is also possible to spontaneously clear the virus after the acute phase of the illness but when this happens and why is not well understood. The number of patients spontaneously clearing the virus is small.

HCV causes inflammation of the liver cells. The level of inflammation varies among HCV patients. ... the inflammation may vary in intensity from time to time.

...

Inflammation and necrosis of liver cells results in scarring of liver tissue (fibrosis). Fibrosis also appears in various patterns in HCV patients .... Fibrosis can stay the same or increase over time, but does not decrease, because although the liver can regenerate cells, it cannot reverse scarring. On average it takes approximately 20 years from point of infection with Hepatitis C until cirrhosis develops, and so on a scale of 1 to 4 units the best estimate is that the rate of fibrosis progression is 0. 133 units per year.

...

Once a patient is cirrhotic, they are either a compensated cirrhotic, or a decompensated cirrhotic, depending on their liver function. In other words, the liver function may, still be normal even though there is fibrosis since there may, be enough viable liver cells remaining to maintain function. These persons would have compensated cirrhosis. If liver function fails the person would then have decompensated cirrhosis. The liver has very many functions and liver failure may involve some or many of these functions. Thus decompensation may present in a number of ways with a number of different signs and symptoms.

A compensated cirrhotic person has generally more than one third of the liver which is still free from fibrosis and whose liver can still function on a daily basis. They may have some of the symptoms discussed below, but they may also be asymptomatic.

Decompensated cirrhosis occurs when approximately 2/3 of the liver is compromised (functioning liver cells destroyed) and the liver is no longer able to perform one or more of its essential functions. It is diagnosed by the presence of one or more conditions which alone or in combination is life threatening without a transplant. This clinical stage of affairs is also referred to as liver failure or end stage liver disease. The manifestations of decompensation are discussed below. Once a person develops decompensation, life expectancy is short and they will generally die within approximately 2-3 years unless he or she receives a liver transplant.

> Patients who progress to cirrhosis but not to decompensated cirrhosis may develop hepatocellular cancer ("HCC"). This is a cancer, which originates from liver cells, but the exact mechanism is uncertain. The simple occurrence of cirrhosis may predispose to HCC, but the virus itself may also stimulate the occurrence of liver cell cancer. Life expectancy after this stage is approximately 1-2 years.
>
> ...
>
> The symptoms of chronic HCV infection, prior to the disease progressing to cirrhosis or HCC include: fatigue, weight loss, upper right abdominal pain, mood disturbance, and tension and anxiety ...
>
> Of those symptoms, fatigue is the most common, the most subjective and the most difficult to assess .... There is also general consensus that the level of fatigue experienced by an individual infected with HCV does not correlate with liver enzyme levels, the viral level in the blood, or the degree of inflammation or fibrosis on biopsy. It is common for the degree of fatigue to fluctuate from time to time.

Dr. Anderson identifies some of the symptoms associated with cirrhosis which can include skin lesions, swelling of the legs, testicular atrophy in men, enlarged spleen and internal hemorrhaging. Decompensated cirrhosis symptomatic effects, he states, can include jaundice, hepatic encephalopathy, protein malnutrition, subacute bacterial peritonitis and circulatory and pulmonary changes. Dr. Anderson also states, in respect of his own patients, that "at least 50% of my HCV infected patients who have not progressed to decompensated cirrhosis or HCC are clinically asymptomatic."

84 It is apparent, in light of Dr. Anderson's evidence, that in the absence of evidence of the individual damages sustained by class members, past precedents of damage awards in personal injury actions cannot be applied to this case to assess the reasonableness of the settlement for the class.

85 This fact alone is not a fatal flaw. There have long been calls for reform of the "once and for all" lump sum awards that are usually provided in personal injury actions. As stated by Dickson J, in Andrews v. Grand & Toy Alberta Ltd, [1978] 2 S.C.R. 229 at 236:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

86 The "once-and-for-all" lump sum award is the common form of compensation for damages in tort litigation. Although the award may be used to purchase annuities to provide a "structured" settlement,

the successful claimant receives one sum of money that is determined to be proper compensation for all past and future losses. Of necessity, there is a great deal of speculation involved in determining the future losses. There is also the danger that the claimant's future losses will prove to be much greater than are contemplated by the award of damages received because of unforeseen problems or an inaccurate calculation of the probability of future contingent events. Thus even though the claimant is successful at trial, in effect he or she bears the risk that there may be long term losses in excess of those anticipated. This risk is especially pronounced when dealing with a disease or medical condition with an uncertain prognosis or where the scientific knowledge is incomplete.

87 The present settlement is imaginative in its provision for periodic subsequent claims should the class member's condition worsen. The underlying philosophy upon which the settlement structure is based is set forth in the factum of the plaintiffs in the Transfused Action. They state at para. 10 that:

> The Agreement departs from the common law requirement of a single, once-and-for-all lump sum assessment and instead establishes a system of periodic payments to Class Members and Family Class Members depending on the evolving severity of their medical condition and their needs.

88 This forward-looking provision addresses the concern expressed by Dickson J. with respect to the uncertainty and unfairness of a once and for all settlement. Indeed, the objectors and intervenors acknowledge this in that they do not take issue with the benefit distribution structure of the settlement as much as they challenge the benefits provided at the levels within the structure.

89 These objections mirror the submissions in support of the settlement, in that they are largely based on an analogy to a tort model compensation scheme. For the reasons already stated, this analogy is not appropriate because the proper application of the tort model of damages compensation would require an examination of each individual case. In the absence of an individualized examination, the reasonableness, or adequacy, of the settlement cannot be determined by a comparison to damages that would be obtained under the tort model. Rather the only basis on which the court can proceed in a review of this settlement is to consider whether the total amount of compensation available represents a reasonable settlement, and further, whether those monies are distributed fairly and reasonably among the class members.

90 The total value of the Pan-Canadian settlement is estimated to be $1.564 billion dollars. This is calculated as payment or obligation to pay by the federal, provincial and territorial governments in the an amount of $1.207 billion on September 30, 1999, plus the tax relief of $357 million over the expected administrative term of the settlement. This amount is intended to settle the class proceedings in Ontario, British Columbia and Quebec. The Ontario proceeding, as stated above, covers all of those class members in Canada other than those included in the actions in British Columbia and Quebec.

91 Counsel for the plaintiffs and for the settling defendants made submissions to the court with respect the length and intensity of the negotiations leading up to the settlement. There was no challenge by any party as to the availability of any additional compensation. I am satisfied on the evidence that the negotiations achieved the maximum total funding that could be obtained short of trial.

92 In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The CRCS is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable

at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.

93 Moving to the remaining factors, although there have been no examinations for discovery, the extensive proceedings before the Krever Commission serve a similar purpose. The settlement is supported by the recommendation of experienced counsel as well as many of the intervenors. There is no suggestion of bad faith or collusion tainting the settlement. The support of the intervenors, particularly the Canadian Hemophilia Society which made submissions regarding the meetings held with class members, is indicative of communication between class counsel and the class members. Although, there were some objectors who raised concerns about the degree of communication with the Transfused Class members, these complaints were not strenuously pursued. Perhaps the most compelling evidence of the adequacy of the communications with the class members regarding the settlement is the relatively low number of objections presented to the court considering the size of the classes. Finally, counsel for all parties made submissions, which I accept, regarding the rigourous negotiations that resulted in the final settlement.

94 In conclusion, I find that the global settlement represents a reasonable settlement when the significant and very real risks of litigation are taken into account.

95 The next step in the analysis is to determine whether the monies available are allocated in such a way as to provide for a fair and reasonable distribution among the class members. In my view, as the settlement agreement is presently constituted, they are not. My concern lies with the provision dealing with opt out claimants. Under the agreement, if opt out claimants are successful in individual litigation, any award such a claimant receives will be satisfied out of the settlement Fund. While this has the potential of depleting the Fund to the detriment of the class members, thus rendering the settlement uncertain, the far greater concern is the risk of inequity that this creates in the settlement distribution. The Manual for Complex Litigation states at 239 that whether "claimants who are not members of the class are treated significantly differently" than members of the class is a factor that may "be taken into account in the determination of the settlement's fairness, adequacy and reasonableness ...".

96 In principle, there is nothing egregious about the payment of settlement funds to non-class members. Section 26(6) of the CPA provides the court with the discretion to sanction or direct payments to non-class members. In effect, the opt out provision reflects the intention of the defendants to settle all present and future litigation. This objective is not contrary to the scheme of the CPA per se. See, for example, the reasons of Brenner J. in Sawatzky v. Societe Chirurgiale Instrumentarium Inc. [1999] B.C.J. No. 1814 (S.C.), adopted by this court in Bisignano v. La Corporation Instrumentarium Inc. (September 1, 1999, Court File No. 22404/96, unreported.)

97 However, given that the settlement must be "fair, reasonable and in the best interests of the class", the court cannot sanction a provision which gives opt out claimants the potential for preferential treatment in respect of access to the Fund. The opt out provision as presently written has this potential effect where an opt out claimant either receives an award or settlement in excess of the benefits that he or she would have received had they not opted out and which must be satisfied out of the Fund. Alternatively, the preferential treatment could also occur where the opt out claimant receives an award similar to their entitlement under the settlement in quantum but without regard for the time phased payment structure of the settlement.

98 In my view, where a defendant wishes to settle a class proceeding by providing a single Fund to deal with both the claims of the class members and the claims of individuals opting out of the

settlement, the payments out of the Fund must be made on an equitable basis amongst all of the claimants. Fairness does not require that each claimant receive equal amounts but what cannot be countenanced is a situation where an opt out claimant who is similarly situated to a class member receives a preferential payment.

99 The federal government argues that fairness ensues, even in the face of the different treatment, because the opt out claimant assumes the risk of individual litigation. I disagree. Because the defendants intend that all claims shall be satisfied from a single fund, individual litigation by a claimant opting out of the class pits that claimant against the members of the class. The opt out claimant stands to benefit from success because he or she may achieve an award in excess of the benefits provided under the settlement. This works to the detriment of the class members by the reducing the total amount of the settlement. More importantly however, the benefits to the class members will not increase as a result of unsuccessful opt out claimants.

100 In the instant case, fairness requires a modification to the opt out claimant provision of the settlement. The present opt out provision must be deleted and replaced with a provision that in the event of successful litigation by an opt out claimant, the defendants are entitled to indemnification from the Fund only to the extent that the claimant would have been entitled to claim from the Fund had he or she remained in the class. This must of necessity include the time phasing factor. Such a provision ensures fairness in that there is no prospect of preferential distribution from the Fund, nor will the class suffer any detrimental effect as a result of the outcome of the individual litigation. The change also provides a complete answer to the complaint that the current opt out provision renders the settlement uncertain. Similarly, the modification renders the provision for defence costs to be paid out of the Fund unnecessary and thus it must be deleted.

101 Accordingly, the opt out provision of the settlement would not bean impediment to court approval with the modifications set out above.

102 In my view, the remainder of distribution scheme is fair and reasonable with this alteration to the opt out provision. It is beyond dispute that the compensation at any level will not be perfect, nor will it be tailored to individual cases but perfection is not the standard to be applied. The benefit levels are fair. More pointedly, fairness permeates the settlement structure in that each and every class member is provided an opportunity to make subsequent claims if his or her condition deteriorates. An added advantage is that there is a pre-determined, objective qualifying scheme so that class members will be able to readily assess their eligibility for additional benefits. Thus, 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.

103 In any, event, the settlement structure also provides a reasonable basis for the distribution of the funds available. Class counsel described the distribution method as a "need not greed" system, where compensation is meant, within limits, to parallel the extent of the damages. There were few concerns raised about the compensation provided at the upper levels of the scheme. Rather, the majority of the objections centred on the benefits provided at Levels 1, 2 and 3. The damages suffered by those whose conditions fall within these Levels are clearly the most difficult to assess. This is particularly true in respect of those considered to be at Level 2. However, in order to provide for the subsequent claims, compromises must be made and in this case, I am of the view that the one chosen is reasonable.

104 Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory, benefits assigned to claimants at different levels were largely influenced by the total of the monies available for allocation. As stated in the CASL study at p. 3:

> At the request of the Federal government of Canada, provincial governments, and Hepatitis C claimants, i.e. individuals infected with hepatitis C virus during the period of 1986 to 1990, an impartial group, the Canadian Association for the Study of the Liver (CASL) was asked to construct a natural history model of Hepatitis C. The intent of this effort was to generate a model that would be used by all parties, as guide to disbursing funds set aside to compensate patients infected with hepatitis C virus through blood transfusion.

105 Of necessity, the settlement cannot, within each broad category, deal with individual differences between victims. Rather it must be general in nature. In my view, the allocation of the monies available under the settlement is "fair, reasonable and in the best interests of the class as a whole."

106 In making this determination, I have not ignored the submissions made by certain objectors and intervenors regarding the sufficiency of the Fund. They asserted that the apparent main advantage of this settlement, the ability to "claim time and time again" is largely illusory because the Fund may well be depleted by the time that the youngest members of the class make claims against it.

107 I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $334,173,000. Admittedly, Eckler currently projects a deficit of $58,533,000 if the holdbacks are released.

108 However, the Eckler report contains numerous caveats regarding the various assumptions that have been made as a matter of necessity, including the following, which is stated in section 12.2:

> A considerable number of assumptions have been made in order to calculate the liabilities in this report. Where we have made the assumptions, we used our best efforts based on our understanding of the plan benefits; in general, where we have made simplifying assumptions or approximations, we have tried to err on the conservative side, i.e. increasing costs and liabilities. In many instances we have relied on counsel for the assumptions and understand that they, have used their best efforts in making these. Nevertheless, the medical outcomes are very unclear - e.g. the CASL report indicates very wide ranges in its confidence intervals for the various probabilities it developed. There is substantial room for variation in the results. The differences will emerge in the ensuing years as more experience is obtained on the actual cohort size and characteristics of the infected claimants. These differences and the related actuarial assumptions will be re-examined at each periodic assessment of the Fund.

109 Unfortunately, but not unexpectedly, the limitations of the underlying medical studies upon which Eckler has based its report require the use of assumptions. For example. the report prepared by Dr. Remis, dated July 6, 1999, states at p. 642:

> There are important limitations to the analyses presented here and, in particular, with the precision of the estimates of the number of HCV-infected recipients who are likely to qualify for benefits under the Class Action Settlement ...
>
> The proportion of transfusion recipients who will ultimately be diagnosed is particularly important in this regard and has substantial impact on the final estimate. We used an estimate of 70% as the best case estimate for this proportion based on the BC experience but the actual proportion could be substantially different from this,

> depending on the type, extent and success of targeted notification activities that will be undertaken, especially, in Ontario and Quebec. This could alter the ultimate number who eventually qualify for benefits by as much as 1,500 in either direction.

110 The report of the CASL study states at. 22:

> Our attempt to project the natural history of the 1986-1990 post transfusion HCV infected cohort has limitations. Perhaps foremost among these is our lack of understanding of the long-term prognosis of the disease. For periods beyond 25 years, projections remain particularly uncertain. The wide confidence intervals surrounding long-term projections highlight this uncertainty.
>
> Other key, limitations are lack of applicability of these projections to children and special groups.

111 The size of the cohort and the percentage of the cohort which will make claims against the Fund are critical assumptions. Significant errors in either assumption will have a dramatic impact on the sufficiency of the Fund. Recognizing this, Eckler has chosen to use the most conservative estimates from the information available. The cohort size has been estimated from the CASL study rather than other studies which estimate approximately 20% less surviving members. Furthermore, Eckler has calculated liabilities on the basis that 100% of the estimated cohort will make claims against the Fund.

112 Class counsel urged the court to consider the empirical evidence of the "take-up rate" demonstrated in the completed class proceeding, Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 25 O.R. (3d) 331 (Gen. Div.), leave to appeal dismissed (1995), 129 D.L.R. (4th) 110 (Ont. Div. Ct.), to support a conclusion that the Fund is sufficient. In Nantais, all of the class members were known and accordingly received actual notice of the settlement. Seventy-two percent of the class chose to make claims, or "take-up" the settlement. It was contended that this amounted to strong evidence that less than one hundred per cent of the classes in these proceedings would take up this settlement. I cannot accept the analogy. While I agree that it is unlikely that the entire estimated cohort will take up the settlement, it is apparent from the caveats expressed in the reports provided to the court that the estimate of the cohort size may be understated by a significant number. Accordingly, for practical purposes, a less than one hundred per cent take up rate could well be counter-balanced by a concurrent miscalculation of the cohort size.

113 Although I cannot accept the Nantais experience as applicable on this particular point, the Eckler report stands alone as the only and best evidence before the court from which to determine the sufficiency of the Fund. Eckler has recognized the deficiencies inherent in the information available by using the most conservative estimates throughout. This provides the court with a measure of added comfort. Not to be overlooked as well, the distribution of the Fund will be monitored by this court and the courts in Quebec and British Columbia, guided by periodically, revised actuarial projections. In my view, the risk that the Fund will be completely depleted for latter claimants is minimal.

114 Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000.000 considered in the context of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus, in this respect, the settlement is reasonable.

115 I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the

defendants. The Society contends that this provision simpliciter is repugnant to the basis on which this settlement is constructed. It argues that the benefit levels were established on the basis of the total monies available, rather than a negotiation of benefit levels per se. Thus, it states there is a risk that the Fund will not be sufficient to provide the stated benefits and further, that this risk lies entirely with the class members because the defendants have no obligation to supplement the Fund if it proves to be deficient for the intended purpose. Moreover, the Society argues that the use of conservative estimates in defining the benefit levels, although an attempt at ensuring sufficiency, has the ancillary negative effect of minimizing the benefits payable to each class member under the settlement. Therefore, the Society contends that a surplus, if any develops in the ongoing administration of the Fund, should be used to augment the benefits for the class members.

116 The issue here is whether a reversion clause is appropriate in a settlement agreement in this class proceeding, and by extension, whether the inclusion of this clause is such that it would render the overall settlement unacceptable.

117 It is important to frame the submission of the Society in the proper context. This is not a case where the question of entitlement to an existing surplus is presented. Indeed, given the deficit projected by the Eckler report, it is conjectural at this stage whether the Fund will ever generate a surplus. If the Fund accumulates assets over and above the current Eckler projections, they must first be directed toward eliminating the deficit so that the holdbacks may be released.

118 The plan also provides that after the release of the holdbacks, the administrator may make an application to raise the $75,000 annual cap on income replacement if the Fund has sufficient assets to do so. It is only after these two areas of concern have been fully addressed that a surplus could be deemed to exist.

119 The clause in issue does not, according to the interpretation given to the court by class counsel, permit the withdrawal by the defendants of any actuarial surplus that may be identified in the ongoing administration of the Fund. Rather, they state that it is intended that the remainder of the Fund, if any, revert to the defendants only after the Plans have been fully administered in the year 2080.

120 Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefitting neither party during the entire 80 year term of the settlement.

121 Quite apart from the question of tying up the surplus for this unreasonable period of time, there is the underlying question of whether in the context of this settlement, it is appropriate for the surplus to revert in its entirety to the defendants.

122 The court is asked to approve the settlement even though the benefits are subject to fluctuation and regardless that the defendants are not required to make up any shortfall should the Fund prove deficient. This is so notwithstanding that the benefit levels are not perfect. It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

123 This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. This is in keeping with the CPA which provides in s. 26(4) that surplus funds may "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 ...". On the other hand, in the proper circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.

124 To attempt to determine the range of reasonable solutions at present, when the prospect of a surplus is uncertain at best, would be to pile speculation upon speculation. In the circumstances therefore, the only appropriate course, in my opinion, is to leave the question of the proper application of any surplus to the administrator of the Fund. The administrator may recommend to the court from time to time, based on facts, experience with the Fund and future considerations, that all or a portion of the surplus be applied for the benefit of the class members or that all or a portion be released to the defendants. In the alternative, the surplus may be retained within the Fund if the administrator determines that this is appropriate. Any option recommended by the administrator would, of course, be subject to requisite court approval. This approach is in the best interests of the class and creates no conflicts between class members. Moreover, it resolves the anomaly created by freezing any surplus for the duration of the administration of the settlement. If the present surplus reversion clause is altered to conform with the foregoing reasons, it would meet with the court's approval.

125 There was an expressed concern as to the potential for depletion of the Fund through excessive administrative costs. The court shares this concern. However, the need for efficient access to the plan benefits for the class members and the associated costs that this entails must also be recognized. This requires an ongoing balancing so as to keep administrative costs in line while at the same time providing a user friendly claims administration. The courts, in their supervisory role, will be vigilant in ensuring that the best interests of the class will be the predominant criterion.

Disposition

126 In ordinary circumstances, the court must either approve or reject a settlement in its entirety. As stated by Sharpe J. in Dabbs No. 1 at para. 10:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; Poulin v. Nadon, [1950] O.R. 219 (C.A.) at 222-3.

127 These proceedings, emanating from the blood tragedy, are novel and unusually complex. The parties have adverted to this in the settlement agreement which contemplates the necessity for changes of a non-material nature in Clause 12.01:

> This Agreement will not be effective unless and until it is approved by the Court in each of the Class Actions, and if such approvals are not granted without any material differences therein, this Agreement will be thereupon terminated and none of the Parties will be liable to any other Parties hereunder. (Emphasis added.)

128 The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial. Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to

successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.

129 I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. Thirdly, in the interests of fairness, a sub-class must be created for the thalassemia victims to take into account their special circumstances.

130 The defendants have expressed their intention to be bound by the settlement if it receives court approval absent any material change. As stated, this reflects their acknowledgment of the complexity of the case, the scientific uncertainty surrounding the infections and the fact this settlement is crafted with a degree of improvisation.

131 The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by counsel for the defendants, the variation indicated is de minimis in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. The creation of the sub-class of thalassemia victims, in the context of the cohort size is equally de minimis. I am prepared to approve the settlement with these changes.

132 However, should the parties to the agreement not share the view that these changes are not material in nature, they may consider the proposed changes as an indication of "areas of concern" within the meaning the words of Sharpe J. in Dabbs No. 1 at para. 10:

> As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement ...

133 The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

133a I am obliged to counsel, the parties and the intervenors and especially to the individual objectors who took the time to either file a written objection or appear in person at the hearings. [The Court did not number this paragraph. QL has assigned the number 133a.] WINKLER J.

cp/s/jjy/qljyw

REJB 1999-14523 - Texte intégral

CITATION: Honhon c. Canada (Procureur général)

COUR SUPERIEURE (Chambre civile)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTREAL
NO : 500-06-000016-960

DATE : 1999-09-21

EN PRÉSENCE DE :

NICOLE MORNEAU , J.C.S.

Dominique Honhon
Requérante
c.
Procureur général du Canada, Procureur général du Québec, Société canadienne de la Croix-Rouge
Intimés
et
Fonds d'aide aux recours collectifs & Le Curateur public du Québec
Mis en cause

Morneau J.C.S.:-

1 La requérante, qui avait été autorisée à exercer le présent recours collectif, demande au tribunal d'approuver le projet de règlement négocié avec les gouvernements du Canada, des provinces et des territoires au profit des personnes qui, ayant reçu, au Québec, une transfusion de sang, entre le 1er janvier 1986 et le 1er juillet 1990, sont ou ont été infectées par le virus de l'hépatite C (ci-après VHC).
2 Le tribunal doit donc déterminer si le projet de règlement soumis est juste, équitable, raisonnable et dans le meilleur intérêt des membres de ce groupe et de ceux de l'autre recours collectif autorisé au profit des hémophiles dans le dossier portant le numéro 500-05-000068-987. Les deux requêtes en approbation ont en effet été entendues en même temps et, en grande partie, sur une preuve commune.
3 Avant d'intenter le recours collectif proprement dit, les parties ont négocié. Elles ont convenu d'un règlement daté du 15 juin 1999 qui doit régler le présent recours collectif ainsi que les recours collectifs autorisés au Canada au profit d'autres personnes infectées par le VHC, incluant les hémophiles.
4 Ce projet de règlement, valable pour l'ensemble du Canada, est conditionnel à son approbation par les tribunaux du Québec, de la Colombie-Britannique et de l'Ontario *sans différence matérielle*. Il a, par ailleurs, déjà reçu l'approbation des Cabinet et Conseil du

Trésor de chacun des gouvernements. Ces derniers s'engagent, selon les conditions du projet de règlement, à payer une somme de 1 207 000 000 $, incluant les intérêts au 30 septembre 1999, aux personnes décrites dans les recours collectifs en cause et à un groupe beaucoup plus restreint de personnes indirectement contaminées par le VIH qui n'ont pas été indemnisées en vertu de programmes antérieurs, savoir:

R.A.E., régime d'aide extraordinaire annoncé à l'égard du VIH par le gouvernement du Canada, le 14 décembre 1989.

P.P.T.A., programme provincial et territorial d'aide annoncé à l'égard du VIH par les gouvernements des provinces et des territoires, le 15 septembre 1993.

5 Se déclarant fiers de présenter ce projet de règlement et d'en recommander à la Cour l'approbation, les représentants des recours collectifs ont fait valoir, au cours d'une audition commune tenue entre les 23 août et 1er septembre 1999, les motifs de leurs recommandations, savoir que:

le projet fournira rapidement aux victimes une indemnisation pour les dommages subis;

le règlement proposé élimine tous les risques et aléas d'un procès;

les indemnités sont payables en fonction de la sévérité de la maladie;

les membres bénéficient d'une possibilité de réajustement de leur indemnité;

les indemnités prévues sont, à plusieurs égards, équivalentes sinon plus généreuses que les indemnités généralement accordées par les tribunaux de droit commun;

le projet de règlement est juste et raisonnable.

La Preuve

6 Ayant pris connaissance d'une abondante preuve documentaire comprenant, entre autres, les rapports de trois experts, le tribunal a eu le privilège de les entendre. Ainsi, le docteur Bernard Willems, hépatologue, a témoigné sur l'histoire et l'évolution naturelle de l'hépatite C ainsi que son caractère tout à fait imprévisible. Le docteur Robert S. Remis, à la fois médecin épidémiologiste et statisticien, a expliqué son estimation du nombre de bénéficiaires potentiels au Canada dans le cadre du règlement en cause. Enfin, l'actuaire Jacob Levi, membre de la firme Eckler Associés Ltée, a expliqué les calculs de la valeur actualisée des prestations auxquelles auront droit les membres du groupe au fur et à mesure de l'évolution de leur maladie, de même que la valeur actualisée au 30 septembre 1999 des frais et dépenses reliés à ce règlement, de façon à ce que cette valeur actualisée puisse être comparée avec l'actif disponible pour financer le régime d'indemnisation.

7 La preuve soumise satisfait le tribunal du fait que le règlement proposé rencontre les critères développés par la jurisprudence *dans l'affaire Dabbs*[1] pour démontrer que le projet de règlement est juste, équitable, raisonnable et dans le meilleur intérêt des membres des groupes concernés. Le tribunal ne peut en effet ignorer les difficultés et les risques qu'affronteraient autrement les individus obligés de se décharger du fardeau de la preuve quant à la faute, aux dommages, ainsi qu'au lien de causalité entre les deux, trois éléments de base essentiels à l'obtention d'un jugement octroyant des dommages-intérêts dans le cadre d'une action en responsabilité.

8 Soulignons aussi le fait que la Société canadienne de la Croix-Rouge, intimée au recours collectif, n'est pas partie au projet de règlement puisqu'elle s'est placée, depuis juillet 1998, sous la protection de la *Loi sur les arrangements avec les créanciers des compagnies*[2]. Le jugement à intervenir sur la requête en approbation du projet de règlement ne peut donc avoir d'effet légal ou de conséquence quelconque contre elle, en raison des ordonnances de sursis de procédures prononcées en sa faveur et renouvelées pour valoir encore au moins jusqu'au 29 février 2000.

9 Madame Honhon a reçu des transfusions de culots globulaires, un dérivé du sang, lors d'un accouchement au Québec, le 21 février 1989. Elle a alors été infectée par le virus de l'hépatite

C. Ce n'est qu'en février 1994 qu'elle a appris que son profil sanguin présentait une anomalie suite à la communication de résultats de tests effectués à sa demande aux fins d'obtenir une augmentation de sa couverture d'assurance-vie, laquelle lui a d'ailleurs été refusée. Avant le 21 février 1989, elle n'avait jamais reçu de transfusion de sang ou de dérivés du sang et n'avait jamais eu de problème de santé lié à sa fonction hépatique. Inquiétée par le refus de l'assureur et les résultats de ses tests, elle a requis une investigation de sa condition et obtenu confirmation, au printemps 1994, d'une sérologie de l'hépatite C positive. Elle a déposé sa requête pour autorisation d'intenter un recours collectif dans les trois ans de sa connaissance.

10 Son témoignage a révélé qu'elle a suivi, peut-être avec succès, le traitement combinant les injections d'interféron et les comprimés de ribavirine. Bien que ce traitement ne régénère pas le foie, il pourrait avoir arrêté la progression de la maladie. Madame Honhon connaît l'entente et demande au tribunal de la ratifier.

11 L'entente élimine pour les membres du groupe les difficultés résultant du fardeau de la preuve et du risque de rejet au motif de prescription. Les délais écoulés entre la connaissance de l'infection et le dépôt de l'action risquent en effet d'être, dans bien des cas, fatals.

12 Le régime d'indemnisation pour les dommages non pécuniaires tenant compte de la progression de la maladie présente aussi, eu égard à l'imprévisibilité de l'évolution de l'hépatite C, un avantage important. Sans cela, certains membres du groupe devraient intenter leur propre action pour interrompre la prescription avant d'être en mesure de connaître et d'établir leurs dommages. Or, l'article 1615 C.c.Q. qui autorise le tribunal, quand il accorde des dommages intérêts en réparation d'un préjudice corporel, à réserver au créancier le droit de demander des dommages-intérêts additionnels *pour une période d'au plus trois ans, lorsqu'il n'est pas possible de déterminer avec une précision suffisante l'évolution de sa condition physique au moment du jugement*, ne pourrait pallier adéquatement à l'impossibilité dans laquelle se retrouveraient bon nombre de demandeurs de prouver adéquatement et avec un minimum de certitude, leurs dommages.

13 De plus, le projet de règlement prévoit, outre une compensation pour perte de revenus jusqu'à concurrence d'un plafond de 75 000,00 $ par année, des indemnités pour dommages non pécuniaires pouvant totaliser, dépendant de la progression de la maladie et du niveau atteint, 225 000,00 $ ou un peu plus s'il y a thérapie. Si elles peuvent être légèrement inférieures au plafond établi par la Cour suprême du Canada pour une incapacité totale permanente, les indemnités pour dommages non pécuniaires ne diffèrent guère des compensations généralement accordées par les tribunaux de droit commun quant au surplus.

14 Les membres du groupe n'étant pas tous identifiés, certaines retenues seront appliquées le temps nécessaire pour permettre d'évaluer la suffisance du fonds. Les rapports et évaluations du docteur Remis et de l'actuaire Levi se sont voulus conservateurs. Ces deux experts ont considéré ce qu'ils croient être les pires scénarios, tout en demeurant réalistes. Leurs conclusions, bien que tributaires d'impondérables, permettent de croire à la suffisance du fonds. Selon monsieur Levi, il pourrait même arriver que des retenues et certains plafonds puissent être levés après quelques années d'expérience. À cette fin, l'on souhaite que l'administrateur du régime puisse combiner, dans le traitement des réclamations, une interprétation large et libérale en faveur des membres du groupe et la sévérité qui s'impose à l'égard de ceux qui, ne rencontrant pas les conditions d'admissibilité au présent règlement, tenteraient tout de même d'en tirer profit.

Les Oppositions

15 Invités à soumettre leurs motifs d'opposition au règlement, onze opposants, dont trois membres du groupe des hémophiles, se sont annoncés en temps opportun. Certains ont retiré leur opposition. Ceux qui se sont présentés ont été entendus.

16 Il est vrai qu'une entente négociée dans le but d'aider l'ensemble des membres d'un groupe ne saurait rencontrer tous les besoins particuliers de chacun. La présente requête ayant été

entendue avec la requête de monsieur Page, représentant autorisé du «groupe des hémophiles», il semble approprié de mentionner les sujets abordés dans le cadre de l'ensemble des oppositions soumises au tribunal.

17 Ainsi, certains auraient voulu être compensés pour l'impossibilité d'obtenir de l'assurance-vie en raison de leur infection. D'autres craignent que l'entente ne prenne fin avant que leurs jeunes enfants, porteurs du VHC, n'aient pu percevoir les bénéfices auxquels ils auraient eu droit si leur état se détériorait. Il y en a qui trouvent les indemnités insatisfaisantes. Ils auraient souhaité avoir droit à la compensation non pécuniaire additionnelle de 100 000,00 $ avant d'en être rendus au niveau 6 qui comporte, par exemple, une décompensation, un cancer ou une transplantation du foie. D'autres sont inquiets du fait que le fonds doive assumer le paiement des jugements que pourraient obtenir certains individus qui choisiraient de s'exclure du groupe pour intenter leur propre action. Ils craignent que le fonds soit alors insuffisant.

18 Sur ce dernier point, l'actuaire Levi a budgété une somme de 10 000 000 $ qui s'additionne, cela va de soi, aux montants de base déjà prévus pour ces personnes qui s'excluraient mais qui sont, pour le moment, comprises dans les quelque 8 000 réclamants potentiels. L'on parle ici de jugements individuels qui seraient obtenus contre les gouvernements pour une somme supérieure à 225 000 $, payable de façon échelonnée selon la gravité de la maladie au chapitre des dommages non pécuniaires. De plus, ces condamnations excéderaient le remboursement prévu pour certaines dépenses liées au traitement de la maladie, de même que les indemnités pour perte de revenus, dans la mesure où cette perte n'est pas déjà compensée par une assurance-invalidité.

19 À ce qui précède s'ajoutent les risques inhérents à la poursuite, au procès et aux recours en appel avec les délais qu'ils impliquent. De plus, le fonds n'assume que le tiers des frais de défense des recours privés. L'on peut donc espérer que ces poursuites n'auront pas l'impact que craignent certains. Enfin, d'autres ne s'expliquent pas l'octroi d'indemnités inférieures aux proches des personnes décédées avant le 1er janvier 1999.

20 Des représentations ont aussi été faites de la part des personnes dites «co-infectées» par le virus du sida (VIH) et par celui de l'hépatite C (VHC). Bénéficiant du programme PPTA déjà mentionné leur procurant, depuis 1989, une indemnité annuelle non imposable de 30 000,00 $, ces personnes contestent le fait que ce montant soit considéré dans le cadre du présent règlement. Elles ne voudraient pas qu'il soit déduit de l'indemnité pour perte de revenus qui leur serait autrement payable. Elles font valoir que leur double infection équivaut à deux accidents au cours desquels elles auraient perdu des membres différents et prétendent que cela devrait justifier des indemnités cumulatives. Elles ne semblent pas vouloir admettre que le remplacement d'un revenu annuel total de 30 000,00 $ par une indemnité correspondante compense déjà la totalité de leur perte, ni qu'une incapacité additionnelle ne se traduit pas nécessairement par une perte additionnelle de revenus.

Le Droit

21 L'on ne peut qu'être touchés par le drame que vivent les personnes infectées par les produits du sang contaminé au VHC, de même que leurs proches. Si l'avenir comporte pour tous une grande part d'incertitude, ceux-ci ont certainement des soucis additionnels. Ils craignent que l'infection ne progresse. Même si cela ne devait pas se produire, la peur demeure. En ce sens, aucune somme ne pourra jamais compenser leur souffrance. Comme le disait Monsieur le juge André Denis, en approuvant un règlement intervenu dans le cadre d'un autre recours collectif[3]

> *En ce sens, le règlement proposé est bien imparfait. Tout règlement hors cour est imparfait. En ce domaine plus qu'en tout autre.*

22 Toutefois, ici comme dans la cause de l'ACEF-CENTRE, les procureurs et les témoins ont tous expliqué avec honnêteté et intelligence un règlement qu'ils qualifient en leur âme et conscience de raisonnable. Les quelque 83 oppositions reçues au Canada, suite à une

campagne de publicité invitant les membres à se faire entendre, représentent plus ou moins 1% des membres des groupes visés par le projet de règlement. Certains d'entre eux sont venus expliquer qu'ils retiraient leur opposition. La requérante et d'autres insistent sur l'importance d'une approbation rapide, de telle sorte que les victimes puissent bénéficier du régime dans les meilleurs délais.

23 Comme l'écrivait M. le juge Denis dans l'affaire précitée (pp. 5 et 6):

> *Les opposantes n'ont pas l'expérience juridique des procureurs des requérantes, même si leur expérience vécue comme membre du groupe est supérieure. Elles ne réalisent pas l'importance de ne pas avoir à démontrer de lien de causalité entre leur condition et l'implantation de prothèses mammaires. Elles ne réalisent pas les difficultés qu'elles évitent en voyant les intimées renoncer aux avantages de la prescription. Elles connaissent mal le régime d'indemnisation canadien et québécois. Elles ne savent sans doute pas qu'après le jugement du soussigné dans l'affaire Dow Corning autorisant le recours collectif, la compagnie-mère de l'intimée s'est prévalue de la protection de la Loi sur la faillite aux États-Unis, laissant ainsi présager une complication certaine du dossier. Malgré les qualités humaines de leurs interventions, elles n'ont soumis aucun argument juridique susceptible d'éclairer la Cour et de contrer les prétentions des procureurs des requérantes*. (J'ai souligné)

24 Les propos cités ci-dessus valent dans la présente cause. Ici aussi, la Société canadienne de la Croix-Rouge, l'un des acteurs importants, ne serait fort possiblement pas en mesure d'acquitter les jugements que l'on pourrait tenter d'obtenir contre elle, une fois les ordonnances de sursis expirées. Plusieurs demandeurs seraient confrontés à de sérieux problèmes de preuve et de prescription.

25 Le tribunal ne voit donc aucune raison de ne pas entériner ce projet de règlement qu'il considère raisonnable, équitable, approprié et dans le meilleur intérêt des groupes visés. Le règlement sera donc entériné selon ses conditions, le tribunal étant disposé à entendre, dans les meilleurs délais, les requêtes portant sur la nomination des personnes mentionnées à l'article 10 de l'entente, de même que sur l'approbation des honoraires des avocats. À cet effet, les honoraires doivent être approuvés par le tribunal, mais l'on aura compris que la très vaste majorité des sommes disponibles devra être consacrée à indemniser les membres du groupe.

Par ces Motifs, Le Tribunal:

26 *ACCUEILLE* la requête en approbation d'une transaction présentée par la requérante;

27 *DÉCLARE* que le groupe, dont les membres seront liés par le jugement, est défini comme suit:

> i. des personnes ayant reçu, au Québec, une transfusion de sang, tel que ci-après défini, entre le 1er janvier 1986 et le 1er juillet 1990 inclusivement et qui sont ou ont été infectées par le virus de l'hépatite C;
>
> ii. d'un époux ou d'un conjoint infecté indirectement par le virus de l'hépatite C par un époux ou un conjoint qui est une personne décrite au paragraphe (i);
>
> iii. d'un enfant infecté indirectement par le virus de l'Hépatite C par un parent qui est une personne décrite aux paragraphes (i) et (ii); ou
>
> iv. d'un membre de la famille d'une personne décrite aux paragraphes (i), (ii) ou (iii);
>
> le sang étant défini comme suit:
>
> le sang total et les produits sanguins suivants: les concentrés de globules rouges, les plaquettes, le plasma (frais congelé et stocké) et les globules blancs. Le sang ne comprend pas l'albumine à 5%, l'albumine à 25%, le facteur VIII, le facteur VIII porcin, le facteur IX, le facteur VII, l'immunoglobuline anti-cytomégalovirus, l'immunoglobuline anti-hépatique B, l'immunoglobuline anti Rh, l'immunoglobuline antivaricelleuse-antizostérienne, l'immunoglobuline sérique, (FEIBA) FEVIII

Inhibitor Bypassing Activity, Autoplex (complexe prothrombine), l'immunoglobuline antitétanique, l'immunoglobuline intraveineuse (IVIG) et l'antithrombine III (ATIII);

28 *DÉCLARE* que la Convention de règlement relative à l'hépatite C 1986-1990, intervenue en date du 15 juin 1999, ainsi que ses annexes «A», «B», «C», «D» et «E» ci-après décrites:

Annexe «A»: Régime à l'intention des transfusés infectés par le VHC;

Annexe «B»: Régime à l'intention des hémophiles infectés par le VHC;

Annexe «C»: Programme d'aide financière fédéral/ provincial/ territorial pour les personnes indirectement infectées par le VIH;

Annexe «D»: Accord de financement;

Annexe «E»: Législation sur les prestations sociales;

et l'accord de financement (ci-après appelée «*Convention de Règlement*») sont justes, raisonnables et ont été conclus dans le meilleur intérêt des membres du recours collectif des transfusés infectés par le VHC;

29 *APPROUVE* la Convention de règlement et *ORDONNE* aux parties et aux membres liés par la Convention de règlement de s'y conformer;

30 *ORDONNE ET DÉCLARE* que le présent jugement n'affectera en aucune façon la Société canadienne de la Croix-Rouge, étant donné que les présentes procédures en recours collectif ont été suspendues contre celle-ci par un jugement de l'honorable juge Blair de la Cour supérieure de l'Ontario daté du 20 juillet 1998, rendu en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (S.R.C. 1985, ch. C-36) dans une action portant le numéro 98-CL-002970, pareille suspension ayant été prolongée par des ordonnances ultérieures de la même Cour et datées des 19 août 1998, 5 octobre 1998, 18 janvier 1999, 5 mai 1999 et du 28 juillet 1999;

31 *DÉCLARE* que la Cour procédera ultérieurement à la nomination des personnes appropriées aux postes décrits à la Convention de règlement;

32 *DÉCLARE* que les honoraires et déboursés des procureurs de la requérante seront déterminés à une date ultérieure;

33 *NOMME* Me Pierre R. Lavigne au comité conjoint comme le conseiller aux recours collectifs (Québec) et ce, jusqu'à ordre contraire d'un tribunal, selon les termes et conditions et avec les devoirs et responsabilités décrits à ladite Convention de règlement;

34 *DÉCLARE* que le mis en cause, le Curateur public du Québec, pourra, par requête pour directives et instructions, s'adresser à cette Cour, selon qu'il le juge approprié;

35 *DISPENSE* le mis en cause, le Curateur public du Québec, d'obtenir l'autorisation du tribunal requise pour transiger en faveur de chacune des personnes qu'il représente, pour quelque indemnisation que ce soit en vertu de la Convention de règlement, nonobstant l'article 36 de la *Loi sur le curateur public* (L.R.Q., c. C-81) et *DÉCLARE* que le présent jugement équivaut à l'autorisation requise en vertu de l'article 36 de la *Loi sur le curateur public*;

36 *DÉCLARE* que la Convention de règlement constitue une transaction au sens de l'article 2631 du *Code civil du Québec* liant toutes les parties et tous les membres liés par ce règlement;

37 *ORDONNE ET DÉCLARE* que soit donné aux membres des recours collectifs et aux membres de leur famille un avis du présent jugement d'approbation, de la manière à être déterminée par la Cour à une date ultérieure;

38 *DÉCLARE* que la date limite pour s'exclure du groupe visé par la Convention de règlement sera la date que fixera ultérieurement le Tribunal après avoir approuvé les avis à être publiés;

39 *DÉCLARE* que sous réserve de l'article 1008 du *Code de procédure civile du Québec*, tout membre du groupe ci-avant décrit qui ne s'est pas exclu en présentant au gestionnaire des réclamations une formule d'exclusion dûment remplie dans le délai d'exclusion, sera lié par la Convention de règlement et le présent jugement d'approbation;

40 *ORDONNE ET DÉCLARE*, conditionnellement à l'approbation de la Convention de règlement par l'honorable juge Smith en Colombie-Britannique et l'honorable juge Winkler en Ontario, qu'à l'exception de ce qui est prévu ci-avant, le recours collectif institué par madame Dominique Honhon est rejeté sans frais;

41 La soussignée demeurera saisie du présent dossier à moins de contrordre du Juge en chef.

MORNEAU J.C.S.

Me Michel Savonitto et *Me Pierre R. Lavigne*, pour la requérante.
Me André Lespérance et *Me Nathalie Drouin*, pour Procureur général du Canada.
Me Robert Monette et *Me Dany Leduc*, pour Procureur général du Québec.
Me Robert E. Charbonneau, pour la Société canadienne de la Croix-Rouge.
Me Louise Ducharme, pour Fonds d'aide aux recours collectifs.
Me Hélène Laberge, pour Curateur public du Québec.

1. *Dabbs c. Sun Life Assurance Co. of Canada* [1998] O.J. No. 1598 , p. 3.
2. S.R.C. 1985, ch. C-36.
3. *ACEF-CENTRE et al. c. Bristol-Myers Squibb Company et al.* , C.S. Montréal 500-06-000004-917, 1995-08-08, J. Denis, p. 5.

REJB 1999-15380 - Texte intégral

CITATION: Honhon c. Canada (Procureur général)

COUR SUPERIEURE (Chambre civile)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTREAL
NO : 500-06-000016-960

DATE : 1999-11-19

EN PRÉSENCE DE :

NICOLE MORNEAU , J.C.S.

Dominique Honhon
Requérante
c.
Procureur général du Canada, Procureur général du Québec, Société canadienne de la Croix-Rouge
Intimés
et
Fonds d'aide aux recours collectifs & Le Curateur public du Québec
Mis en cause

Morneau J.C.S.:-

1 *LE TRIBUNAL* est saisi d'une requête visant à obtenir une ordonnance additionnelle d'approbation d'une transaction présentée par la requérante, Dominique Honhon;
2 *CONSIDÉRANT* que le Tribunal a rendu un jugement le 21 septembre 1999 accueillant la requête en approbation d'une transaction présentée par la requérante, Dominique Honhon;
3 *CONSIDÉRANT* l'entente intervenue entre les parties modifiant la Convention relative à l'Hépatite C 1986-1990 et ses annexes datée du 15 juin 1999 (ci-après la «Convention de règlement»), contenue à l'Annexe F de la Convention de règlement;
4 *CONSIDÉRANT* que les parties ont convenu que les gouvernements PT possèdent l'option de verser des montants périodiques en conformité avec les articles 4.02 et 4.04 de l'Accord de financement de telle sorte que, dans cette éventualité, il ne restera dans le Fonds en Fiducie aucune somme d'argent ou actif des gouvernements PT qui ne serait alloué actuariellement;
5 *CONSIDÉRANT* la nature avantageuse des modifications contenues à l'Annexe F de la Convention de règlement;
6 *CONSIDÉRANT* que les modifications à la Convention de règlement prévues à l'Annexe F sont également soumises pour approbation dans les provinces de l'Ontario et de la Colombie-Britannique, avec les adaptations nécessaires pour respecter les spécificités de chacune des juridictions;

7 *CONSIDÉRANT* que le Tribunal a pris connaissance du projet de jugement à être rendu par l'honorable juge Warren K. Winkler sur une requête similaire présentable en Ontario;
8 *CONSIDÉRANT* que les modifications prévues à l'Annexe F tiennent compte de la spécificité du droit applicable dans la province de Québec;
9 *CONSIDÉRANT* qu'il est dans l'intérêt des membres et de la justice que le Tribunal entérine les modifications à la Convention de règlement contenues à l'Annexe F de la Convention de règlement, lesquelles sont à l'avantage des membres;
10 *CONSIDÉRANT* que la requérante demande d'être dispensée de donner l'avis prévu à l'article 1025 du Code de procédure civile compte tenu de la nature avantageuse des modifications pour les membres et afin d'éviter d'imposer à ceux-ci tout délai additionnel;
Par ces Motifs, Le Tribunal:
11 *ACCUEILLE* la requête en approbation additionnelle d'une transaction présentée par la requérante;
12 *PREND ACTE* du consentement des parties aux modifications à la Convention de règlement contenues à l'Annexe F;
13 *ENTÉRINE* les modifications à la Convention de règlement contenues à l'Annexe F;
14 *DISPENSE* la requérante de publier l'avis prévu à l'article 1025 du Code de procédure civile compte tenu de la nature avantageuse desdites modifications pour les membres du recours collectif;
15 *DÉCLARE* que le groupe, dont les membres seront liés par le jugement, est défini comme suit:

i des personnes ayant reçu, au Québec, une transfusion de sang, tel que ci-après défini, entre le 1er janvier 1986 et le 1er juillet 1990 inclusivement et qui sont ou ont été infectées par le virus de l'Hépatite C;
ii d'un époux ou d'un conjoint infecté indirectement par le virus de l'Hépatite C par un époux ou un conjoint qui est une personne décrite au paragraphe (i);
iii d'un enfant infecté indirectement par le virus de l'Hépatite C par un parent qui est une personne décrite aux paragraphes (i) et (ii); ou
iv d'un membre de la famille, d'une personne décrite aux paragraphes (i), (ii) ou (iii);
le sang étant défini comme suit:
le sang total et les produits sanguins suivants: les concentrés de globules rouges, les plaquettes, le plasma (frais congelé et stocké) et les globules blancs. Le sang ne comprend pas l'albumine à 5%, l'albumine à 25%, le facteur VIII, le facteur VIII porcin, le facteur IX, le facteur VII, l'immunoglobuline anti-cytomégalovirus, l'immunoglobuline anti-hépatitique B, l'immunoglobuline anti Rh, l'immunoglobuline antivaricelleuse-antizostérienne, l'immunoglobuline sérique, (FEIBA) FEVIII Inhibitor Bypassing Activity, Autoplex (complexe prothrombine), l'immunoglobuline antitétanique, l'immunoglobuline intraveineuse (IVIG) et l'antithrombine III (ATIII);

16 *DÉCLARE* que la Convention de règlement relatif à l'Hépatite C 1986-1990, intervenue en date du 15 juin 1999 ainsi que ses annexes «A», «B», «C», «D», «E» et «F» ci-après décrites:

•	Annexe «A»:	Régime à l'intention des transfusés infectés par le VHC;
•	Annexe «B»:	Régime à l'intention des hémophiles infectés par le VHC;
•	Annexe «C»:	Programme d'aide financière fédéral/provincial/territorial pour les personnes indirectement infectées par le VIH;
•	Annexe «D»:	Accord de financement;
•	Annexe «E»:	Législation sur les prestations sociales;
•	Annexe «F»:	Modifications numéro 1 à la Convention de règlement;

et l'Accord de financement (ci-après appelée «*Convention de règlement*») sont justes, raisonnables et ont été conclus dans le meilleur intérêt des membres du recours collectif des transfusés infectés par le VHC;

17 *APPROUVE* la Convention de règlement et *ORDONNE* aux parties et aux membres liés par la Convention de règlement de s'y conformer;

18 *DÉCLARE* qu'à la date d'approbation, le gouvernement fédéral doit payer au fiduciaire, en vertu des paragraphes 4.01(1) et 4.02(1) de l'Accord de financement, le montant dû et échu en date du 30 septembre 1999, soit la somme de 846 327 527,00 $, plus les intérêts courus entre cette date et la date de paiement, conformément à l'Accord de financement, plus ou moins de tout ajustement prévu par cet accord

19 *ORDONNE ET DÉCLARE* que le présent jugement n'affectera en aucune façon la Société canadienne de la Croix-Rouge étant donné que les présentes procédures en recours collectif ont été suspendues contre celle-ci par un jugement de l'honorable juge Blair de la Cour supérieure de l'Ontario daté du 20 juillet 1998, rendu en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (S.R.C. 1985, ch. C-36) dans une action portant le numéro 98-CL-002970, pareille suspension ayant été prolongée par des ordonnances ultérieures de la même Cour et datées des 19 août 1998, 5 octobre 1998, 18 janvier 1999, 5 mai 1999 et du 28 juillet 1999;

20 *DÉCLARE* que les honoraires et déboursés des procureurs de la requérante seront déterminés à une date ultérieure;

21 *DÉCLARE* que la Cour procédera ultérieurement à la nomination des personnes appropriées aux postes décrits à la Convention de règlement;

22 *NOMME* Me Pierre R. Lavigne au comité conjoint comme le conseiller aux recours collectifs des transfusés (Québec) et ce, jusqu'à ordre contraire d'un tribunal, selon les termes et conditions et avec les devoirs et responsabilités décrits à ladite Convention de règlement;

23 *DÉCLARE* que le mis en cause, le Curateur public du Québec, pourra, par requête pour directives et instructions, s'adresser à cette Cour, selon qu'il le juge approprié;

24 *DISPENSE* le mis en cause, le Curateur public du Québec, d'obtenir l'autorisation du tribunal requise pour transiger en faveur de chacune des personnes qu'il représente, pour quelque indemnisation que ce soit en vertu de la Convention de règlement, nonobstant l'article 36 de la *Loi sur le curateur public* (L.R.Q., c. C-81) et *DÉCLARE* que le présent jugement équivaut à l'autorisation requise en vertu de l'article 36 de la *Loi sur le curateur public*;

25 *DÉCLARE* que la Convention de règlement constitue une transaction au sens de l'article 2631 du *Code civil du Québec* liant toutes les parties et tous les membres liés par ce règlement;

26 *ORDONNE ET DÉCLARE* que soit donné aux membres des recours collectifs et aux membres de leur famille un avis du présent jugement, de la manière à être déterminée par la Cour à une date ultérieure;

27 *DÉCLARE* que la date limite pour s'exclure du groupe visé par le règlement sera la date que fixera ultérieurement le Tribunal après avoir approuvé les avis à être publiés;

28 *DÉCLARE* que, sous réserve de l'article 1008 du *Code de procédure civile du Québec*, tout membre du groupe ci-avant décrit qui ne s'est pas exclu en présentant au gestionnaire des réclamations une formule d'exclusion dûment remplie dans le délai d'exclusion, sera lié par la présente Convention de règlement et le présent jugement d'approbation;

29 *ORDONNE ET DÉCLARE*, conditionnellement à l'approbation de la Convention de règlement par l'honorable juge Smith en Colombie-Britannique et le l'honorable juge Winkler en Ontario, qu'à l'exception de ce qui est prévu ci-avant, le recours collectif institué par madame Dominique Honhon est rejeté sans frais;

30 *DÉCLARE* que la soussignée demeurera sai-ie du présent dossier à moins de contrordre du Juge en chef;

MORNEAU J.C.S.

Me Michel Savonitto et *Me Pierre R. Lavigne*, pour la requérante.
Me André Lespérance et *Me Nathalie Drouin*, pour Procureur général du Canada.
Me Robert Monette et *Me Dany Leduc*, pour Procureur général du Québec.
Me Robert E. Charbonneau, pour la Société canadienne de la Croix-Rouge.
Me Louise Ducharme, pour Fonds d'aide aux recours collectifs.
Me Hélène Laberge, pour Curateur public du Québec.

ANNEXE F

Modification Numéro 1 - 2 novembre 1999

La Convention de règlement est modifiée comme suit:

1. Par l'ajout au paragraphe 10.01 de la Convention de règlement des alinéas suivants:

p.1) Dans le cadre du libre exercice de leur pouvoir discrétionnaire, ordonner, de temps à autre, sur demande de toute partie ou du Comité conjoint, que les fonds et les autres éléments d'actif détenus par le fiduciaire en vertu de la Convention de règlement et qui ne font pas l'objet d'une attribution actuarielle soient en tout ou en partie:

(i) attribués aux membres des recours collectifs et/ou aux membres de la famille;

(ii) attribués de toute manière dont on peut raisonnablement s'attendre qu'elle bénéficie aux membres des recours collectifs et/ou aux membres de la famille, même si l'attribution ne prévoit pas le versement d'une indemnité aux membres des recours collectifs et/ou aux membres de la famille;

(iii) payés, en tout ou en partie, aux gouvernements FPT, à certains ou à un seul d'entre eux, compte tenu de la source des fonds et des autres éléments d'actif que comprend le fonds en fiducie; et/ou

(iv) conservés, en tout ou en partie, dans le fonds en fiducie;

de la manière que, dans le cadre du libre exercice de leur pouvoir discrétionnaire, les tribunaux estimeront raisonnable en tenant compte de toutes les circonstances, pourvu que, dans la distribution, aucune discrimination n'ait lieu selon l'endroit où le membre du recours collectif a reçu du sang ou selon l'endroit où il réside;

p.2) Dans le cadre du libre exercice de leur pouvoir discrétionnaire qui leur est conféré par l'alinéa p.1) ci-devant, les tribunaux peuvent prendre en considération, mais sans être liés par aucun d'entre eux, notamment les facteurs suivants:

(i) le nombre de membres des recours collectifs et de membres de la famille;

(ii) l'expérience du fonds en fiducie;

(iii) le fait que les indemnités prévues par les régimes peuvent, dans certains cas, ne pas refléter le régime de responsabilité en matière extra-contractuelle;

(iv) l'article 1036 du *Code de procédure civile du Québec*;

(v) la question de savoir si l'intégrité de la Convention de règlement sera maintenue et si les versements des indemnités prévues dans les régimes seront assurés;

(vi) la question de savoir si la progression de la maladie est très différente de celle prévue dans le modèle médical utilisé dans le rapport actuariel Eckler;

(vii) le fait que les membres des recours collectifs et les membres de la famille assument le risque d'insuffisance du fonds en fiducie;

(viii) le fait que les contributions des gouvernements FPT sont limitées en vertu de la Convention de règlement;

(ix) la source des fonds et des autres éléments d'actif que comprend le fonds en fiducie;

(x) tout autre fait que les tribunaux estiment important.

2. Les paragraphes 11.02 de la Convention de règlement et 6.03 de l'Accord de financement sont abrogés et remplacés par ce qui suit:

11.02(1) Le montant à payer ou payable par les gouvernements FPT en vertu de la Convention de règlement et de l'Accord de financement doit être réduit de 10,533,000$, en date du 30 septembre 1999; soit la somme de 10,000,000 $ représentant la valeur actualisée estimée du coût excédentaire pour le fonds en fiducie du règlement des actions intentées ou poursuivies par ceux qui s'excluent ou qui sont réputés s'exclure d'un recours collectif et par ceux qui intentent une action récursoire ou en garantie ou qui présentent une réclamation, une demande ou toute autre procédure contre un gouvernement FPT dont l'objet ou la cause est, de quelque manière que ce soit: (i) dans le cas d'un membre d'un recours collectif des transfusés ou d'un membre de la famille aux termes du Régime à l'intention des transfusés infectés par le VHC, l'infection d'une personne directement infectée par le VHC pendant la période visée par les recours collectifs; ou (ii) dans le cas d'un membre d'un recours collectif des transfusés ou des hémophiles ou d'un membre de la famille des transfusés ou des hémophiles aux termes du Régime à l'intention des hémophiles infectés par le VHC, l'infection d'un hémophiles ou d'un transfusé directement infecté par le VHC provenant du sang (y compris, dans chaque cas, l'infection d'une personne indirectement infectée) (collectivement appelés les personnes qui s'excluent); et la somme de 533,000$ représentant la valeur actualisée du tiers des coûts liés à la défense contre les actions poursuivies par les personnes qui s'excluent. Pour plus de certitude, toute personne qui est membre d'un recours collectif ci-avant défini peut participer aux régimes créés par la Convention de règlement.

11.02(2) Sur remise au fiduciaire d'une copie d'un jugement final (tel que défini au paragraphe 1.07 de la Convention de règlement) obtenu par une personne qui s'exclut contre les gouvernements FPT, certains ou un seul d'entre eux, ou d'une transaction conclue par une personne qui s'exclut et les gouvernements FPT, certains ou un seul d'entre eux, et d'une copie de l'ordonnance finale d'un tribunal homologuant une transaction, les gouvernements FPT ou leurs mandataires doivent recevoir à partir du fond en fiducie:

(i) suivant la date de ce jugement ou de ce règlement, un montant égal au montant que la personne qui s'exclut aurait eu droit de recevoir du fonds en fiducie s'il avait été admissible à un régime; et

(ii) un versement forfaitaire, sur approbation de l'un des tribunaux, en vue de couvrir le montant que la personne qui s'exclut aurait pu être en droit de recevoir de temps à autre du fonds en fiducie s'il avait été admissible à un régime, ce montant devant être calculé conformément à un protocole devant être approuvé par les tribunaux;

pourvu, cependant, que dans aucun cas, le montant devant être versé à partir du fonds en fiducie aux gouvernements FPT, à certains ou à un seul d'entre eux n'excède le montant du jugement ou du règlement versé à la personne qui s'exclut par les gouvernements FPT, certains ou un seul d'entre eux, plus les intérêts courus sur ce montant.

11.02(3) Aucun autre montant ne doit être payé à partir du fonds en fiducie pour régler une action poursuivie par une personne qui s'exclut, pour satisfaire à un jugement obtenu sur une action intentée par une personne qui s'exclut ou pour indemniser les gouvernements FPT, certains ou un seul d'entre eux de tout jugement ou de tout règlement intervenu par suite de toute action intentée ou poursuivie par une personne qui s'exclut.

Le Régime à l'intention des transfusés (Annexe A) est modifié comme suit:

3. Le sous-paragraphe a) de la définition de «Personne directement infectée» au paragraphe 1.01 est modifié comme suit:

remplacer le «;» par un «.» à la fin du sous-paragraphe a); et

ajouter la phrase suivante à la fin dudit sous-paragraphe a):

Une personne atteinte ou ayant été atteinte de thalassémie majeure n'est pas visée par le présent sous-paragraphe a);

4. Par l'ajout d'un paragraphe 4.10:

Les personnes directement infectées atteintes de thalassémie majeure ont le droit de présenter les preuves requises à des fins d'indemnisation et de recevoir les indemnités prévues par le Régime à l'intention des hémophiles infectés par le VHC, *mutatis mutandis*, comme si elles étaient des hémophiles directement infectés, et elles sont réputées être, pour les fins de la Convention et du Régime à l'intention des hémophiles infectés par le VHC, des hémophiles directement infectés, sous réserve que la condition figurant au paragraphe 4.01(5) du Régime à l'intention des hémophiles infectés par le VHC ne s'applique pas, et leur conjoint et leurs enfants qui sont des personnes indirectement infectées au sens du régime à l'intention des transfusés ainsi que les membres de la famille ont également le droit de présenter les preuves requises à des fins d'indemnisation et de recevoir les indemnités prévues par le Régime à l'intention des hémophiles infectés par le VHC, sous réserve que la condition figurant au paragraphe 4.01(5) du Régime à l'intention des hémophiles infectés par le VHC ne s'applique pas.

Date: 19991001
Docket: C965349
Registry: Vancouver

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 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

Docket: A981187
Registry: Vancouver

BETWEEN:

CHRISTOPHER FORREST MITCHELL

PLAINTIFF

AND:

THE CANADIAN RED CROSS SOCIETY, THE ATTORNEY GENERAL OF CANADA, and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE K. SMITH

Counsel for the Plaintiff Anita Endean:	J.J. Camp, Q.C. Sharon D. Matthews
Counsel for the Plaintiff Christopher Forrest Mitchell:	Marvin R.V. Storrow, Q.C. David E. Gruber
Counsel for the Defendant The Canadian Red Cross Society:	Ward Branch
Counsel for the Defendant/Third Party Her Majesty The Queen in Right of the Province of British Columbia:	D. Clifton Prowse, Q.C. Keith Johnston
Counsel for the Defendant The Attorney of Canada and the Third Party Her Majesty The Queen in Right of Canada:	John Haig, Q.C. Michelle LaPierre
Counsel for the Third Parties Dr. William Galliford, Dr. Robert Hart Dykes, and Dr. Peter Houghton:	Peter Wilcock
Counsel for the Third Party Prince George Regional Hospital:	John Ankenman
Counsel for the Public Trustee of British Columbia:	Christine Cunningham
Counsel for those plaintiffs infected by transfusion between January 1, 1986, and July 31, 1986, inclusive:	Paul Rosenberg
Place and Dates of Hearing:	Vancouver, B.C. August 18, 19, 20, 1999

[1] Anita Endean and Christopher Forrest Mitchell commenced these actions for damages for personal injuries and deaths arising out of the infection of the Canadian blood supply with Hepatitis C virus (HCV). The actions were certified as class actions. The present applications are brought by Ms. Endean and Mr. Mitchell as representative plaintiffs for approval of a settlement that they have negotiated with the federal, provincial, and territorial governments of Canada ("the FPT Governments"). Their applications are supported by counsel for the FPT Governments.

[2] The Canadian Red Cross Society ("the CRCS") is a defendant in both actions but it was granted protection from its creditors pursuant to the ***Companies' Creditors Arrangements Act***, R.S.C. 1985, c. C-36 by order of the Ontario Court of Justice (General Division) on July 20, 1998. It is therefore not a party to the proposed settlement. Although the CRCS was represented by counsel at the hearing, he took no position on the applications. Similarly, counsel for the various third parties adopted a neutral posture.

[3] Mr. Madsen and Ms. Innes, who are members of the class, and Ms. Gibbenchuk, whose son is a member, spoke briefly and movingly to record their opposition to the proposed settlement.

[4] The gist of the plaintiffs' claims in these actions is that the FPT Governments were at fault or, alternatively, that

they are vicariously liable for the fault of the CRCS in failing to seasonably implement tests of donated blood for HCV and that this fault was a cause of the injury and loss suffered by the class plaintiffs.

[5] Ms. Endean represents the B.C. Transfused Class, which is defined in the certification order as all residents of British Columbia who:

> a. received Hepatitis C positive whole blood, packed red cells, platelets, plasma (both fresh frozen and banked) or white blood cells ("whole blood and blood products") during the period January 1, 1986 through July 1, 1990 (the "Expanded Material Time") in British Columbia (the "Transfusion") and were infected with the Hepatitis C virus as a result of the Transfusion and have tested positive for the antibody to the Hepatitis C virus;
>
> b. have been infected with the Hepatitis C virus by a spouse or a parent who was infected with the Hepatitis C virus as a result of receiving whole blood and blood products during the Expanded Material Time;
>
> c. are the personal representatives of all residents of British Columbia who have become deceased as a result of being infected with the Hepatitis C virus as a result of receiving whole blood and blood products during the Expanded Material Time; and
>
> d. are the executors or administrators of the estates of all residents of British Columbia who have become deceased as a result of being infected with the Hepatitis C virus as result [sic] of receiving whole blood and blood products during the Expanded Material Time.

[6] Mr. Mitchell represents the B.C. Haemophiliac Class, which is defined in its certification order as all residents of British Columbia who:

> (a) are haemophiliacs, and thus have had a blood clotting or factor defect or deficiency, including a defect or deficiency in factors V, VII, VIII, IX, XI, XII, XIII and the von Willebrand factor ("Haemophiliacs");
>
> (b) received whole blood and/or blood products, including packed red cells, plasma (fresh frozen and banked), white blood cells cryoprecipitate, Factor VIII, Porcine Factor VIII, Factor IX, Factor VII, and (FEIBA) FEVIII Inhibitor Bypassing Activity, and other factor concentrates specifically used to treat haemophilia and other similar congenital bleeding disorders ("Blood and Blood Products") which were collected, supplied or distributed by the Defendant The Canadian Red Cross Society ("CRCS") from the period from 1 January 1986 to 1 July 1990 ("Period"); and
>
> (c) who became infected with Hepatitis C;
>
> (d) are the Spouses of the persons referred to in subparagraphs (a) to (c) and who are or were infected with Hepatitis C by such persons. For the purposes of this Order "Spouse" means a spouse of:
>
> (i) either of a man and a woman who,
>
> 1. are married to each other;
>
> 2. have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this class proceeding;
>
> 3. have cohabited for at least two years; or
>
> 4. have cohabited in a relationship of some permanence if they are the natural parents of a child; or
>
> (ii) either of two persons of the same sex who have lived together in a close personal

relationship that would constitute a conjugal relationship if they were not of the same sex:

1. for at least two years; or

2. in a relationship of some permanence if they are the parents of a child;

(e) are the children of the persons referred to in subparagraphs (a) to (c) and who are or were infected with Hepatitis C by such persons.

(f) are the personal representatives of all persons referred to in subparagraphs (a) to (c) and who have become deceased as a result of being infected with the Hepatitis C virus as a result of receiving Blood and Blood Products during the Period; and

(g) are the executors or administrators of all persons referred to in subparagraphs (a) to (c) and who have become deceased subsequent to being infected with the Hepatitis C virus as a result of receiving Blood and Blood Products during the Period.

[7] On March 27, 1998, the FPT Governments announced that they would pay up to $1.118 billion to compensate the plaintiffs. The announcement triggered negotiations between the parties and, by June 15, 1999, the representative plaintiffs and the FPT Governments had reached a settlement agreement which they have reduced to writing in what counsel describe as a framework agreement. Many details relating to the implementation of the settlement remain to be resolved but the essential features of the settlement are contained within this document.

[8] The agreement provides that the settlement will not be effectual unless it should be approved not only by this court

but also by the courts in Quebec and Ontario in similar proceedings brought in those provinces in ***Honhon v. The Attorney General of Canada et al.*** and in ***Parsons et al. v. The Canadian Red Cross Society et al.; Krepner et al. v. The Canadian Red Cross Society et al.*** respectively. The decision of Madame Justice Morneau of the Superior Court of Quebec in ***Honhon*** was handed down on September 21, 1999, and that of Mr. Justice Winkler of the Superior Court of Justice of Ontario in ***Parsons*** on September 22, 1999. I had by then reached my decision but was not yet in a position to publish my reasons. As delay was not acceptable in the circumstances, I advised counsel by memorandum on September 23, 1999, as follows:

> . . . I agree with the decision of Mr. Justice Winkler as set out in his reasons released yesterday. In particular, I agree with his comments concerning modifications in respect of opting-out claimants and concerning the provision for surplus and I adopt his remarks in paragraphs 129 to 133 inclusive of his reasons . . . .
>
> My written reasons will follow in due course.

These are my written reasons.

[9] Mr. Justice Winkler, in his reasons in ***Parsons***, has set out the background facts and has outlined the terms of the settlement and the manner in which the settlement fund has been derived. I have nothing to add to what he has said.

[10] Unlike in ***Parsons***, no intervenors appeared in British Columbia. As well, the Thalassemia Foundation of Canada did

not appear and it is not necessary for me to address the creation of a sub-class of persons represented by that organization.

[11] As I understand it, the evidence presented in Ontario and before me was virtually identical. Like Mr. Justice Winkler, I conclude that the plaintiffs' negotiators maximized the available fund and that it is questionable whether the CRCS will ever have the means to pay anything significant to the claimants. I agree generally, as well, with Mr. Justice Winkler's reasoning under his heading "Law and Analysis" commencing at paragraph 67. However, I wish to add some remarks that bear on the British Columbia applications.

[12] The statutory provisions for approval of settlements of class actions are worded differently in Ontario, Quebec, and British Columbia. These applications are brought pursuant to s. 35 of the ***Class Proceedings Act***, R.S.B.C. 1996, c.50, which says, in part:

> **35.** (1) A class proceeding may be settled, discontinued or abandoned only
>
> (a) with the approval of the court, and
>
> (b) on the terms the court considers appropriate.
>
> ***
>
> (3) A settlement under this section is not binding unless approved by the court.

Nevertheless, the standard to be applied by the court on such applications is common to all three provinces.

[13] Morneau J. and Winkler J., in their respective reasons, applied the standard set out by Sharpe J. in ***Dabbs v. Sun Life Assurance Co. of Canada***, [1998] O.J. No. 1598 (Gen Div.)(***Dabbs No. 1***) at para. 9:

> . . . the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

That has been adopted as the correct approach on an application for approval of a settlement pursuant to s. 35 of the British Columbia statute as well: ***Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.*** (1998), 169 D.L.R. (4th) 565 (B.C.S.C.) at para. 21. In applying the test, the court is to be concerned with the interests of the class as a whole rather than with the interests of particular members: ***Sawatzky v. Societe Chirurgicale Instrumentarium Inc.***, [1999] B.C.J. No. 1814 (S.C.) at para. 19.

[14] At paragraphs 69 and 70 in ***Parsons***, Winkler J. said:

> [69] ... As this court stated in ***Ontario New Home Warranty Program v. Chevron Chemical Co.***, [1999] O.J. No. 2245 (Sup. Ct.) at para. 89:
>
> > The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

> [70] Sharpe J. stated in ***Dabbs v. Sun Life Assurance*** (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. dismissed October 22, 1998, (***Dabbs No. 2***) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

I agree with and adopt those remarks as applicable to the applications before me.

[15] In their respective notices of motion, the representative plaintiffs seek approval pursuant to Rule 6(14) of the ***Rules of Court***, as well as pursuant to s. 35 of the ***Class Proceedings Act***. It does not appear that any similar statutory authority was invoked in Quebec or Ontario. Rule 6(14) provides:

> (14) . . . where a claim is made by or on behalf of a person under disability, no settlement, compromise, payment or acceptance of money paid into court, whenever entered into or made, so far as it relates to that person's claim, is binding without the approval of the court.

[16] The standard for approval of a settlement pursuant to Rule 6(14) is whether it is beneficial to the person under legal disability: ***Howe (an infant by next friend) and Howe v. City of Vancouver*** (1957), 22 W.W.R. 385 (B.C.S.C.) at 388, appl'd ***Ho (Guardian ad litem of) v. Chan*** (1995), 7 B.C.L.R. (3d) 315

(S.C.). The focus of an application brought under the Rule is the particular claimant, and the court has traditionally taken great care to ensure that the settlement is beneficial to the claimant in the specific circumstances presented.

[17] Counsel did not address the role of Rule 6(14) in the context of an application to approve settlement of a class action. An individual-oriented approach to approval of settlements on behalf of persons suffering from legal disability does not seem possible in the context of an application brought under s. 35 of the ***Class Proceedings Act*** because neither the identities of such persons nor their particular circumstances are or can be known at the time of the application.

[18] I can do no more on this application than to say that, in my opinion, the proposed settlement is beneficial to such class members generally and that, considering the interests of the class as a whole, it is a fair and reasonable settlement, subject to the qualifications identified by Winkler J. in ***Parsons***.

[19] Many objections were raised to the proposed settlement. I do not mean to minimize the importance of the objections to those who made them. However, having regard to the principle that I must be concerned with the best interests of the class as a whole as opposed to the individual interests of particular

class members, I have concluded that none of the objections are of such significance as to render the proposed settlement inappropriate. The objections raised before me were similar to those before Madame Justice Morneau and Mr. Justice Winkler and were dealt with fully by those learned judges. I need say no more about them except for those relating to the sufficiency of the fund.

[20] The sufficiency of the fund is the subject of a number of objections. The evidence presented on this aspect of the application was the actuarial opinion of Eckler Partners Ltd.. I have no qualms about the methodology they employed but it did appear to me during the hearing that many of their assumptions rested on thin evidential foundations. Accordingly, I raised with counsel the question of whether I should ask for another independent actuary to advise the court with respect to the reliability of the Eckler report.

[21] Counsel pointed out that in every situation where an assumption might be questionable, Eckler Partners Ltd. made the assumption that was most conservative, that is, that would produce the greatest adverse effect on the fund. Counsel also adverted to the lengths to which the actuaries went to investigate and clarify the medical underpinnings of their assumptions.

[22] The difficulty with the use of conservative assumptions is that the risk of error is borne almost entirely by the claimants. In other words, if the assumptions turn out to be unduly pessimistic, the claims on the fund will be less and there will be an undistributed surplus. The corollary of that, of course, is that the benefits paid to the claimants could have been more generous. However, this is not a situation where the parties have negotiated the global settlement amount by estimating its constituent parts, as is the usual case in litigation. Here, the global amount was predetermined, and the benefits payable had to be made to fit within it. As well, it is a term of the settlement that the claimants bear the risk of insufficiency of the fund. Thus, it was open to the plaintiffs to instruct the actuaries to use neutral or liberal assumptions and to provide for more generous benefits to claimants with a concomitant increase in the risk of the fund turning out to be insufficient. In these circumstances, 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.

[23] On reflection, I am satisfied that any value that I might obtain from another actuarial opinion would be minimal and would be offset by the expense and delay it would occasion.

Accordingly, I concluded that I would not ask for a second actuarial opinion.

[24] The final matter on which I wish to comment is the submissions made on behalf of the Public Trustee. Counsel for the Public Trustee supported the plaintiffs' applications but expressed some reservations and suggested some modifications of the settlement.

[25] I am satisfied that the Public Trustee's concerns about notice to persons suffering legal disability can be adequately addressed in an order to be made pursuant to s. 35(5) of the ***Class Proceedings Act***, which provides:

> (5) In . . . approving a settlement . . . the court must consider whether notice should be given under section 20 and whether the notice should include
>
> (a) an account of the conduct of the proceeding,
>
> (b) a statement of the result of the proceeding, and
>
> (c) a description of any plan for distributing any settlement funds.

Counsel will appear before me in due course to speak to the terms of such an order.

[26] The Public Trustee expressed concerns, as well, about the forms of protocols as they relate to persons with legal disabilities. Under Article 10 of the settlement agreement,

the court has the duty to approve all protocols. I therefore order that the Public Trustee be given notice of any application brought in relation to protocols and that he have standing to be heard on such applications.

[27] Counsel for the Public Trustee noted that there is no method provided in the agreement for persons suffering legal disability to opt out of the action. Counsel suggested that the court should order that those legally responsible for persons suffering disability may not opt such persons out of the action except with leave of the court and on notice to the Public Trustee. That is reasonable and I so order.

[28] The Public Trustee suggested that the settlement should be amended to provide for legal counsel at the fund's expense for claimants to establish their entitlement to participate and to represent them in regard to disputes concerning the administration of their claims. Article 5.02(g) of the agreement charges the Administrator with the duty of "assisting in the completion of claim forms and attempting to resolve any disputes with claimants." It is intended that there be an official appointed within the office of the Administrator to assist claimants in that regard. Further, to provide some claimants with legal counsel at the expense of the fund would be unfair to the other claimants who would, in effect, share in the payment of the legal expenses by way of a reduction in the money available to them. These factors militate against such a

provision but, in any event, the court has no power to direct an amendment of the settlement agreement: ***Dabbs No. 1***, *supra.*, at para. 10. Accordingly, this request cannot be given effect.

[29] Similarly, the Public Trustee's request that the parties be directed to amend the settlement to provide compensation for loss of care and guidance to those foster children who lose a foster parent as a result of HCV infection must be refused. The court has no power to give such a direction and the lack of such a provision is not, in all of the circumstances, a defect in the plan that would warrant a refusal of approval. Indeed, counsel for the Public Trustee did not suggest that it is.

[30] As already mentioned, I said in my memorandum to counsel of September 23, 1999, that I expressly adopt paragraphs 129 to 133 of the reasons of Mr. Justice Winkler in ***Parsons***. So there is no uncertainty, and for ease of reference for those who are reading these reasons, I will set those paragraphs out:

> [129] I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. [The third modification is not relevant to the British Columbia actions.]
>
> [130] The defendants have expressed their intention to be bound by the settlement if it receives court

approval absent any material change. As stated, this reflects their acknowledgment of the complexity of the case, the scientific uncertainty surrounding the infections and the fact this settlement is crafted with a degree of improvisation.

[131] The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by counsel for the defendants, the variation indicated is *de minimis* in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. . . .

[132] However, should the parties to the agreement not share the view that these changes are not material in nature, they may consider the proposed changes as an indication of "areas of concern" within the meaning the words of Sharpe J. in ***Dabbs No. 1*** at para 10:

> As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement . . . .

[133] The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these

points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

[31] Judgment accordingly.

"K.J. Smith J."

CITATION: Parsons v. Canadian Red Cross Society, 2016 ONSC 4809
COURT FILE NO.: 98-CV-141369CP
COURT FILE NO.: 98-CV-146405CP
DATE: 20160815

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

Intervenors

Kathryn Podrebarac, Sharon D. Matthews, Q.C., Harvey Strosberg, Q.C., Heather Rumble Peterson, J.J. Camp, Q.C., Michel Savonitto, Martine Trudeau and *Arnaud Sauvé-Dagenais* for the Joint Committee

Mark Polley for Objecting Class Member

William P. Dermody for Claimants 2213 and 7438

John E. Callaghan for Fund Counsel for Ontario

Gordon J. Kehler for Fund Counsel for British Columbia

Philippe Dufort-Langlois for Fund Counsel for Québec

Paul B. Vickery, John Spencer, Bill Knights, Nathalie Drouin, Stéphane Arcelin, Sarah-Dawn Norris, Matthew Sullivan, and *Nathalie Hamam* for the Attorney General of Canada

D. Clifton Prowse, Q.C. and *Keith L. Johnson* for Her Majesty the Queen in Right of British Columbia

Lise Favreau and *Erin Rizok* for Her Majesty the Queen in Right of Ontario

Manon Des Ormeaux for la Procureure générale du Québec

Caroline Zayid and *H. Michael Rosenberg* for the Intervenors representing Provinces and Territories

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 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*

HEARD: June 20-22, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION AND OVERVIEW

[1] These are the Reasons for Decision in two applications in the administration of a settlement under Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6 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 were made in parallel class actions, namely: *Endean v. The Canadian Red Cross Society*, in British Columbia under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, and *Honhon c. Canada (Procureur général)* and *Page v. Canada (Procureur général)* in Québec under the *Code of Civil Procedure*, CQLR c C-25, Article 1036.

[3] 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.

[4] All the applications were heard in Toronto at a special joint-hearing of the Superior Courts of British Columbia, Ontario, and Québec. The applications are interdependent in the sense that for a party to obtain an operative order, the party must succeed in all three courts. The court orders will be conditional on approvals in all the courts.

[5] During and after the hearing, I conferred with Chief Justice Hinkson of the British Columbia Supreme Court and with Justice Corriveau of the Québec Superior Court. My draft decision was shared with my colleagues, but each court will make its own independent decision about the applications. The parties to the applications agreed that the consultative approach employed by the courts was appropriate. The approach enhanced but did not ensure that the respective courts would arrive at a common decision.

[6] 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. The applications now before the courts of British Columbia, Ontario, and Québec are to enforce or apply a provision of the Settlement Agreement, that I shall label the excess capital allocation provision.

[8] In one of the applications, Canada, a defendant in the class actions, requests that between $236.3 million and $256.6 million of actuarially unallocated capital ("excess capital"), which is held by the Trustee under the Settlement Agreement, be paid to it. During the argument of the applications, Canada modified its request and acknowledged that provided that the terms and conditions of the Settlement Agreement were satisfied, some portion of the excess capital could be allocated in response to the requests of the "Joint Committee," which represents the Class Members and which is the applicant in the second application.

[9] Although Canada's position was modified during the course of the joint hearing, its initial position was that since: (a) Canada had put up the money to capitalize the Trust under the Settlement Agreement; (b) the Settlement Agreement specified that at the termination of the Trust any residue should be returned to Canada; (c) the Class Members have received and will receive the full benefit of their bargain under the Settlement Agreement; and (d) any additional payment would be contrary to the terms of the Settlement Agreement; therefore, pursuant to the excess capital allocation provision in the Settlement Agreement, the excess capital should be returned to Canada for the benefit of all Canadians.

[10] Canada also submitted that because of what is now known about the true size of the class, it can now be said that class size was originally overestimated, and as a result of very recent substantial advances in the treatment of HCV leading to actual cures for the majority of living Class Members, Canada has over-endowed the Trust and, therefore, the excess capital should be returned to it.

[11] The Joint Committee fundamentally disagreed with Canada. The position of the Joint Committee was that: (a) Class Members had been undercompensated because the settlement funds, which had been capped by the Defendants, were deficient to cover the actual losses of the Class Members; (b) the Trust had been established because the Defendants had refused to pay an adequate rate of interest on the settlement funds and because Class Members agreed to take on the risk of the settlement funds being deficient; (c) having taken on the risks of the Trust having a deficit, the Class Members were entitled to the benefits of the Trust having yielded an actuarial surplus; and (d) if the excess capital were allocated to the Class Members, there would be no windfall because the Class Members had been and would still be undercompensated for their injuries; therefore, pursuant to the excess capital allocation provision in the Settlement Agreement, the excess capital should be allocated as requested by the Joint Committee.

[12] In its application, the Joint Committee makes two requests. First, the Joint Committee requested that its estimate of the actuarially unallocated money and assets be adjusted downward from $236 million to $207 million to take into account the circumstance that Class Members might be reclassified because of the degenerating nature of HCV (a $29,421,000 potential cost to the Trust funds). I foreshadow to say that I shall grant this prudent request, which was justified by the evidence proffered by the Joint Committee.

[13] Second, the Joint Committee requested that $192,760,000 of the excess capital be allocated for the benefit of Class Members in accordance with the following nine recommendations:

- (1) $32,450,000 for a Late Claims Protocol for Class Members who had been diagnosed with HCV but missed the claims deadline.
    - The Administrator had received 246 late claim requests after the June 30, 2010 First Claim Deadline from persons who did not meet the exceptions to the deadline. Over the last three years, this averages approximately two late claim requests per month.
    - Under the approach proposed by the Joint Committee, a late claimant would need to satisfy a referee that he or she had an acceptable explanation for missing the original deadline. Once a person qualified as a late claimant, he or she would be treated as any other Class Member.

- Assuming that not all Class Members who make late claim requests would qualify for compensation, the actuarial assessment by Eckler, an actuarial consulting firm, of the value of late claims is $32,399,000 before administrative costs.

- (2) $51,392,000 for an increase in fixed payments by either: (a) a 10% increase in respect of all fixed payments as at the date the fixed payment was originally paid, payable retroactively and prospectively; or (b) an 8.5% increase in respect of all fixed payments indexed to January 1st, 2014 payable retroactively and prospectively irrespective of the date at which the original fixed sum was paid.
    - From this allocation, 5,320 Class Members, including 1,650 estates, would benefit as well as other in progress and future claimants.
    - I note here that I favour the 8.5% increase.
- (3) $22,449,000 for an increase in the compensation paid to some defined Family Class Members by either: (a) an increase of $5,000 for Family Class Members indexed to the date the benefit was originally paid payable retroactively and prospectively; or (b) an increase of $4,600 indexed to January 1, 2014 payable retroactively and prospectively.
    - From this allocation, 1,699 Family Class Members classified as children over age 21 and 311 Family Class Members classified as parents would benefit as well as in progress and future claimants.
    - I note here that I favour the $4,600 increase.
- (4) $27,682,000 for loss of income payments to a living class member and loss of support payments to dependants of a deceased Class Member whose death was due to HCV. This allocation, which would increase lost income compensation, would be implemented by eliminating the deduction of collateral benefits; i.e., by eliminating the deduction for CPP/QPP disability, UEI/EI, sickness, accident or disability insurance, and EAP/MPTAP/Nova Scotia Compensation Plan in calculating loss of income and loss of support benefits.
- (5) $19,787,000 to compensate for lost income and loss of pension income by the payment of 10% of gross loss of income, capped to a $200,000 increase payable retroactively and prospectively.
    - From this allocation 528 loss of income/support Class Members would benefit as well as in progress and future claimants.
- (6) $34,364,000 for loss of services for living Class Members and for loss of services payments to dependants of a deceased Class Member whose death was due to HCV. This allocation would be made by increasing the maximum number of hours for loss of services by two hours per week (for a total of 22 hours) payable retroactively and prospectively.
    - From this allocation 1,462 Class Members would benefit as well as in progress and future claimants.
- (7) $629,000 for costs of care reimbursed at disease level 6 to increase the maximum award by $10,000.

- From this allocation, nine Class Members would benefit as well as others in the future with ongoing costs of care claims and potential in progress and future claimants.

- (8) $1,957,000 for a $200 allowance payable for vacation/sick days and/or wages that were lost by Family Class Members when they accompanied Class Members to medical appointments.
    - For this allocation, 3,022 Class Members would benefit as well as other in progress and future claimants.

- (9) $2,050,000 for uninsured funeral expenses payable by increasing the limit on reimbursement of funeral expenses from $5,000 to $10,000 made retroactively and prospectively.
    - Administration data shows that for 395 of the 823 claims for funeral expenses, the current maximum amount payable of $5,000 was inadequate to reimburse the incurred expenses.

[14] The position of the Government of British Columbia was that: (a) in interpreting the excess capital allocation provision, the courts could not amend the Settlement Agreement without the consent of the parties and the courts could not impose new burdens on the Defendants; (b) any allocation of excess capital should not accelerate British Columbia's funding obligations or increase its tax relief obligations; (c) the Joint Committee's recommendation for a removal of the collateral deductions would constitute an impermissible amendment to the Settlement Agreement; (d) the Joint Committee's recommendation for an allocation for Class Members who had missed the claims deadline was an impermissible amendment to the Settlement Agreement; and (e) the discretionary factors set out in the excess capital allocation provision favoured the allocation proposed by Canada; i.e., that Canada receive the excess capital.

[15] The Government of Ontario took 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 should not adversely affect Ontario's obligations to make payments under the Settlement Agreement; and (b) any order should not affect the integrity of the Settlement Agreement.

[16] The position of the Government of Québec was that: (a) it opposed the recommendations of the Joint Committee as constituting impermissible amendments to the Settlement Agreement, and as being contrary to the discretionary factors set out in the excess capital allocation provision; but, (b) if any allocations of excess capital are made, the allocations should not accelerate or increase the obligations of Québec.

[17] The Governments of Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, the Yukon, the Northwest Territories, and Nunavut did not take a position about the requests of Canada and of the Joint Committee save that: (a) they submitted that in interpreting the excess capital allocation provision, the courts could not amend the Settlement Agreement without the consent of the parties and the courts could not impose new burdens on the Defendants; (b) that in interpreting and applying the excess capital allocation provision, the courts should focus on compensation; and (c) the provincial and territorial governments opposed the Joint Committee's request to eliminate the deduction of

collateral benefits for loss of income or loss of support compensation.

[18] Further, the provincial and territorial governments submitted that if the courts did authorize allocations, the allocations had to be implemented as a special distribution rather than by enhancing the benefits payable under the existing compensation plans. The explanation for this submission about the manner of implementation of any capital allocations was that enhancements to any plan benefits would prejudice them by accelerating their funding obligations and by enlarging their tax relief obligations, which adjustments, they submitted, would require an amendment to the Settlement Agreement. A special distribution avoided these prejudicial effects.

[19] I foreshadow the outcome to say that for the reasons set out below: (a) I shall dismiss Canada's application; and (b) with some modifications - so that the allocations are made compliant with the excess capital allocation provisions of the Settlement Agreement - I accept seven recommendations of the Joint Committee (recommendations 1, 2, 3, 5, 6, 7, and 8), and I shall order that the excess capital be allocated by way of special distribution, which manner of allocation addresses the concerns of the provinces and territories.

[20] I shall reject two recommendations (recommendations 4 and 9) because, in my opinion, they are not encompassed by the excess capital allocation provision in the Settlement Agreement or because in my unfettered discretion pursuant to the excess capital allocation provision, I do not favour the allocation.

[21] With the adjustment to the excess capital suggested by the Joint Committee and the rejection of Canada's application and the rejection of two recommendations of the Joint Committee, there is over $40 million in excess capital that has not been allocated.

B. METHODOLOGY

1. Organization

[22] Both Canada and the Joint Committee and also the other participants in the applications submitted that the essential task of the respective courts was to interpret and then to apply the excess capital allocation provision found in the agreements approved by the courts in British Columbia, Ontario, and Québec. I agree, and as will be explained in more detail below, the crux of both applications is a matter of contract interpretation.

[23] Contract interpretation requires the court to objectively determine the meaning of the words used by the contracting parties to express their contractual purposes in the factual circumstances, the factual nexus, in which the words were expressed. As the discussion below will reveal, the critical element of the interpretative arguments of Canada, British Columbia, Ontario, Québec, the other provincial and territorial governments, the Trust Fund Counsel, and the Class Members who made submissions at the joint hearing was that of defining the factual nexus for interpreting the meaning of the words of the excess capital allocation provision of the Settlement Agreement.

[24] In the factums and at the hearing, there was no debate about the meaning of particular words, but in the crucial debate about the factual nexus there was an enormous amount of attention paid to what the parties were thinking about their own and their opponent's negotiating tactics and strategy and about what the parties thought and how they responded to the comments

of the judges involved in the approval process for the Settlement Agreement. As the discussion and analysis below will reveal, an unusual or special feature of the applications now before the court was the emphasis the parties placed on the role played by the courts in British Columbia, Ontario, and Québec in the formation of the parties' contractual intentions and in the meaning to be given to the words used by the parties, most particularly, the meaning to be given to the excess capital allocation provision.

[25] I shall approach the task of interpretation and application by organizing these Reasons for Decision under the following headings:

A. INTRODUCTION AND OVERVIEW
B. METHODOLOGY
    1. Organization
    2. The Excess Capital Allocation Provision
    3. Apologia
C. EVIDENTIARY RECORD
D. CONTRACT INTERPRETATION AND CLASS ACTION ADMINISTRATION
E. FACTUAL BACKGROUND: THE FACTUAL NEXUS OF THE SETTLEMENT AGREEMENT
    1. Introduction
    2. The Pathology and Treatment of HCV
    3. The Underlying Litigation
    4. The Negotiation of the 1986-1990 Settlement Agreement
    5. The Terms of the Settlement Agreement
    6. Settlement Approval
    7. Claims Experience under the Settlement Agreement
    8. The Late Claimants
    9. The Triennial Financial Sufficiency Review and the Excess Capital
    10. Class Member Consultation and Class Members' Stories
    11. Objecting Class Member
    12. Claimant 2213
    13. Claimant 7438
F. DISCUSSION AND ANALYSIS
    1. Introduction
    2. Canada's Claim to the Excess Capital
    3. The Joint Committee's Recommendations
    4. Objecting Class Member
G. CONCLUSION

[26] As may be noted, this organization sets out the contract terms to be interpreted and the principles of contract interpretation before the description of the factual background. This methodology is helpful for the case at bar because it provides a better understanding of the importance of the factual nexus to the interpretative arguments of the parties about how to interpret the excess capital allocation provision.

[27] As may also be noted, this organization includes headings for: (a) Objecting Class Member; (b) Claimant 2213; and (c) Claimant 7438, each of whom made submissions at the joint hearing.

2. The Excess Capital Allocation Provision

[28] Before undertaking the interpretative task, it is helpful to immediately set out the excess capital allocation provision from the Settlement Agreement and other relevant provisions from the Settlement Agreement, including the compensation plans, and from the Funding Agreement, which is Schedule D to the Settlement Agreement.

[29] 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.

[30] In interpreting and applying the excess capital allocation provision, the Approval Orders in British Columbia and in Ontario and Schedule F to the Settlement Agreement in Québec are particularly important. The Approval Orders set out ten factors the courts could consider, but were 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.

[31] 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.

[32] Paragraphs 4.01 and 4.02 of the Funding Agreement for the Settlement Agreement obliged Canada at the outset of the administration of the Trust Fund to make a single payment in full satisfaction of all its liabilities and obligations.

[33] Paragraphs 4.01 and 4.02 of the Funding Agreement provide that the provincial and territorial governments are to make periodic payments "at the time the liability is being determined." Unlike Canada, Ontario and the other provincial and territorial governments were not required to make a lump sum payment into the Trust created by the Settlement Agreement. They are pay-as-you-go contributors.

[34] Paragraph 5.03 of the Settlement Agreement provides that Class Members do not own the Trust Fund's assets.

[35] Paragraphs 10.01 (1)(o) and 12.03(3) of the Settlement Agreement stipulate that any residue upon termination of the Trust Fund will revert to the federal, provincial, and territorial governments.

[36] The provisions of the Plans exclude collateral income from being included in pre-claim net income, and they require that collateral benefits be deducted as post-claim net income, thus reducing the actual income and/or support loss recoverable. The deducted benefits include disability insurance, CPP/QPP, employment insurance and HIV Programs. In addition to these provisions concerning collateral benefits in the income/support loss provisions of the Plans, there is a specific provision concerning collateral benefits as follows:

8.03 Collateral Benefits

(1) If a Class Member is or was entitled to be paid compensation under this Plan and is or was also entitled to be paid compensation under an insurance policy or other plan or claim in any way relating to or arising from the infection of a HCV Infected Person with HCV, the compensation payable under this Plan will be reduced by the amount of the compensation that the Class Member is entitled to be paid under the insurance policy or other plan or claim.

(2) Notwithstanding the provisions of Section 8.03(1), life insurance payments received by any Class Member will not be taken into account for any purposes whatsoever under this Plan.

[37] Paragraph 10.02 of the Funding Agreement provides that if at the time of the termination of the settlement trust, the total liability of the trust is less than the maximum amount that the federal, provincial and territorial governments agreed to contribute, the provincial and territorial governments shall have no further liability. The liability of the provincial and territorial governments is to pay as obligations arise up to the pre-determined maximum liability of the provincial and territorial governments.

[38] 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;

….

(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.

[39] Section 12.02 of the Settlement Agreement provides that the contracting parties must consent to any amendment to the Settlement Agreement. Section 12.02 states:

> 12.02 … except as expressly provided in this Agreement, no amendment or supplement may be made to the provisions of this Agreement and no restatement of this Agreement may be made unless agreed to by the FPT Governments and all members of the Joint Committee in writing and any such amendment, supplement or restatement is approved by the Courts without any material differences.

[40] Section 13.02 of the Settlement Agreement provides that the Settlement Agreement constitutes the "entire agreement" between the parties and that there are no "representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between the Parties with respect to the subject matter hereof other than as expressly set forth".

3. Apologia

[41] The evidentiary record for the hearings contained hundreds of personal stories from Class Members and from members of their families, some of whom are Family Class Members.

[42] Class Members attended the hearings of the applications and several of them, with courage and eloquence, told the courts about what had happened to them and their families as a result of them or a family member having been infected by HCV tainted blood.

[43] The stories were heartbreaking.

[44] For example, one of the Family Class Members who spoke at the hearing was a young women who saw her mother and father both die of HCV, horribly. During her parents' death spiral, the young woman sacrificed her own career and the creation of her own family life in order to care for her parents and then her mother at home and finally at a hospice.

[45] For another example, a Class Member went to the hospital to give birth and she and her newborn were given blood transfusions. It is a perversion of the word mercy to say that mercifully only she was infected with HCV after receiving a notice that she should take herself and her child to a clinic to be tested for HCV.

[46] No amount of money would appear to be adequate to compensate for what the Class Members and their families suffered. On the plane of justice and morality, there can be no debate that the compensation to Class Members for what is priceless can be other than paltry. It is, therefore, understandable that many Class Members might feel that it was immoral, obscene, and offensive for there even to be a debate about whether or not the Class Members whose lives and families had been destroyed had been overcompensated by those in charge of Canada's blood supply delivery system.

[47] I agree with the moral arguments of the Class Members, and if I were entitled to decide these applications just based on morality, then justice, honor, charity, empathy, and kindness would justify dismissing Canada's application and granting the application of the Joint Committee. These applications, however, must be decided on a different plane. It is legal arguments, not moral ones, which will decide these applications.

[48] That is not to say, however, that morality has no role to play in deciding these applications. The law of contract and the law of civil procedure, including the law that governs

class proceedings, are infused with moral values.

[49] The plane of justice and morality intersects with the plane of justice and the law; however, these different planes of justice are not contiguous, and on the legal plane, Canada, the provincial governments, and the territorial governments were entitled to ask the court to enforce the Settlement Agreement in accordance with its terms.

[50] The Settlement Agreement is a binding agreement on the Class Members, who settled their claims. The Class Members are entitled only to be compensated under the law of property, contract, tort, and statute, and the law in all these areas makes practical and pragmatic decisions about how to value the priceless.

[51] Similar sentiments were expressed by the judges who approved the Settlement Agreement. In *Page c. Canada (Procureur général*), [1999] J.Q. no. 4415 (C.S.), Justice Morneau stated at para. 23:

> L'on ne peut qu'être touchés par le drame que vivent les personnes infectées par les produits du sang contaminé au VHC, de même que leurs proches. Si l'avenir comporte pour tous une grande part d'incertitude, ceux-ci ont certainement des soucis additionnels. Ils craignent que l'infection ne progresse. Même si cela ne devait pas se produire, la peur demeure. En ce sens, aucune somme ne pourra jamais compenser leur souffrance.

[52] In *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 (S.C.J.), when Justice Winkler (as he then was) approved the Settlement Agreement, at paragraph 77 he stated:

> The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

C. EVIDENTIARY RECORD

[53] The record for the hearing of the applications was comprised of a two-volume motion record from the Joint Committee and a Joint Record of 25 volumes including material from the Joint Committee and from Canada.

[54] Not counting books of legal authorities, there was approximately 10,000 pages of material including: the settlement agreements; the funding agreement, compensation plans, affidavits, experts' reports, medical reports, financial reports, actuarial reports, court documents, court orders, the personal accounts of the lawyers involved in the settlement negotiations, and personal histories of Class Members.

D. CONTRACT INTERPRETATION AND CLASS ACTION ADMINISTRATION

[55] The Settlement Agreement is a court enforced and administered contract between the governments and the Class Members. The Class Members released their claims in exchange for the performance of the terms of this court approved settlement. The Class Members had the choice of proceeding to a trial and possibly recovering more or less or nothing at all but they chose to settle in accordance with a contract that was subject to court approval under the *Class Proceedings Act, 1992*.

[56] The fundamental principle of contract interpretation in British Columbia and Ontario is to ascertain the intent of the parties by reading the contract as a whole and by giving the words used their ordinary and grammatical meaning in the context of the surrounding circumstances known to the parties at the time of formation of their contract: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21 at para. 27; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4.

[57] Similarly, in Quebec, contractual interpretation is centered on the intention of the parties. Sections 1425 to 1432 of the *Civil Code of Québec* provides a code in regard to the interpretation of contract. The code closely if not identically embodies the principles of contract interpretation used by the common law provinces.

[58] As mentioned above and revealed below, in the two applications before the court, the interpretative battleground amongst the parties was mainly about the factual nexus; i.e. the surrounding circumstances of the Settlement Agreement. As the discussion below in the analysis portion of these Reasons for Decision will reveal, the parties fundamentally differed about how the surrounding circumstances affected the meaning of the words used in the excess capital allocation provision.

[59] As the discussion below will also reveal, it shall be important to keep in mind the proper role of evidence of the surrounding circumstances in the interpretation of contracts. This topic was discussed at some length by Justice Rothstein in *Sattva Capital Corp. v. Creston Moly Corp*., *supra*. In that case, he stated at paragraphs 47-48 and 56-60:

> 47. Regarding the first development, 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" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways*), 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). 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:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)
>
> 48. The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement …. As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

…..

56. I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. ….

57. While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement …. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (*Hall*, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

58. The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the *parol* evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

Considering the Surrounding Circumstances Does Not Offend the *Parol* Evidence Rule

59. It is necessary to say a word about consideration of the surrounding circumstances and the *parol* evidence rule. The *parol* evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and *Hall*, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (*Hall*, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129, at paras. 54-59, per Iacobucci J.). The purpose of the *parol* evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd*., [1993] 2 S.C.R. 316, at pp. 341-42, per Sopinka J.).

60. The *parol* evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. 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; therefore, the concern of unreliability does not arise.

[60] Where a settlement arises in the context of a class action, in exercising its ongoing supervisory jurisdiction, the court may not vary the agreement reached by the parties by adding, deleting or modifying any material term and that changes to material terms can only be made with the consent of all of the parties: *Harrington v. Dow Corning Corp*., [2010] B.C.J. No. 867 (S.C.); *Lavier v MyTravel Canada Holidays Inc.*, 2011 ONSC 3149; *Bodnar v. Cash Store Inc*. [2011] B.C.J. No. 1777 (C.A.); *Coopérative d'habitation Village Cloverdale c. Société canadienne d'hypothèque et de logement*, 2012 QCCA 57; *Honhon c. Canada (Procureur general)*, 2014 QCCS 2032, at para. 16; *Endean v. Canadian Red Cross Society*, 2014 BCSC 621, at para. 12.

[61] The court does not have the jurisdiction to rewrite the Settlement Agreement and 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.

[62] In *Lavier v. MyTravel Canada Holidays Inc.*, *supra*, at paras. 31-33, I stated:

> 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*, (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 4999 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.

E. FACTUAL BACKGROUND: THE FACTUAL NEXUS OF THE SETTLEMENT AGREEMENT

1. Introduction

[63] As noted above, the crux of the applications before the courts of British Columbia, Ontario, and Québec is a matter of contract interpretation, and for a court, the crux of contract interpretation is the interpretation of the words used by the parties and understanding those words in the context of the circumstances of the parties at the time of contracting.

[64] In this part of my Reasons for Decision, I shall set out my findings of fact, and because the arguments of the parties predominately focused on understanding the surrounding circumstances, I shall describe in particular the factual nexus for the interpretation of the excess capital allocation provision.

[65] The applications before the courts turn on understanding how and why the excess capital allocation provision was added to the Settlement Agreement. As the discussion in this part will reveal, the factual nexus for the interpretation of the excess capital allocation provision was complex.

[66] In arguing for their respective interpretations and applications of the excess capital allocation provision, the parties focused a great deal of attention on the factual circumstances that led to the Settlement Agreement and to the history of how it came about that the Settlement Agreement came to have an excess capital allocation provision. As the factual narrative below will reveal, this provision was not part of the Settlement Agreement originally negotiated by the parties, and it was only added to the Agreement as a result of comments made by the courts of British Columbia, Ontario, and Québec during the process of obtaining the courts' approval of the Settlement Agreement. The parties shared the view that it was important to interpreting the excess capital allocation provision to understand the role of the courts in shaping the ultimate terms of the Settlement Agreement.

[67] In arguing for their respective interpretations of the excess capital allocation provision, the parties dedicated a great deal of attention to proving what was known about the state of scientific, epidemiological, and medical knowledge about HCV at the time of the approval of the Settlement Agreement, and they spent a great deal of time leading evidence about the actuarial and epidemiological knowledge about class size at the time of the negotiation of the Settlement Agreement and the effect of these factors on the culmination of a settlement.

[68] In arguing for their respective interpretations of the excess capital allocation provision, the parties made submissions about the quality of the Settlement Agreement in terms of whether or not it was a good settlement from the perspective of the Class Members having regard to the possible outcomes and possible recoveries had the class actions gone to trial and individual assessments of the Class Members' claims been made. For instance, the parties' submissions described the various types of compensation provided under the Settlement Agreement and compared and contrasted what would have been recoverable under the laws of the provinces and territories where the Class Members resided. These submissions were complex because for various heads of damages, the approach of the law is not uniform across the country.

[69] Although the actual performance of the Trust established under the Settlement Agreement would not have been known at the time of the settlement agreements, the parties led evidence and made argument about the claims and compensation payout experience and about the investment performance of the fund.

[70] All of this information was submitted by the parties as relevant to the courts' task of interpreting the excess capital allocation provision in its factual nexus at the time of the approval of the Settlement Agreement.

[71] The discussion below and later in the analysis portion of these Reasons for Decision will reveal that the parties' respective accounts of the factual nexus was contentious largely because of conflicting assessments of the motives and rationalizations for the positions taken by the parties during the negotiations up to and including the settlement approval hearings across the country. Thus, in arguing for their respective interpretations of the excess capital allocation provision, the parties included submissions about the factual nexus that, in my opinion, were more a matter of argument than a matter of admissible evidence. These submissions about the contractual intentions of the parties to the 1986-1990 Hepatitis C Settlement Agreement were of the nature of subjective speculations about what the counsel for the parties were thinking about what their opponent was thinking.

[72] In the description of the factual nexus that follows, I shall attempt to avoid the subjective submissions of the parties and leave those submissions, which are more argument than evidence, to the analysis section of these Reasons for Decision.

2. The Pathology and Treatment of HCV

[73] Hepatitis is an inflammation of the liver caused by a virus. HCV is a chronic, progressive, and ultimately life-threatening disease. There are six forms or genotypes of the virus some of which are more resistant to treatment than the others.

[74] Approximately 25% of all persons infected clear the HCV spontaneously within approximately one year of infection. The virus-cleared persons will still test positive for the antibody, but they will not experience any progressive liver disease nor test positive on a

Polymerase Chain Reaction ("PCR") test.

[75] If the Hepatitis C Virus does not spontaneously clear, the disease becomes chronic and progressive, which is to say that the virus causes scarring (fibrosis) that proceeds through several stages leading to the death (necrosis) of liver cells. The higher the stage, the more marked the pattern of fibrosis in the liver. In the end stage, the fibrosis is described as cirrhotic.

[76] The most common description of the pathology of HCV specifies four disease levels that correlate to the stages of the fibrosis. Cirrhotic patients have livers which are either "compensated," where liver function is maintained notwithstanding the cirrhotic pattern or "decompensated," where the liver is not able to perform one or more of its essential functions. Patients who progress to cirrhosis with or without decompensation may develop hepatocellular cancer. A decompensated liver is life threatening and death will ensue unless the patient receives a liver transplant.

[77] HCV, however, will attack a liver transplant and the progression of the disease restarts.

[78] Many patients are asymptomatic before developing cirrhosis or hepatocellular cancer but others suffer serious symptoms as the disease progresses. Pre-cirrhotic symptoms include: fatigue, weight loss, upper right abdominal discomfort, mood disturbance, poor concentration, clinical anxiety, and clinical depression.

[79] Some patients with HCV suffer from conditions which are related to their infection, conditions which they are more vulnerable to developing as a result of infection with HCV or conditions that HCV exacerbates. These conditions are considered co-morbidities and they include: hepatocellular cancer; pain; mental illnesses such as depression and anxiety; diabetes (higher incidence in HCV population); mixed cryoglobulinemia (inflammation in blood vessels); erythema multiform, erythema nodosum, lichen planus and other skin conditions; glomerulonephritis (inflammation in the kidneys and in some instances kidney failure); thyroid diseases; polyarteritis (inflammation of small blood vessels); porphyria cutanea tarda (painful blisters on exposed skin areas); thrombocytopenia (low platelets); uveitis, Mooren corneal ulcers; Sjogren's syndrome (lack of production of tears and saliva); and B-cell lymphoma (cancer of the lymph glands).

[80] At the time of the negotiation of the Settlement Agreement, HCV was an incurable disease, and there was no viable treatment for it. However, between 2000 to 2011, drug treatments were introduced. Treatment of HCV is called antiviral therapy with the goal of eradicating the virus so that it drops below detectable levels on PCR blood testing and stays below detectable levels for 12 weeks after antiviral treatment. If the therapy is successful, the inflammation and further scarring and death of liver cells stops, except in advanced cirrhosis where the extent of scarring is so great that the liver proceeds to liver failure notwithstanding the cessation of the inflammation.

[81] The drug treatments for HCV might last for a year or longer. Up until recently, there were brutal side effects and the cure rates were low, only up to 10%.

[82] From 2000 to 2011, although the treatment results were poor and the side effects grievous, the standard antiviral therapy for patients infected with HCV was pegylated interferon plus ribavirin. The efficacy of the treatment was disappointing, especially among patients infected with genotype 1, which accounted for approximately two-thirds of the patients. Treatments lasted between 24 to 48 weeks and many patients abandoned their course of

treatments because of the painful and debilitating side effects.

[83] In 2011, Health Canada approved Telaprevir and Boceprevir, known as direct-acting antiviral ("DAA") drugs, for the treatment of chronic HCV genotype 1. Outcomes improved greatly and some, but not all patients, did not require the supplement of ribavirin.

[84] In 2013-2014, Health Canada approved Harvoni and Holkira-Pak with treatment consisting of one to six pills per day, usually over the course of 8 to 12 weeks. The cure rates increased with substantially reduced side effects. The remaining side effects that last until the treatments are completed include fatigue, headaches, insomnia, nausea, diarrhea, pruritus and asthenia.

[85] In some cases ribavirin must still be taken with Holkira-Pak. With some exceptions, Harvoni and Holkira-Pak are effective in persons who have not been previously treated and in those treated previously who did not respond to the older drugs. Harvoni and Holkira-Pak are expected to achieve a cure in over 90% of cases, with the exception of categories of patients such as genotype 3 patients with cirrhosis.

[86] Antiviral therapy treatment durations and contraindications have decreased but the cost of treatment has increased. The cost starts at approximately $50,000 for 8 weeks to $76,000 for 12 weeks. If ribavirin is added, the additional cost is approximately $3,800-$4,400 for 12 weeks.

[87] On January 29, 2016, Health Canada granted regulatory approval of Zepatier, another all-oral treatment for patients with HCV genotypes 1 and 4.

[88] Dr. Samuel Lee, a professor of medicine specializing in gastroenterology and hepatology opined that in 2016 another generation of DAAs will offer even greater advantages for patient care and there would be very few cases where the virus could not be eradicated with modest or minimal side effects.

[89] The development of DAA therapies has, over the last three years, made becoming HCV-free possible for a large proportion of the Class Members who are still living with the disease. However, this does not guarantee a return to good health because the Class Members' livers have been damaged over a course of some 30 years of chronic and progressive viral infection. The mental health issues linger and cured or not, Class Members have an elevated risk of hepatocellular cancer and are vulnerable to a subsequent liver insult.

[90] Notwithstanding the higher efficacy of the DAA drugs, the 2013 medical model for the Class Members alive as of August 31, 2013 predicts that by 2070: (a) 19.9% of Class Members will have already developed or will develop cirrhosis; (b) 12.1% will have already developed or will develop decompensated cirrhosis; (c) 4.3% have will already developed or will develop hepatocellular cancer; and (d) 14.7% will have already experienced or will experience liver-related mortality.

[91] The number of Class Members who have not yet been diagnosed is still unknown. Canada's witness, Dr. Lee, estimated that one-quarter to one-third of those at the cirrhotic stage are as yet undiagnosed.

3. The Underlying Litigation

[92] Between 1996 and 1998, class actions were commenced in each of British Columbia, Ontario, and Québec seeking damages for personal injury and wrongful death on behalf of

transfused persons and persons with hemophilia. The Class Members were persons who received blood or certain blood products in Canada between January 1, 1986 and July 1, 1990 and who were infected with HCV.

[93] The Ontario actions included claims for persons wherever located who were not included in the British Columbia and Québec actions and claims in respect of certain Family Class Members.

[94] The Defendants included The Canadian Red Cross Society, The Attorney General of Canada ("Canada"), Her Majesty the Queen in Right of the Province of British Columbia ("British Columbia"), Her Majesty the Queen in Right of Ontario ("Ontario"), and le Gouvernement du Québec ("Québec"). The other provinces and territories ultimately became intervenors in the action in Ontario and were bound by the outcome, making the class actions, when viewed collectively, national in scope.

[95] The Canadian Red Cross Society was a defendant in all the actions, but it was granted protection from its creditors pursuant to the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 and it was not a party to the settlement that was ultimately achieved. The source of funding for a settlement was the federal, provincial, and territorial governments.

[96] Following certifications, the parties entered into settlement discussions that lasted for over 18 months and that involved, as discussed below, a conditional settlement approval and then a revised Settlement Agreement that was approved by the respective courts.

[97] The settlement negotiations were prompted by the announcement on March 27, 1998 that Canada and the provincial and territorial governments would pay up to $1.118 billion to compensate the Class Members. The governments made it clear from the outset of the negotiations that the $1.118 billion was the maximum they would pay.

4. The Negotiation of the 1986-1990 Settlement Agreement

[98] In the negotiations that led up to the Settlement Agreement, the position of the federal, provincial, and territorial governments was that their liability must be capped at no more than $1.118 billion. This position was contentious because of uncertainties about class size, the epidemiology of HCV, the merits of the claims and the defences, and the calculation of various disputed heads of damages.

[99] As noted above, at the time of the settlement negotiations, HCV was thought to be an irreversible and terminal disease, and in 1999, Eckler, an actuarial firm that was engaged by Class Counsel to provide actuarial advice and evidence, estimated that the total cohort of transfused and hemophiliac Class Members was 9,825. The Class Members' case was strongest against The Canadian Red Cross Society and weaker against the governments. Class Counsel felt that there was a 35% chance of the Class Members' action failing. The government lawyers estimated litigation success as a 50:50 probability. Notwithstanding that class size and class disease demographics were uncertain, the governments stood firm about the extent of their $1.118 billion contribution. Thus, the development of the compensation plans was "top down" in the sense of negotiating how to distribute that sum among various heads of damages rather than being a "bottom up" plan that would aggregate the various heads of damages to arrive at an appropriate sum to compensate the Class Members.

[100] After months of negotiating, on December 18, 1998, the parties agreed to a Framework

Agreement under which the governments agreed to a capped liability of $1.118 billion. Because the liability was capped, the Class Members took on the risk that $1.118 billion was insufficient for full compensation under the proposed distribution plan of benefits to Class Members. For the governments' part, because their contribution was fixed, notwithstanding that class size and class disease demographics were uncertain, the governments took on the risk that they had overfunded the settlement if the Class Members' take-up was below the actuarial and epidemiological predictions.

[101] From the Class Members' perspective, given the uncertainties of how many claims would be made and the nature of those claims, there was a fear that compensation might have to be prorated, and, thus, under the Framework Agreement, to ensure the sufficiency of the $1.118 billion, restrictions and holdbacks on scheduled compensation were established. These restrictions could be reduced or removed if there were sufficient funds after the take-up of the benefits, which was in fact what eventually occurred.

[102] A contentious issue during the negotiations was the amount of interest that the governments should pay on the settlement funds before they were actually paid to Class Members. During the negotiations, the bargaining proposal was that the governments would notionally invest the settlement funds and pay interest at a rate equivalent to long-term Government of Canada Bonds, but the governments sought to change the rate to the lower Treasury Bill Rate. The negotiation about the calculation of interest was resolved by Canada agreeing to pay to a Trustee 8/11ths of the fixed settlement sum (approximately $846 million plus interest) upon settlement approval. The Trustee could invest this up-front money based on investment recommendations from a professional advisor and Class Counsel. Under this scheme, Class Members take on the risk that the performance of the investments would erode the sufficiency of the funds to be taken up by Class Members.

[103] In June 1999, the Settlement Agreement was concluded and the parties sought approval in British Columbia, Ontario, and Québec. The settlement was comprised of the Settlement Agreement, a Funding Agreement and plans for the distribution of the settlement funds. The Settlement created two benefit plans, the Transfused HCV Plan to compensate persons who are or were infected with HCV through a blood transfusion, their secondarily-infected spouses and children and their other family members; and the Hemophiliac HCV Plan to compensate hemophiliacs who received blood or blood products in Canada in the Class Period and who were infected with HCV, their secondarily-infected spouses and children and their other family members.

[104] The Funding Agreement capitalized the Trust Fund by Canada's up-front payment of 8/11ths of the settlement amount and a promise by each provincial and territorial government to pay a portion of its share of the 3/11ths of the unpaid balance of the settlement amount as may be requested from time to time until the outstanding unpaid balance of the settlement amount, together with interest accruing on the unadvanced settlement funds, had been paid in full. From Canada's up-front payment, $4,353,611 was used to establish the Trust.

[105] The governments agreed that no income taxes would be payable on the income earned by the Trust. The governments' agreement to forgo taxes has a present value of about $357 million and is a factor in explaining why, at the present time, there is excess capital to be allocated.

5. The Terms of the Settlement Agreement

[106] The Settlement Agreement pays benefits 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. All Class Members who qualify as HCV infected persons are entitled to a fixed payment as compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical condition at the time of qualification under the Plan. However, the Class Member will be subsequently entitled to additional compensation if and when his or her medical condition deteriorates to a medical condition described at a higher compensation level. The fixed payments range from a single payment of $10,000, for a person who has cleared the disease and only carries the HCV antibody, to payments totaling $225,000 for a person who has decompensation of the liver or a similar medical condition. In addition, Class Members at disease level 3 or higher whose HCV caused loss of income or inability to perform his or her household duties, were entitled to compensation for loss of income or loss of services in the home.

[107] Details of how compensation was paid under the Settlement Agreement, with some commentary relevant to the recommendations of the Joint Committee as to how excess capital might be allocated, are as follows:

- Compensation was payable based on the severity of a Class Member's medical condition using a six level scale that reflected the levels of seriousness of the disease.
- There were fixed sum payments as compensation for pain and suffering (general damages) for each stage of the disease. The fixed payments could accumulate, but the maximum payable to a Class Member was $225,000.
    - It should be noted that as of January 1999, the maximum amount recoverable for general damages under the Supreme Court's trilogy of *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, *Thornton v. Prince George Board of Education*, [1978] 2 S.C.R. 267 and *Arnold v. Teno*, [1978] 2 S.C.R. 287, was $260,500.
    - Based on consultations with Class Members and their submissions about the nature of HCV's chronic and progressive harm, the Joint Committee submitted that excess capital should be used to redress that compromises had been made in determining the fixed payments for general damages for pain and suffering.
- Loss of income compensation, which was calculated net of income tax and collateral benefits and which was paid periodically until age 65, was available for disease level 3 Class Members who elected to forgo a fixed payment and for Class Members at disease level 4 or higher.
    - The accounts of Class Members revealed that some Class Members elected a fixed payment instead of loss of income compensation because they felt that this was the better choice given an anticipated short lifespan and working life. When these Class Members survived, they sometimes found themselves without any income to live on.
    - There was no compensation for loss of employee benefits including loss or diminishment of pension.

  - The loss of income and loss of support benefits available under the Plans represented the single largest compromise from the tort model. The inadequacy of compensation for lost income evoked the greatest amount of concern from Class Members who were consulted about the allocation of excess capital. They particularly objected to the deduction of collateral benefits which was the source of considerable hardship.

- As a substitute for loss of income compensation, Class Members at disease level 4 or higher could claim loss of services in the home compensation, if they normally performed household duties. Compensation was calculated at a rate of $12 per hour to a maximum of $240/week, equivalent to 20 hours per week. This benefit was also available for disease level 3 Class Members who did not elect a fixed payment.
  - Many communications from Class Members described loss of services payments as being vital to their survival and many commented that the compensation was inadequate to actually replace the work.
- A Class Member at disease level 6 who incurred care costs that were not recoverable under any public or private healthcare plan was entitled to be reimbursed those costs to a maximum of $50,000 per calendar year.
  - For approximately 10% to 15% of the eligible Class Members, the current benefit did not reimburse them for the expenditure incurred for cost of care.
- A Class Member was entitled to reimbursement for uninsured out-of-pocket expenses based on rates contained in the *Financial Administration Act* regulations.
  - The Joint Committee and Class Members submitted that the reimbursement for out-of-pocket expenses were inadequate particularly because of the loss of time, vacation days, sick days, and wages by Family Class Members when they accompanied Class Members to medical appointments.
- A Class Member was entitled to reimbursement for uninsured treatment and medication costs.
- A Class Member at disease level 3 or higher who took Compensable HCV Drug Therapy (i.e., interferon or ribavirin or any other treatment with a propensity to cause adverse side effects that has been approved by the Courts) was entitled to be paid $1,000 for each completed month of therapy.
- Hemophiliac Class Members who are co-infected with HIV could elect to be paid $50,000 in full satisfaction of all claims, past, present or future, including potential claims by their dependents or other Family Class Members.
- For Class Members who died before January 1, 1999 from HCV, their estate could claim an all-inclusive $50,000 plus up to $5,000 for reimbursement of uninsured funeral expenses and their dependent Family Class Members could claim loss of guidance, care and companionship payments. Alternatively, the estate, dependents, and Family Class Members collectively could claim an all-inclusive $120,000 plus up to $5,000 for uninsured funeral expenses. For hemophiliac Class Members who were co-infected with HIV the alternative was an all-inclusive payment of $72,000 without proof of death due to HCV.

- For Class Members who died after January 1, 1999, their estate could claim any unpaid benefits and post-death loss of services and Family Class Members could make their claims.
- Family Class Members living with a class member at the time of the Class Member's death caused by his or her HCV infection received fixed payment compensation for loss of support. The payments ranged from $500 for a grandchild to $25,000 for a spouse.
    - Family Class Members do not receive loss of guidance, care and companionship benefits while the infected Class Member is alive contrary to statutory provisions in some jurisdictions but consistent with the case law in other jurisdictions; for example British Columbia, where the statute has been interpreted to provide compensation for family members only if the injuries to a person resulted in death. See *Porpaczy (Guardian ad litem of) v. Truitt*, [1990] B.C.J. No. 2018 (B.C.C.A.).
    - The Joint Committee and Class Members submitted that these fixed payments were miserly. The Joint Committee recommended an increase to the benefits payable to children 21 years or older and to parents which were divergent from the benefits payable to spouses and to children under age 21.
- Dependents living with Class Members at the time of their death were entitled to a loss of support claim calculated in the same manner as a loss of income claim less a 30% discount and payable until the 65th anniversary of the Class Member's birth after which the dependent could switch to a loss of services in the home claim.
- Dependents living with a Class Member at the time of the Class Member's death could claim compensation for loss of services as an alternative to the loss of support claim. This benefit was payable until the earlier of the dependent's death or the statistical lifetime of the infected Class Member calculated without regard to the HCV infection.
- Class Members whose claim was based on blood transfusions and who had already been diagnosed with HCV had to submit a claim by the "First Claim Deadline", which was June 30, 2010.
- Class Members who had not been diagnosed were not affected by the First Claim Deadline and were entitled to make a claim within three years of diagnosis.

6. Settlement Approval

[108] To come into effect, the settlement had to be uniformly approved by the courts of British Columbia, Ontario, and Québec. The approval decisions are reported as: *Endean v. Canadian Red Cross Society*, [1999] B.C.J. No. 2180 (B.C.S.C.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.); *Honhon c. Canada (Procureur général)*, [1999] J.Q. no 4370 (C.S.); *Page c. Canada (Procureur général)*, [1999] J.Q. no 4415 (C.S.); *Page c. Canada (Procureur général)*, [1999] J.Q. No. 5325 (C.S.).

[109] On September 21, 1999, Justice Morneau of the Superior Court of Quebec approved the Settlement Agreement.

[110] The next day, on September 22, 1999, in Ontario, Justice Winkler provisionally approved

the Settlement Agreement.

[111] In determining whether the proposed settlement was fair, reasonable, and in the best interests of the Class Members, Justice Winkler rejected the argument of Class Counsel and of the government defendants that the quality of the Settlement Agreement should be judged by comparing the potential recovery of each Class Member's personal injury tort litigation with the compensation available for the various disease levels identified in the compensation plans.

[112] In this last regard, it is important to note that Justice Winkler (at paragraph 81) disagreed with the argument advanced in favour of the Settlement that the benefits provided at each disease level were similar to the awards Class Members would recover from adjudicated tort claims in individual litigation. He said that this argument was flawed and did not provide a basis for assessing the fairness of the Settlement. Rather, (at paragraph 89) he stated that: "the only basis on which the court can proceed in a review of this settlement is to consider whether the total amount of compensation available represents a reasonable settlement, and further, whether those monies are distributed fairly and reasonably among the class members."

[113] I pause to emphasize that Justice Winkler did not determine whether or not the $1.118 billion was more or less than the Class Members would recover assuming they were successful at both the common issues trial and in proving their individual damages. Rather, Justice Winkler stated (at paragraph 91) that he was satisfied that the negotiations were lengthy and intense and that the Class Members achieved the maximum total funding that could be obtained short of trial.

[114] Justice Winkler stated that the most significant factor favouring approving the Settlement was the substantial litigation risk; Justice Winkler stated at paragraphs 92 and 94:

> 92. In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The [Canadian Red Cross Society] is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.
>
> ….
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> 94. In conclusion, I find that the global settlement represents a reasonable settlement when the significant and very real risks of litigation are taken into account.

[115] With an adjustment to address claims by Class Members that might opt-out of the Settlement to pursue individual claims, Justice Winkler was satisfied that the distribution scheme in the Settlement Agreement was fair and reasonable for Class Members.

[116] For present purposes, Justice Winkler's comments about the distribution scheme are relevant because they provide some insight into the factual nexus for the excess capital allocation provision, which, as noted above, was not a part of the Settlement Agreement as it was originally presented to Justice Winkler. In this regard, Justice Winkler stated at paras. 103-109, 111, 113-

14:

103. … There were few concerns raised about the compensation provided at the upper levels of the scheme. Rather, the majority of the objections centred on the benefits provided at Levels 1, 2 and 3. The damages suffered by those whose conditions fall within these Levels are clearly the most difficult to assess. This is particularly true in respect of those considered to be at Level 2. However, in order to provide for the subsequent claims, compromises must be made and in this case, I am of the view that the one chosen is reasonable.

104. Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory benefits assigned to claimants at different levels were largely influenced by the total of the monies available for allocation. ….

105. Of necessity, the settlement cannot, within each broad category, deal with individual differences between victims. Rather it must be general in nature. In my view, the allocation of the monies available under the settlement is "fair, reasonable and in the best interests of the class as a whole."

106. In making this determination, I have not ignored the submissions made by certain objectors and intervenors regarding the sufficiency of the Fund. They asserted that the apparent main advantage of this settlement, the ability to "claim time and time again" is largely illusory because the Fund may well be depleted by the time that the youngest members of the class make claims against it.

107. I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $334,173,000. Admittedly, Eckler currently projects a deficit of $58,533,000 if the holdbacks are released.

108. However, the Eckler report contains numerous caveats regarding the various assumptions that have been made as a matter of necessity ….

109. Unfortunately, but not unexpectedly, the limitations of the underlying medical studies upon which Eckler has based its report require the use of assumptions. ….

111. The size of the cohort and the percentage of the cohort which will make claims against the Fund are critical assumptions. Significant errors in either assumption will have a dramatic impact on the sufficiency of the Fund. Recognizing this, Eckler has chosen to use the most conservative estimates from the information available. The cohort size has been estimated from the CASL study rather than other studies which estimate approximately 20% less surviving members. Furthermore, Eckler has calculated liabilities on the basis that 100% of the estimated cohort will make claims against the Fund.

….

113. … the Eckler report stands alone as the only and best evidence before the court from which to determine the sufficiency of the Fund. Eckler has recognized the deficiencies inherent in the information available by using the most conservative estimates throughout. This provides the court with a measure of added comfort. Not to be overlooked as well, the distribution of the Fund will be monitored by this court and the courts in Quebec and British Columbia, guided by periodically, revised actuarial projections. In my view, the risk that the Fund will be completely depleted for latter claimants is minimal.

114. Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000,000 considered in the context

of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus, in this respect, the settlement is reasonable.

[117] At paras. 115-117 and 120-124, Justice Winkler addressed the matters that led him to propose that the Settlement Agreement expressly include a provision to allocate excess capital; he stated:

115. I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the defendants. The Society contends that this provision simpliciter is repugnant to the basis on which this settlement is constructed. It argues that the benefit levels were established on the basis of the total monies available, rather than a negotiation of benefit levels per se. Thus, it states there is a risk that the Fund will not be sufficient to provide the stated benefits and further, that this risk lies entirely with the class members because the defendants have no obligation to supplement the Fund if it proves to be deficient for the intended purpose. Moreover, the Society argues that the use of conservative estimates in defining the benefit levels, although an attempt at ensuring sufficiency, has the ancillary negative effect of minimizing the benefits payable to each class member under the settlement. Therefore, the Society contends that a surplus, if any develops in the ongoing administration of the Fund, should be used to augment the benefits for the class members.

116. The issue here is whether a reversion clause is appropriate in a settlement agreement in this class proceeding, and by extension, whether the inclusion of this clause is such that it would render the overall settlement unacceptable.

117. It is important to frame the submission of the Society in the proper context. This is not a case where the question of entitlement to an existing surplus is presented. Indeed, given the deficit projected by the Eckler report, it is conjectural at this stage whether the Fund will ever generate a surplus. If the Fund accumulates assets over and above the current Eckler projections, they must first be directed toward eliminating the deficit so that the holdbacks may be released.

….

120. Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefitting neither party during the entire 80 year term of the settlement.

121. Quite apart from the question of tying up the surplus for this unreasonable period of time, there is the underlying question of whether in the context of this settlement, it is appropriate for the surplus to revert in its entirety to the defendants.

122. The court is asked to approve the settlement even though the benefits are subject to fluctuation and regardless that the defendants are not required to make up any shortfall should the Fund prove deficient. This is so notwithstanding that the benefit levels are not perfect. It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

123. This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the

> settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. .... On the other hand, in the proper circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.
>
> 124. To attempt to determine the range of reasonable solutions at present, when the prospect of a surplus is uncertain at best, would be to pile speculation upon speculation. In the circumstances therefore, the only appropriate course, in my opinion, is to leave the question of the proper application of any surplus to the administrator of the Fund. The administrator may recommend to the court from time to time, based on facts, experience with the Fund and future considerations, that all or a portion of the surplus be applied for the benefit of the class members or that all or a portion be released to the defendants. In the alternative, the surplus may be retained within the Fund if the administrator determines that this is appropriate. Any option recommended by the administrator would, of course, be subject to requisite court approval. This approach is in the best interests of the class and creates no conflicts between class members. Moreover, it resolves the anomaly created by freezing any surplus for the duration of the administration of the settlement. If the present surplus reversion clause is altered to conform with the foregoing reasons, it would meet with the court's approval.

[118] Justice Winkler summarized his analysis and his determination of whether the Settlement agreement should be approved at paras. 128-129, 131, 133 as follows:

> 128. The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial. Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.
>
> 129. I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. Thirdly, in the interests of fairness, a sub-class must be created for the thalassemia victims to take into account their special circumstances.
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> ….
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> 131. …. I am prepared to approve the settlement with these changes.
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> ….
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> 133. The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

[119] On September 23, 1999, in British Columbia, with written reasons to follow, Justice K.J. Smith released an endorsement agreeing with the decision of Justice Winkler, and, in particular, Justice Smith agreed with Justice Winkler's comments about modifications to the Settlement Agreement with respect to the treatment of any surplus capital.

[120] On October 1, 1999, Justice Smith released his written reasons. See *Endean v. Canadian Red Cross Society*, [1999] B.C.J. No. 2180 (B.C.S.C.). For present purposes, what is pertinent are Justice Smith's comments at paragraphs 20 to 22 about objectors who questioned the actuarial evidence about the sufficiency of the Fund to pay the benefits prescribed by the compensation plans. Justice Smith's comments were as follows:

> 20. The sufficiency of the fund is the subject of a number of objections. The evidence presented on this aspect of the application was the actuarial opinion of Eckler Partners Ltd. I have no qualms about the methodology they employed but it did appear to me during the hearing that many of their assumptions rested on thin evidential foundations. Accordingly, I raised with counsel the question of whether I should ask for another independent actuary to advise the court with respect to the reliability of the Eckler report.
>
> 21. Counsel pointed out that in every situation where an assumption might be questionable, Eckler Partners Ltd. made the assumption that was most conservative, that is, that would produce the greatest adverse effect on the fund. Counsel also adverted to the lengths to which the actuaries went to investigate and clarify the medical underpinnings of their assumptions.
>
> 22. The difficulty with the use of conservative assumptions is that the risk of error is borne almost entirely by the claimants. In other words, if the assumptions turn out to be unduly pessimistic, the claims on the fund will be less and there will be an undistributed surplus. The corollary of that, of course, is that the benefits paid to the claimants could have been more generous. However, this is not a situation where the parties have negotiated the global settlement amount by estimating its constituent parts, as is the usual case in litigation. Here, the global amount was predetermined, and the benefits payable had to be made to fit within it. As well, it is a term of the settlement that the claimants bear the risk of insufficiency of the fund. Thus, it was open to the plaintiffs to instruct the actuaries to use neutral or liberal assumptions and to provide for more generous benefits to claimants with a concomitant increase in the risk of the fund turning out to be insufficient. In these circumstances, 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 under compensation of individual claimants, on the other.

[121] The parties resolved the matters of concern to Justices Winkler and Smith, including the matter of a surplus, by consent approval orders that amended the Settlement Agreement to include the excess capital allocation provision. Justice Morneau incorporated the elements suggested by Justices Winkler and Smith in her November 19, 1999 decision.

7. Claims Experience under the Settlement Agreement

[122] As of December 31, 2013, $776.9 million in payments had been made to Class Members and their dependents.

[123] As of December 31, 2013, there were 5,283 HCV infected Class Members who had been approved or who had submitted applications and were assumed to be approved. Of those: 1,585 have already died (959 due to HCV); 240 of the alive persons have already developed cirrhosis and 121 of the deceased persons have progressed to cirrhosis by the time of death; and, 137 of the alive persons have already progressed to disease level 6. Of the deceased persons, 467 had

progressed to disease level 6 by the time of death.

[124] There were also 390 "in progress" claims as of September 30, 2015, comprised of 265 infected persons and 125 Family Class Members, including 207 primarily infected transfused persons, 29 primarily infected hemophiliac persons and 29 secondarily infected persons. Of the infected in progress claimants, 23 had died before January 1, 1999, and 87 died after January 1, 1999, leaving 155 alive in September 2015.

8. The Late Claimants

[125] As noted in the introduction to these Reasons for Decision, one of the Joint Committee's recommendations is that an allocation of excess capital be made to Class Members who had been diagnosed with HCV before the Settlement Agreement but who had missed the deadline for making a claim. There is a history to this idea that I will describe here. I will discuss the merits of the recommendation in the analysis portion of these Reasons for Decision.

[126] In late 2013, three Class Counsel applied to the courts in British Columbia, Ontario, and Québec for approval of "the Late Claim Requests Protocol." This new protocol would allow Class Members the right to make a claim for compensation, notwithstanding that the June 30, 2010 deadline for First Claims under the Settlement Agreement had passed and notwithstanding that the Class Members did not qualify under two existing exceptions for late claims under the Settlement Agreement.

[127] In the application in Ontario, I agreed with the submissions of Canada and the provincial and territorial governments that this protocol did not come within the authority of the courts to authorize because it would amount to an amendment of the Agreement that would require the consent of the parties. However, I concluded that the protocol might be encompassed by the excess capital allocation provision assuming that there was excess capital, which had not yet been determined. I, therefore, ordered that the late claims protocol be approved conditional upon an order under the excess capital allocation provision being made and the courts of British Columbia and Québec respectively making an Order without material difference.

[128] In British Columbia, Chief Justice Hinkson, in *Endean v. Canadian Red Cross Society*, 2014 BCSC 611 agreed with me that the protocol could not be approved because it amended the Settlement Agreement. However, he disagreed with me that the proposed protocol might come within the terms of the excess capital allocation provision because, once again, this would impermissibly amend the Settlement Agreement without the consent of the parties.

[129] In Québec, Chief Justice Rolland in *Honhon c. The Attorney General of Canada*, 2014 QCCS 2032 agreed that the protocol could not be approved because it amended the Settlement Agreement, and he concluded that it was premature to determine whether or not the protocol for late claimants could be accommodated by the excess capital allocation provision.

[130] Because of the divergence among the courts in British Columbia, Ontario, and Québec, the late claims protocol was not approved.

9. The Triennial Financial Sufficiency Review and the Excess Capital

[131] Under the Approval Orders, the courts are required to conduct triennial reviews to determine the sufficiency of the Trust Fund and to determine whether there are any actuarially

unallocated amounts; i.e. any unallocated excess capital.

[132] Following the triennial financial sufficiency review triggered on December 31, 2013, the courts issued consent orders. For example, in Ontario, by Order dated July 10, 2015, I ordered that the assets of the Trust Fund exceeded the liabilities by $236.3 million to $256.6 million. Those amounts were based on actuarial forecasts contained in reports prepared by Eckler and Morneau Sheppell and commissioned by the Joint Committee and Canada respectively.

[133] The excess capital was a product of the investment strategy undertaken by the Trustee acting on the instructions of the Joint Committee. Had the compensation not been pre-funded and invested, there would have been a $348 million deficit and the contributions of the provincial and territorial governments would have been exhausted by 2026.

[134] After the Sufficiency Orders, in the course of preparing for the applications now before the courts, the Joint Committee identified a liability that was not reflected in the financial position of the Trust in respect of those Class Members at disease level 2 who might transition to disease level 3 and become entitled to the $30,000 fixed payment associated with level 3 based upon the provisions in the Settlement Agreement concerning Compensable HCV Drug Therapy.

[135] The Joint Committee asked its actuaries to identify the cost of the advancement from disease level 2 to disease level 3 based upon the protocol for Compensable HCV Drug Therapy on a conservative basis, and financial consequences of this progression are approximately $29,421,000. Therefore, the Joint Committee requested a downward restatement of the amount available to be allocated.

[136] As noted above, I am satisfied that this restatement is prudent and is justified by the evidence. I, therefore, shall order this adjustment to the determination of the amount of the excess capital.

10. Class Member Consultation and the Class Members' Stories

[137] In anticipation of the allocation applications now before the courts of British Columbia, Ontario, and Québec, the Joint Committee met with the administrator of the Settlement Agreement, reviewed appeal decisions of the administrator's decisions, and consulted with Class Members.

[138] In the spring of 2015, the Joint Committee posted information on a website available for Class Members, and in August 2015, a notice concerning the financial sufficiency review, allocation hearings and consultations sessions was distributed by email and direct mail to Class Members and in progress and late claimant Class Members.

[139] In August and September 2015, the Joint Committee held seven consultation sessions in Vancouver, Toronto, and Montreal, which were webcast live over the internet. The Joint Committee received many emails as a direct result of these webcasts.

[140] Class Members were invited to provide written submissions to the Joint Committee for consideration and presentation to the courts. They were also invited to communicate with the Joint Committee by telephone if they wished to do so.

[141] Based on the information gathered from all these sources, the Joint Committee formulated a list of recommendations for the allocation of the excess capital. The Joint Committee identified 28 issues and ultimately arrived at the nine recommendations listed in the

introduction to these Reasons for Decision. The costing of the recommendations was delegated to Eckler and is also noted in the introduction to these Reasons for Decision.

[142] The Joint Committee advised the courts that the following factors went into deciding which benefits to recommend: (a) priority should be given to addressing those benefits most compromised in comparison to the tort model; (b) priority should be given to Class Members input where possible, provided the input was consistent with the tort model; (c) compensation should be obtained for as many Class Members as possible; (d) information from the Administrator that identified that a benefit was not adequately compensating the majority as intended should be addressed; (e) the administrative burden that the benefit would impose on Class Members should be considered; and (f) the cost of administering the benefit should be considered.

[143] As of April 16, 2016, more than 740 submissions received from and on behalf of Class Members and Family Class Members were filed for use on these allocation hearings. Written submissions were also received from the Canadian Hemophilia Society, Action Hepatitis Canada and the Manitoba Public Guardian and Trustee.

11. Objecting Class Member

[144] The Objecting Class Member is a hemophiliac, who contracted both HCV and HIV through tainted blood products. He underwent alpha-interferon therapy and a liver transplant, and has suffered from serious adverse side effects from his condition and treatments. The diseases cut short what was an extraordinarily successful career at the height of which he was earning over $2 million per year.

[145] The Objecting Class Member is one of two Class Members receiving lost income payments whose lost earnings were over $300,000 per year. In 2015, the amount he received for lost income was approximately $1.5 million.

[146] With one exception, the Objecting Class Member supported the recommendations of the Joint Committee. He opposed the $200,000 cap on the recommendation to increase compensation for lost income, which cap he submitted was discriminatory, unfair, and inconsistent with the spirit of the Settlement Agreement, which he describes as aiming toward full compensation for the losses and injuries suffered by Class Members and their families.

[147] The Objecting Class Member submits further that the cap, which would save $5,730,800 from the allocation of excess capital as compensation for lost income, is unnecessary because there is ample excess capital.

12. Claimant 2213

[148] Claimant 2213 is a hemophiliac primarily infected with HCV, but he was also infected with HIV from tainted blood. Because he believed he was not going to live very long, he elected to be paid $50,000 rather than to receive a long term of periodically paid benefits.

[149] As events turned out, Claimant 2213's decision about the stark choice given to him of either taking $50,000 or receiving long term benefits payable if he lived was a pathetically wrong choice, because he did not die.

[150] Claimant 2213 is among a small group of approximately 20 Class Members who were

very sick, elected to receive $50,000 but who did not die as anticipated.

[151] In his factum, Claimant 2213 described the consequences of his decision as follows:

> Knowing what I now know I question whether I should have elected to take the package at all. I could not have guessed how awful HCV treatment would have been for my physical, emotional and mental health. I could never have guessed the burden my wife would carry while I endured 48 weeks of treatment. I would never have imagined that I would get depressed and have to take a leave from work due to the myriad of treatment side effects. The health care system was virtually vacuous in its support of myself and my family during this time of treatment. Every support that helped me through this time was sourced by me and paid by me. I have rarely felt more abandoned. I am a husband and father now. I have a career and a demanding life. I am free of HCV because I managed to withstand 48 weeks of treatment. I am certain that it has affected me permanently. I know, now, that the compensation package was not in line with what my wife and I had to endure in the slim hopes of getting better. I would like the opportunity to opt back into settlement discussions (less what I have already received) because I now understand what it means to have HCV and what the real costs are to get cured.

[152] Generally speaking, Claimant 2213 supported the Joint Committee's recommendations and its interpretation of the excess capital allocation provision and he opposed Canada's interpretation and any allocation being made to Canada.

13. Claimant 7438

[153] Claimant 7438 suffers from a debilitating disease, and he was totally dependent on his mother for support. She was infected with HCV by a blood transfusion and received compensation under the Settlement Agreement until her death at age 71 on December 24, 2000. He received loss of services compensation under the Settlement Agreement until October 1, 2012. At that time, the Administrator terminated further payments, on the basis that October 1, 2012 was the actuarially determined life expectancy for Claimant 7438's mother. As is required under the Settlement Agreement, the Administrator used the Canada Life tables current at the time of death to determine the maximum period for which loss of services may be payable. Loss of services payments are made only for the period of life expectancy as determined by the actuarial tables. The termination of any compensation left Claimant 7438 destitute.

[154] Claimant 7438 appealed the Administrator's decision to a Referee. The Referee upheld the decision of the Administrator. On a further appeal, I upheld the decision of the Referee. In my Reasons for Decision, I stated as follows:

> 9. There is no dispute that the Claimant was entitled to benefits as a Dependent of a primarily infected person. The only issue on this motion is whether those benefits should continue beyond the life expectancy date determined by the Administrator.
>
> 10. It is clear from the materials provided that the Claimant has had a challenging life and that as a result of his own medical conditions continues to have serious difficulties. It is also clear from the evidence provided that the Claimant will have significant difficulty supporting himself without the Loss of Service benefits he received from the Fund.
>
> 11. Unfortunately, there is nothing in the Settlement Agreement or relevant CAPs that gives the Administrator or this court the discretion to extend the period for which the Claimant is entitled to benefits beyond the life expectancy date.
>
> 12. I note that in his decision, the Referee, while dismissing the claim, provided suggestions as to how to address this apparent unfairness in the administration of the fund for Dependents in

> circumstances similar to that of the Claimant here. The Referee suggested that loss of services benefits be paid: (i) indefinitely for the life of the dependent; or (ii) until the dependent reaches age 65 and is eligible for old age security benefits. As a third option the Referee suggested to limit the benefits payable up to age 65 to the difference between the CPP pension in this case (or other income in other cases) and the amount of the full old age security benefit would be if the dependent was age 65.
>
> 13. I share the Referee's concerns and echo his suggestion that this matter be brought to the attention of the Joint Committee for future consideration, particularly in the event that the Committee has the opportunity to make submissions to this court as to what should be done with any Fund surplus.

[155] Generally speaking, Claimant 7438 supported the Joint Committee's recommendations and its interpretation of the excess capital allocation provision and he opposed Canada's interpretation and any allocation being made to Canada.

F. DISCUSSION AND ANALYSIS

1. Introduction

[156] With the above factual and legal background, I shall now turn to an explanation of why, in my opinion, Canada's application should be dismissed and why seven of the Joint Committee's recommendations should be approved - with some modifications so that the recommended allocations are made compliant with the excess capital allocation provision of the Settlement Agreement.

2. Canada's Claim to the Excess Capital

[157] The excess capital allocation provision is set out above. But for the arguments of the parties, its interpretation seems straightforward and uncontroversial. To parse or paraphrase the gravamen of the provision, it stipulates that in their unfettered discretion, the courts may order all or any portion of the actuarially unallocated Trust money to be allocated: (a) for the benefit of the Class Members; (b) paid to the federal, provincial, or territorial governments; or (c) retained.

[158] Subject to the overriding restriction that the Settlement Agreement cannot be amended without the consent of the parties, once it is determined that there actually is unallocated capital, the only restrictions on the courts unfettered discretion are that the allocations must: (a) be reasonable; (b) not discriminate based upon where the Class Member received blood; and (c) not discriminate based upon where the Class Member resides. The approval order provides some non-binding guidelines for the exercise of the courts' discretion.

[159] However, relying on extensive evidence and argument about the circumstances that led to the creation of the excess capital allocation provision, the parties make controversial how this provision should be applied.

[160] In resolving this controversy, perhaps the most salient factual circumstances for the interpretative exercise now before the courts is that the Settlement Agreement originally submitted to the courts of British Columbia, Ontario, and Québec did not contain the excess capital allocation provision.

[161] I agree with the approach of all the parties that the meaning of the words used to express

the excess capital allocation provision is to be found in understanding the surrounding circumstances or factual nexus. Acquiring that understanding requires an analysis of what was the excess capital allocation provision's goal or purpose. Within the competing interpretative arguments of the parties, particularly in the debate between Canada and the Joint Committee, is a debate about what purpose was to be served or achieved for the parties by the inclusion of this provision into their Settlement Agreement.

[162] Some of the arguments of the parties made in their factums and during the joint hearing were directed at what Justices Smith, Winkler, and Morneau intended by suggesting that the excess capital allocation provision be added to the Settlement Agreement. However, it is the parties' not the judges' intentions that matters. Although it is true that within the comments of the judges, there is a rationale or explanation for adding the excess capital allocation provision to the Settlement Agreement, the judges' ultimate rationale just begs the question of what was the rationale of the contracting parties for adding the provision to the Settlement Agreement.

[163] The judges' ultimate explanation was that the provision was necessary to make the Settlement Agreement fair, reasonable, and in the best interests of the Class Members; i.e., to make the Agreement approvable, but that explanation does not answer the question of why the contracting parties agreed to add the provision. Insight about the meaning of the excess capital allocation provision comes from asking and answering the question of what was the purpose - of the parties - in adding the excess capital allocation provision to the Settlement Agreement.

[164] Although the parties express their interpretative arguments more elaborately, in its essence, Canada's argument is that the purpose of the provision was to remedy the problem of overcompensation; i.e., that the Class collectively should not get more than it contractually bargained for as compensation for the harm caused to the Class Members being infected by HCV and, therefore, any surplus should go to Canada.

[165] Underlying Canada's argument is the submission that because of uncertainties about class size, Class Member disease demographics, and the prospect of advances in medical science, it was possible that it would be unnecessary to fully draw down on the $1.118 billion that had been committed by the federal, provincial, and territorial governments for the contracted benefits, and since Canada was paying in advance the predominant portion of this commitment and since the Agreement provided for periodic actuarial reviews of the adequacy of the funding, the design or purpose of the excess capital allocation provision was to accelerate the return of the excess capital to Canada, which otherwise would have to wait 80 years for the return of its possible overpayment.

[166] Canada's interpretation of the excess capital allocation provision is wrong for four reasons.

[167] First, Canada's interpretation is inconsistent with the language used by the parties to express their contractual intentions. The existence of excess capital presupposes that there are enough funds to pay for the contracted benefits, but Canada would have it that the excess capital then cannot be used to pay benefits to the Class Members because they would be overcompensated. Canada's interpretation is contrary to the words used by the parties, which expressly state that the excess capital can be used for the benefit of Class Members.

[168] Second, Canada's interpretative argument includes the false premise that the Class Members bargained only to receive the defined benefits prescribed by the compensation plans in

the Settlement Agreement. That premise was true - before the excess capital allocation provision was added to the Agreement - but it became false precisely because the parties added the excess capital allocation provision to the Agreement.

[169] At the urging of the courts, the parties were bargaining for something more. Canada's interpretative argument ignores the fact that the Class Members gave up something and got something in return - as did Canada – as consideration for the excess capital allocation provision. There was *quid pro quo*. Canada gained possible early access to the excess capital, which otherwise would be locked up for 80 years; the Class Members gained possible benefits from the excess capital that they otherwise would not have obtained. Canada's argument ignores that the Class Members bargained for the opportunity that the courts in their unfettered discretion would allocate more than the defined benefits originally prescribed by the compensation plans. Canada's interpretation would deny the Class Members what they bargained for.

[170] I digress here to note that the circumstances that the parties to the Settlement Agreement were negotiating for something more can be demonstrated by contrasting what occurred in the immediate case with what occurred in other HCV litigation. Sadly, problems with Canada's national blood supply system were not limited to the period between 1986 and 1990, and four class actions with respect to HCV tainted blood were brought for the period before 1986 and for the period after 1990. These actions were brought in British Columbia, Alberta, Ontario, and Québec. The pre-1996/post-1990 HCV action in British Columbia is *Killough v. Canadian Red Cross Society*. The action in Alberta is *Adrian v. Canada (Minister of Health)*. The action in Ontario is *McCarthy v. Canadian Red Cross Society*, and the action in Québec is *Surprenant c. Société canadienne de la Croix-Rouge* and later *Desjardins v. Canada (Procureur général)*. For the background to these class actions, see in particular: *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.); *Adrian v. Canada (Minister of Health)*, [2007] A.J. No. 619 (Q.B.).

[171] The four class actions were settled by a pan-Canadian Settlement Agreement entered into on December 14, 2006. Under this settlement, a Compensation Fund of $1,023,475,575 was established and from this fund $93.1 million was transferred to a separate fund, known as the Past Economic Loss and Dependents Fund (the "PELD Fund"), for the purpose of providing compensation for damages for past loss of income and past loss of services in the home. An Actuarial Report dated October 10, 2013 indicates that the PELD Fund has been exhausted and that the Compensation Fund will be in a deficit position by the end of 2016. Payment to Claimants from the PELD Fund have not been made for several years. Payments to Class Members who qualified for past economic loss compensation have been suspended. There is no obligation on Canada, which contributed to the Compensation Fund, to make up the deficiencies and unlike the situation in the case at bar, the agreement does not have an excess capital allocation provision; rather, it has the following provision, which makes Canada wait until the end of the administration of the trust before a return of any surplus:

> *5.09 Sufficiency of the Fund and Disposition of Surplus*
>
> (1) In express recognition of the fact that Canada has not negotiated any discount for legal risk:
>
> > (a) the Parties agree that Canada will not be liable to provide further funding in the event that the Compensation Fund is inadequate to compensate all Class Members who have met the eligibility requirements. For greater certainty, any risk of insufficiency in the Compensation Fund will be borne by the Class Members.

> (b) the Parties specifically agree that any funds remaining in the Trust Fund on the Termination Date will be the sole property of and will be transferred to Canada within 60 days of the Termination Date.

[172] Third, Canada's interpretative argument misstates the purpose of the excess capital allocation provision, which was not to ensure that the Class Members were not overcompensated for their injuries because of uncertainties about class size, Class Member disease demographics, or because of changes in medical science. The factual nexus reveals that on a legal plane, the Settlement Agreement was actually designed to make it impossible for the Class Members to be overcompensated regarding or regardless of these factors of uncertainty.

[173] 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.

[174] Further, as described above, the factual circumstances reveal that the governments' contribution of $1.118 billion for compensation was never intended by either party to be the equivalent of full compensation at law for the Class Members' injuries. It is not clear how the governments arrived at this sum. Whatever was their private assessment, at the settlement approval hearings, the governments advised the court that the Class Members' chance of success was 50:50 should the matter be litigated. It is unclear whether the governments' $1.118 offer of compensation was discounted accordingly.

[175] The courts evaluated whether the terms of the Settlement, including the compensatory plans, were fair, reasonable, and in the best interests of the Class Members, but the courts never evaluated whether there would be under or over compensation comparing the Settlement Agreement to the possible trial outcomes. The most predominant factor favouring the Settlement Agreement was that the Settlement avoided the considerable litigation risk confronting the Class Members that the only solvent defendants had a good defence and if the matter went to trial in the distant future, the already suffering and needy Class Members would receive nothing.

[176] Fourth, Canada's interpretative argument would have it that its upfront payment of its full contribution entitled it to be the exclusive beneficiary of the excess capital allocation provision. In other words, Canada would have it that because of its advance payment, it should be the beneficiary of: (a) the excellent investment performance of the Trust Fund; (b) the smaller than anticipated class size; and (c) the advances in science, which taken together decreased the cost of some benefits prescribed by the compensatory plans and led to the existence of excess capital. The mistake in this argument is its aspect of exclusivity. It is true that Canada can be the beneficiary of the excess capital allocation provision but not exclusively.

[177] This last analytical comment and the other three reasons disposes of Canada's interpretative argument, but there remains the question of whether, nevertheless, Canada's request for all or part of the excess capital should be granted. In my opinion, the answer to that

question is “no”. In the exercise of my unfettered discretion, for the reasons discussed next, I rather approve of the allocation of the excess capital for the purposes of seven of the Joint Committee’s recommendations. While that would leave about $30 million of unallocated excess capital that could be allocated to Canada, I have not been persuaded that I should make any such allocation.

[178] In interpreting and applying the excess capital allocation provision for Canada, there is a gap between what could be done and what should be done with the excess capital. Canada’s submission that the money would be used for the benefit of all Canadians is not persuasive. The money is already being used for the benefit of all Canadians, who one can hope would at least share the empathy if not the liability or the responsibility to compensate the suffering Class Members, all of whom are innocent fellow citizens grievously injured from tainted blood. Put simply, beyond persuading me that I could allocate excess capital to Canada, I am not persuaded that I should do so.

3. The Joint Committee’s Recommendations

[179] As already mentioned several times above, with some modifications - so that the allocations are made compliant with the excess capital allocation provisions of the Settlement Agreement - I accept seven recommendations of the Joint Committee (recommendations 1, 2, 3, 5, 6, 7, and 8), and I shall order that the excess capital be allocated by way of special distribution, which manner of allocation addresses the concerns of the provinces and territories.

[180] In my opinion, these allocations not only can be done pursuant to the excess capital allocation provision, but they should be done. The seven allocations are: (a) reasonable; (b) non-discriminatory based upon where the Class Member received blood; and (c) non-discriminatory based upon where the Class Member resides.

[181] In arriving at these conclusions, I was assisted most by the argument advanced by counsel for the provinces and territories, which interpretative argument I accept as correct.

[182] The problem with the argument of the Joint Committee is that it rationalizes the purpose of the excess capital allocation provision as some sort of reward for the Class Members accepting the risks or for conceding that: (a) the benefits that made for an approvable settlement were less than the benefits that would have been available had the class actions proceeded to a common issues trial and individual assessments of damages; (b) the $1.118 billion contribution of the governments might be inadequate to cover the compensation provided for under the Settlement Agreement; and (c) the $1.118 billion might be eroded by poor investment performance.

[183] However, as indicated above, I view the purpose of the excess capital allocation provision to be different and I do not view it as some sort of reward for taking on risks or for making concessions. Rather, as I understand from the background circumstance, the purpose of the excess capital allocation provision was twofold; namely; (1) to provide Canada with the possibility – but not the assurance – that the excess capital would be returned to it earlier than the end of the Trust; and (2) to provide the Class Members with the possibility – but not the assurance – that the excess capital could be used to benefit Class Members.

[184] In any event, I see no reason to depart from the plain and straightforward language of the excess capital allocation provision. I see no reason to rationalize this language as an award to

Class Members for taking on risk or for having made concessions from what they might have recovered after individual assessments of damages. The parties were contracting for eventualities of a surplus that were just theoretical at the time of the Approval Orders because at that time what was anticipated was a deficiency not a surplus. Through the good fortune of investment acumen and advances of medical science, the unanticipated but planned for event occurred. Quite simply, there is excess capital and the courts in their unfettered discretion may order all or any portion of it be allocated for the benefit of the Class Members or the courts can order all or part of it returned to Canada.

[185] Putting aside for the moment the two recommendations that I am not prepared to approve and also the recommendation for a $32,450,000 allocation for another version of a Late Claims Protocol, recommendations 2, 3, 5, 6, 7, and 8 are all appropriate allocations to be made pursuant to the excess capital allocation provision and they do not require any amendment to be made to the Settlement Agreement.

[186] Turning then to the recommendation for a $32,450,000 allocation for a Late Claims Protocol, I agree again with the proposition advanced by all the parties that in interpreting the provisions of an approved class action and in exercising its administrative authority over the settlement, the courts cannot increase the burden on the defendants. It was for this reason that in 2013, I did not approve the proposed Late Claims Protocol that would have circumvented the claims deadline for Class Members who had already been diagnosed with HCV.

[187] As noted above, however, at that time, I provisionally used the excess capital allocation provision to authorize the Protocol. Chief Justice Rolland disagreed on the grounds that a provisional ruling was premature, and Chief Justice Hinkson disagreed on the grounds that the reliance on the excess capital allocation provision was incorrect because it would have constituted a change to the Settlement Agreement, which requires the mutual consent of the parties.

[188] Having reconsidered the matter, I now believe that Chief Justice Hinkson was correct and, therefore, the Joint Committee's recommendation for a Late Claims Protocol falls outside of the ambit of the excess capital allocation provision. However, it does not follow that a $32,450,000 allocation cannot be made from excess capital for Class Members who were diagnosed with HCV but who missed the claims deadline.

[189] The point is subtle, but the subtleties make a substantive difference. A Late Claims Protocol that circumvents the deadline for making claims, even one that does not increase the burden on Canada or on the provincial and territorial governments, requires an amendment to the Settlement Agreement, which the courts are not authorized to make. However, while an allocation from excess capital for a Late Claims Protocol is outside the ambit of the excess capital allocation provision, an allocation to those Class Members who missed the deadline is permissible.

[190] In other words, the provision of benefits for Class Members who missed the claims deadline for applications cannot be accomplished by a Late Claims Protocol. It can, however, be accomplished by setting up a discrete benefits plan for these Class Members who would qualify for benefits by proving that they are indeed Class Members and that they satisfy the other criteria for benefits under the discrete benefit plan prepared for them. The discrete plan cannot provide better or different benefits than provided other Class Members, and the discrete plan might include a new notice program and a new deadline for making claims for compensation. It might

be necessary to introduce holdbacks in the discrete plan depending on the take up by the Class Members who qualify for the discrete benefit plan.

[191] I, therefore, approve $32,450,000 to be allocated for Class Members who qualify for a discrete and segregated benefits plan, and I authorize the Joint Committee to prepare the benefit plan for these Class Members, with benefits that cannot be better or different than the benefits provided other Class Members. This plan is subject to the approval of the courts in British Columbia, Ontario, and Québec.

[192] I now turn to the rejected recommendation (recommendation 4) of allocating $27,682,000 for loss of income payments and loss of support payments to dependants of a deceased Class Member whose death was due to HCV. The problem I have here in accepting this recommendation is not about its goal of making an allocation to Class Members with respect to loss of income or loss of support.

[193] The problem with this allocation is that it cannot be made by eliminating the deduction of collateral benefits. Although the deduction of collateral benefits has imposed hardship and difficulties on Class Members, the deduction of benefits, like a claims deadline, is what the parties bargained for, and the court cannot use the excess capital allocation provision to change the Settlement Agreement's operative provisions. I, therefore, reject this recommendation.

[194] Finally, there is recommendation 9; i.e., $2,050,000 for reimbursement of uninsured funeral expenses. Although it seems cold hearted to say it, put simply, there are better uses for this excess capital, and, in particular, it would be preferable to use the money to address unique or special cases of hardship that should be prioritized, including the circumstances of Claimants 2213 and 7438, described above.

[195] In my opinion, the Joint Committee ought to have prioritized the allocation of excess capital to respond to the special circumstances of those like Claimants 2213 and 7438, who through no fault of their own, fell through the cracks of the compensatory purposes of the Settlement Agreement.

[196] The existence of excess capital provides an opportunity for Class Members to correct what with the benefit of hindsight were unfortunate decisions that their fellow Class Members were unfortunately called on to make.

4. Objecting Class Member

[197] The Objecting Class Member's sole objection was to the $200,000 cap on the increase for loss of income compensation.

[198] I see no merit to his objection of unfairness and discriminatory treatment. His submission of unfairness ignores, among other things, how favourably and preferentially he has been treated as compared with some of his fellow Class Members. For instance, he ignores the fact that income compensation is not available - at all - for disease level 1 and 2 Class Members, and lost income compensation is available only for disease level 3 Class Members who have elected to forgo a fixed payment. The Objecting Class Member ignores the fact that some Class Members do not have income compensation for a subsistence living standard far below the standard of living achieved by him.

G. CONCLUSION

[199] For the reasons set out above, I dismiss Canada's application and with the adjustments mentioned above, I accept the Joint Committee's recommendations 1, 2, 3, 5, 6, 7, and 8 and I order that the excess capital be allocated by way of special distribution, which manner of allocation addresses the concerns of the provinces and territories. I also grant the Joint Committee's request for a restatement of the amount of the excess capital.

[200] Orders accordingly.

Perell, J.

Released: August 15, 2016

CITATION: Parsons v. Canadian Red Cross Society, 2016 ONSC 4809
COURT FILE NO.: 98-CV-141369CP
COURT FILE NO.: 98-CV-146405CP
DATE: 20160815

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, et al.

Intervenors

AND BETWEEN:

JAMES KREPPNER, et al.

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, et al.

Intervenors

REASONS FOR DECISION

PERELL J.

Released: August 15, 2016

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-06-000016-960
500-06-000068-987

DATE : 15 août 2016

SOUS LA PRÉSIDENCE DE : L'HONORABLE CHANTAL CORRIVEAU, J.C.S.

500-06-000016-960

DOMINIQUE HONHON
Requérante
c.
PROCUREUR GÉNÉRAL DU CANADA
PROCUREUR GÉNÉRAL DU QUÉBEC
SOCIÉTÉ CANADIENNE DE LA CROIX-ROUGE
Intimés
et
ME MICHEL SAVONITTO, ès qualités de membre du Comité conjoint
Requérant
et
FONDS D'AIDE AUX RECOURS COLLECTIFS
LE CURATEUR PUBLIC DU QUÉBEC
Mis en cause

500-06-000068-987

DAVID PAGE
Requérant
c.
PROCUREUR GÉNÉRAL DU CANADA
PROCUREUR GÉNÉRAL DU QUÉBEC
SOCIÉTÉ CANADIENNE DE LA CROIX-ROUGE
Intimés
et
FONDS D'AIDE AUX RECOURS COLLECTIFS

JC2308

LE CURATEUR PUBLIC DU QUÉBEC
Mis en cause

JUGEMENT

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[1] En 1999, le Tribunal a approuvé des ententes réglant les recours collectifs institués par les victimes du sang contaminé par le virus de l'hépatite C entre 1986 et 1990[1]. Des régimes d'indemnisation ont été mis sur pied pour les membres regroupés, soit les transfusés et les hémophiles.

[2] Le comité conjoint représentant les membres et le gouvernement fédéral demandent chacun au Tribunal de leur allouer le capital excédentaire. Il s'agit de sommes importantes, considérées par les actuaires des parties à ce titre et donc non requises pour les paiements anticipés en vertu des régimes d'indemnisation.

[3] Les sommes visées sont au minimum de 206 920 000 $.

[4] Ce dossier a été l'occasion unique de réunir dans une même salle d'audience à Toronto les trois juges responsables de ces recours, soit le juge en chef de la Cour suprême de la Colombie-Britannique, Christopher Hickson, le juge Paul Perell de la Cour supérieure de l'Ontario ainsi que la soussignée. L'audition s'est déroulée sur trois jours[2].

[5] Bien qu'un nombre important d'avocats ont fait des représentations devant le banc de trois juges, l'audience a été reliée par la vidéo et l'audio[3] à Montréal et Vancouver.

[6] Le Tribunal doit décider :

1) Quel est le montant de capital excédentaire?

2) S'il doit y avoir une distribution de ce montant, quels montants iront à quelle partie?

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1 *Honhon* c. *Canada (Procureur général)*, 1999 CanLII 11813 (QC CS), [1999] J.Q. no 4370 (C.S.); *Page* c. *Canada (Procureur général)*, 1999 CanLII 11906 (QC CS); *Honhon* c. *Canada (Procureur général)*, 1999 CanLII 11242 (QC CS); *Page* c. *Canada (Procureur général)*, 1999 CanLII 12145 (QC CS); *Honhon* c. *Canada (Procureur général)* et *Page* c. *Canada (Procureur général)*, 21 novembre 2000, l'honorable juge Nicole Morneau, j.c.s.

2 Du 20 au 23 juin 2016 au Palais de justice de Toronto. Les trois juges ont échangé leurs vues concernant ce dossier tant avant l'audition, pendant celle-ci et par la suite.

3 Mentionnons qu'une fin d'après-midi le 20 juin 2016, la salle d'audience 15.04 à Montréal n'a pas eu accès à la vidéo, mais l'audio est demeurée en fonction.

[7] Le comité conjoint demande au Tribunal d'allouer sous neuf chefs d'indemnités, les sommes visées par le capital excédentaire pour un total de 206 920 000 $.

[8] Le gouvernement fédéral s'oppose à toute remise estimant que le capital excédentaire doit lui revenir au complet puisqu'il s'agit de deniers publics. Alternativement, il soutient que seulement certains chefs de réclamation pourraient être alloués aux membres dans la mesure où il s'agit alors de bonifier certaines indemnités prévues aux ententes de règlement et non pas de créer de nouveaux chefs d'indemnisation.

[9] En effet, selon le gouvernement fédéral, les Tribunaux n'ont pas le pouvoir de réécrire ou de modifier substantiellement les ententes négociées par les parties et entérinées par le Tribunal.

[10] Les représentants des provinces et territoires ne réclament aucun remboursement ou allocation de fonds supplémentaires en tout ou en partie du capital excédentaire.

[11] Leur contribution au fonds d'indemnisation des victimes suit un modèle distinct de celui du gouvernement fédéral. En fait, les provinces et territoires n'ont pas versé les montants dont il est question aux présentes.

[12] De plus, ces derniers demandent au Tribunal de déclarer qu'ils ne seront pas appelés à verser de contribution additionnelle en lien avec les réclamations des membres visées aux présentes.

[13] Par ailleurs, les provinces et territoires appuient l'argumentation du gouvernement fédéral.

1) Quel est le montant du capital excédentaire?

[14] Les parties travaillent chacune en collaboration d'actuaires, soit la firme Eckler limitée pour le comité conjoint et Morneau Shepell pour le gouvernement fédéral.

[15] Selon Eckler, le capital excédentaire est de 236 341 000 $ au 31 décembre 2013.

[16] Selon Morneau Shepell, le capital excédentaire est plutôt de 256 549 000 $ à la même date.

[17] Ces calculs ont été faits en évaluant tous les montants à être déboursés au bénéfice des membres ainsi que tous les frais administratifs en découlant (comptable, avocats, gestionnaires, conseillers, etc.) jusqu'à la fin du régime, soit au terme des 80 ans de la mise en œuvre des ententes.

[18] Ainsi, à l'été 2015[4], les trois Tribunaux ont rendu des ordonnances selon lesquelles le montant du capital excédentaire au 31 décembre 2013 a une valeur de 236 341 000 $ à 256 594 000 $.

[19] À l'audience, plusieurs des parties présentes ont plaidé en faveur d'une approche conservatrice afin de ne pas mettre en péril la suffisance de fonds pour être en mesure de respecter les ententes et indemniser les membres.

[20] Peu avant l'audition, le comité conjoint a réévalué le montant à la baisse estimant que le capital excédentaire doit plutôt être établi à 206 920 000 $.

[21] Cette réévaluation est en lien avec une mésentente concernant la reclassification de personnes. Nous en traiterons dès à maintenant.

- Classification de certaines victimes passant du niveau 2 au niveau 3

[22] Selon le protocole médical adopté par les Tribunaux dans le cadre des ententes de règlement, l'administrateur du programme applique une grille aux fins de déterminer le niveau d'éligibilité d'un réclamant. Il y a six niveaux prévus selon la progression de la maladie, allant de la personne infectée par le virus au niveau 1 jusqu'au niveau 6 pour la personne nécessitant une greffe de foie.

[23] Ainsi, pour qu'une personne atteigne le niveau 3, elle doit être qualifiée pour recevoir une médication indemnisable pour le VHC. Selon les ententes convenues en 1999, l'on entend par médication indemnisable l'Interferon ou Ribavirine seule ou en combinaison, ou tout autre traitement ayant pour effet de causer des effets secondaires indésirables et qui a été approuvé par les Tribunaux aux fins du remboursement.

[24] L'article 4.01(1)(c) des ententes prévoit qu'une somme forfaitaire de 30 000 $ est payable aux membres du groupe au niveau 3 à la survenance de l'une ou l'autre des situations suivantes :

> … sur remise à l'administrateur d'une preuve démontrant que cette personne reconnue infectée par le VHC (i) a vu se constituer un tissus fibreux dans les espaces portes du foie avec des brides fibreuses sortant des espaces portes mais sans formation d'un pont vers d'autres voies des espaces portes ou vers les veines centraux-lobulaires (c'est-à-dire des fibres ne formant pas de pont), ou (ii) a reçu une médication indemnisable au titre du VHC ou (iii) a rempli les conditions ou remplit les conditions d'un protocole de médication indemnisable au titre du VHC, même si ce traitement n'a pas été recommandé ou, s'il a été recommandé, a été refusé.

[4] Jugement sur la requête pour directives présentée par le membre du comité conjoint aux fins de réévaluer les aspects financiers du Fonds daté du 16 juillet 2015 de la soussignée. La décision du juge Paul Perrell de la Cour supérieure d'Ontario porte la date du 10 juillet 2015 et celle du juge en chef de la Cour suprême de Colombie-Britannique est datée du 23 juillet 2015.

(nos soulignés)

[25] Un protocole a été développé par le comité conjoint en consultation avec les experts médicaux et approuvé par les Tribunaux. Il contient des règles à suivre par l'administrateur concernant la preuve requise pour établir les différents niveaux de maladie pour l'approbation de la réclamation, incluant le niveau 3.

[26] Le protocole approuvé par les Tribunaux prévoit trois situations où la médication au titre du VHC satisfait le critère d'éligibilité au niveau 3 de la maladie :

1) avoir reçu une médication indemnisable au titre du VHC;

2) en remplissant les conditions d'un protocole de médication indemnisable pour le VHC fondé sur des critères médicaux;

3) en obtenant une confirmation médicale que la personne remplit les conditions d'un protocole de médication indemnisable pour le VHC. Il n'est pas nécessaire que la personne ait reçu la médication ni même que le traitement ait été recommandé. Ceci est conforme aux termes de la Convention de règlement.

[27] Or, une nouvelle génération de médicaments désignés par DAA est apparue en premier en 2011 puis en 2014. Nous y reviendrons. Mais aux fins des présentes, ces nouveaux médicaments ne contiennent ni Interferon ou Ribavirine. Certains patients peuvent recevoir les DAA sans devoir également prendre de l'Interferon ou de la Ribavirine.

[28] Le comité conjoint veut faire déclarer que la recommandation de prise de cette nouvelle médication doit être reconnue par les Tribunaux. Cela ayant pour conséquence de faire passer certains de ses patients au niveau 2 ou 3.

[29] Le Tribunal est d'avis que l'évolution des traitements médicaux par la disponibilité de nouveaux médicaments, dont la composition est différente que ce qui a été anticipé en 1999 prenant en compte les données scientifiques de l'époque, ne peut-être un frein à l'intégration de cette nouvelle réalité en modèle de compensation retenue. Il ne s'agit pas de changer les ententes que de les faire évaluer avec les nouvelles découvertes médicales.

[30] Le Tribunal conclut qu'il y a lieu de confirmer que la somme de 30 M$ doit être exclue de l'allocation de l'excédent de capital dont il est question aux présentes. De plus, l'arbitre doit en conséquence indemniser les victimes qui sont éligibles à cette nouvelle médication en les faisant passer du niveau 2 au niveau 3.

[31] Ainsi, le Tribunal déclare que le montant d'excédent de capital est établi à 206 920 000 $.

2) Doit-il y avoir une distribution du capital excédentaire et si oui, quels montants iront à quelle partie?

[32] Pour répondre à la question, il est essentiel de revoir les ententes, les jugements et ensuite, de procéder à l'analyse de différents critères. Par la suite, le Tribunal reprend chacune des réclamations faisant l'objet d'une recommandation du comité conjoint et en dispose. Pour conclure, certaines questions particulières ont été soulevées concernant des membres.

BREF HISTORIQUE DES JUGEMENTS

[33] En 1998, les gouvernements FPT[5] (fédéraux, provinciaux et territoriaux) annoncent publiquement leur intention d'indemniser les victimes de l'hépatite C de 1986 à 1990 souhaitant ainsi régler les différents recours collectifs.

[34] Ils offrent aux victimes 1 118 000 000 $ et il s'agit d'un montant maximal.

[35] Les avocats de toutes les parties se sont ingéniés à élaborer un modèle complexe de distribution pour compenser les victimes directes et indirectes (membres des familles, conjoints, enfants, parents) sous plusieurs chefs et selon le niveau d'évolution de la maladie de la personne infectée.

[36] Au cœur des négociations, il y a la question de savoir quelle partie doit supporter la conséquence d'une insuffisance des fonds avant la fin de la mise en œuvre des ententes, soit au terme de 80 ans.

[37] La suffisance des fonds est une préoccupation importante du comité conjoint. De même, les gouvernements FPT ne veulent pas être appelés à contribuer davantage, advenant l'insuffisance de fonds.

[38] Le gouvernement fédéral s'est engagé à isoler sous son contrôle 8/11 du montant de 1 118 000 000 $ dès le départ. Le montant offert en règlement devait garantir un rendement équivalant aux obligations à long terme du gouvernement du Canada.

[39] Au terme des discussions, les parties s'entendent plutôt afin que la portion de la mise de fonds du gouvernement fédéral soit versée dans un Fonds en fiducie (« **le Fonds** ») à être investi et géré par des professionnels indépendants des parties.

[40] De plus, selon les ententes, les gouvernements provinciaux et territoriaux doivent verser leur quote-part au fur et à mesure des besoins.

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[5] Rappelons que cette annonce a été faite dans le contexte où la défenderesse, La Société Canadienne de la Croix-Rouge, s'est placée sous la protection des tribunaux en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, RLRQ (1985) ch. C-36.

[41] Enfin, selon la clause 12.03, il est prévu qu'à la fin des ententes, soit 80 ans plus tard, tout résidu est remis aux gouvernements en proportion de leur contribution. Il est expressément mentionné que le Fonds est mis sur pied au bénéfice des membres, mais qu'il ne leur appartient pas.

[42] En date du 21 septembre 1999, l'honorable Nicole Morneau est la première des trois juges à entériner les ententes soumises au Québec[6]. Son jugement, selon les termes des ententes, va entrer en vigueur une fois que les jugements émanant des juges d'Ontario et de Colombie-Britannique sont rendus, pourvu qu'ils reprennent essentiellement les mêmes termes.

[43] En date du 22 septembre 1999, l'honorable juge Warren K. Winkler de la Cour supérieure de l'Ontario[7] approuve provisoirement les ententes, sujet à ce que trois questions soient abordées à sa satisfaction avant de prononcer l'ordonnance d'approbation finale.

[44] Aux paragraphes 115 et suivants, le juge Winkler résume l'objection soulevée par la Société d'Hépatite C du Canada concernant la remise de surplus aux défendeurs. Selon cette dernière, il lui apparaît injuste que l'ensemble d'un surplus à être réalisé revienne entièrement aux gouvernements.

[45] De plus, à cette époque, un surplus n'est nullement envisagé, le scénario le plus probable étant celui d'insuffisance de fonds, le déficit est évalué à 58 M$[8].

[46] Compte tenu de la crainte de déficit, des retenues concernant certains chefs d'indemnisation sont prévues afin d'optimiser le versement d'indemnités minimums. Certains chefs sont alors partiellement indemnisés, le reste peut être versé plus tard, si la suffisance des fonds le permet.

[47] Aussi, l'on prévoit la possibilité ultérieurement d'élever le plafond salarial de 75 000 $, si les ressources du Fonds s'avèrent suffisantes.

[48] Le juge Winkler pose alors la question à savoir si dans le contexte de cette entente, il est approprié que l'ensemble d'un résidu éventuel soit versé aux défendeurs[9].

[49] Le juge reconnaît qu'un règlement n'est jamais parfait, malgré l'indemnisation variable prévue selon les différents niveaux des bénéficiaires :

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6 1999 CanLII 11813 (QC CS).
7 *Parsons* v. *Canadian Red Cross* Society, [1999] O.J. No. 3572.
8 *Id.* Par. 117 et 131.
9 *Id.* Par. 121.

> **122** (…) It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

[50] Dans ce cas, l'administrateur du Fonds doit faire une recommandation devant être approuvée par les Tribunaux[10].

[51] Le juge Winkler conclut en disant que trois éléments des ententes doivent être modifiés pour que cette dernière soit approuvée :

1) les montants réservés dans le Fonds pour indemniser les membres qui s'excluent ne doivent pas être supérieurs aux montants que ces derniers auraient reçus s'ils ne s'étaient pas exclus;

2) les modalités concernant le capital excédentaire doivent être modifiées pour permettre une allocation aux parties ou au bénéfice des victimes;

3) un sous-groupe doit être ajouté.[11]

[52] Enfin, son paragraphe 133 mérite d'être cité au long afin de comprendre les paramètres des ententes à être approuvées :

> 133 The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

[53] Peu après, le juge Smith de la Colombie-Britannique reprend les commentaires du juge Winkler auxquels il acquiesce[12] et intègre dans son jugement les modifications demandées par ce dernier.

[54] Pour le juge Smith, c'est à partir de la disponibilité des fonds prédéterminés que les parties ont ensuite répartis entre les membres les chefs d'indemnisation possibles et

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10 *Id.* Par. 124.
11 *Id.*, par. 129.
12 *Endean* v. *Canadian Red Cross Society*, 1999 CanLII 6357 (BC SC), [1999] B.C.J. No 2180.

non l'inverse. De plus, il a été soulevé que c'est les membres qui assument le risque d'insuffisance des fonds.

[55] Les négociations reprennent alors entre les parties et les ententes sont modifiées par des ajouts.

[56] Les avocats des parties et intervenants ont ensemble préparé des projets de jugement pour répondre aux préoccupations des Tribunaux, qui amendent spécifiquement la Convention de règlement comme suit **:**

> 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, ate 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;
>
> 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;

[57] Le juge Winkler approuve les ententes modifiées et signe l'ordonnance d'approbation pour l'Ontario et les autres provinces et territoires intervenants. Son jugement est daté du 22 octobre 1999.

[58] Le 28 octobre 1999, le juge Smith de la Colombie-Britannique approuve une entente similaire dont la disposition précitée se retrouve au paragraphe 5b).

[59] La juge Morneau rend une ordonnance semblable dans son texte et ses effets en approuvant par son jugement du 19 novembre 1999 l'annexe F, modification n^{o} 1 à la convention déjà approuvée le 21 septembre 1999. Voici récité au long l'ajout à son jugement initial :

> 10. L'alinéa p.1) de l'article 10.01 (1) prévoit ce qui suit :
>
> « 10.01 (1) Les tribunaux rendront des jugements ou ordonnances sous la forme nécessaire pour mettre en œuvre et faire exécuter les dispositions de la présente convention et superviseront l'exécution continue de la présente convention, y compris les régimes et l'accord de financement. Sans restreindre la portée générale de ce qui précède, les tribunaux devront :
>
> (…)
>
> p.1) Dans le cadre du libre exercice de leur pouvoir discrétionnaire, ordonner, de temps à autre, sur demande de toute partie ou du Comité conjoint, que les fonds et les autres éléments d'actif détenus par le fiduciaire en vertu de la Convention de règlement et qui ne font pas l'objet d'une attribution actuarielle soient en tout ou en partie
>
> (i) attribués aux membres des recours collectifs et/ou aux membres de la famille;
>
> (ii) attribués de toute manière dont on peut raisonnablement s'attendre qu'elle bénéficie aux membres des recours collectifs et/ou aux membres de la famille, même si l'attribution ne prévoit pas le versement d'une indemnité aux membres des recours collectifs et/ou aux membres de la famille;
>
> (iii) payés, en tout ou en partie, aux gouvernements FPT, à certains ou à un seul d'entre eux, compte tenu de la source des fonds et des autres éléments d'actif que comprend le fonds en fiducie; et/ou
>
> (iv) conservés, en tout ou en partie, dans le fonds en fiducie;
>
> De la manière que, dans le cadre du libre exercice de leur pouvoir discrétionnaire, les tribunaux estimeront raisonnable en tenant compte de toutes les circonstances, pourvu que, dans la distribution, aucune discrimination n'ait lieu selon l'endroit où le membre du recours collectif a reçu du sang ou selon l'endroit où il réside;
>
> Selon les ordonnances d'approbation précitées, les tribunaux peuvent prendre en considération certains facteurs dans le libre exercice de leur pouvoir discrétionnaire.

[60] Les ordonnances en Ontario et en Colombie-Britannique ainsi que l'annexe F ajoutée à la Convention de règlement au Québec (« **les ordonnances**

d'approbation ») énumèrent dix facteurs que les Tribunaux peuvent prendre en considération dans le cadre du libre exercice de leur pouvoir discrétionnaire qui leur est conféré, mais sans être lié par aucun d'entre eux : dans le cadre du libre exercice de leur pouvoir discrétionnaire qui leur est conféré par l'alinéa 9(b) [5(b) dans le jugement d'approbation de la Colombie-Britannique et annexe F, par. 1, al. p.2 au Québec], les Tribunaux peuvent prendre en considération, mais sans être lié par aucun d'entre eux, notamment les facteurs suivants :

> (i) Le nombre de membres des recours collectifs et de membres de la famille;
>
> (ii) l'expérience du Fonds en fiducie;
>
> (iii) le fait que les indemnités prévues par les Régimes peuvent, dans certains cas, ne pas refléter le régime de responsabilité en matière extracontractuelle;
>
> (iv) article 26 (10) de la Loi [art. 35(5) de la Loi sur les recours collectifs de la Colombie-Britannique, art. 1036 du Code de procédure civile du Québec;
>
> (v) la question de savoir si l'intégrité de la Convention de règlement sera maintenue et si les versements des indemnités prévus dans les Régimes seront assurés;
>
> (vi) la question de savoir si la progression de la maladie est très différente de celle prévue dans le modèle médical utilisé dans le rapport actuariel Eckler;
>
> (vii) le fait que les membres des recours collectifs et les membres de la famille assument le risque d'insuffisance du Fonds en fiducie;
>
> (viii) le fait que les contributions des gouvernements FPT sont limitées en vertu de la Convention de règlement;
>
> (ix) la source des Fonds et des autres éléments d'actifs que comprend le Fonds en fiducie;
>
> (x) Tous autres faits que les Tribunaux estiment importants.

ANALYSE

[61] Les Tribunaux ont-ils l'autorité, le pouvoir d'attribuer aux membres, en tout ou en partie, des allocations de capital excédentaire?

[62] Selon le comité conjoint, les jugements ayant approuvé les ententes qui ont force et lient les parties sont ceux rendus au terme de la seconde ronde de négociation des ententes.

[63] Le pouvoir du Tribunal tire sa source dans les ententes et ses modifications approuvées par jugements. Ces derniers sont les jugements initiaux conjugués aux jugements finaux et ils forment un tout.

[64] Ces jugements donnent l'autorité aux Tribunaux d'allouer l'excédant de capital aux victimes.

[65] Le gouvernement fédéral, appuyé par les gouvernements provinciaux et territoriaux FPT, s'y oppose.

[66] En premier lieu, ils rappellent qu'au moment de l'approbation de la première entente, alors que le concept d'allocation de capital excédentaire n'est pas présent, le comité conjoint a soutenu que les ententes sont équitables, raisonnables et avantageuses pour les membres. De plus bien que le modèle d'indemnisation n'est pas basé sur le régime classique de compensation, les sommes proposées sont avantageuses et similaires à ce que les victimes auraient reçu si le régime compensatoire avait été suivi.

[67] Les gouvernements FPT plaident également que les demandes du comité conjoint occasionnent une compensation plus avantageuse[13] pour les membres par rapport à ce que les parties ont négocié.

[68] En conséquence, ils plaident que tous les montants de surplus devront être remboursés au gouvernement fédéral qui est la partie ayant procuré ces fonds.

[69] Le modèle retenu divisé en chef d'indemnisation n'est pas un modèle compensatoire du fait qu'il est basé sur une classification des indemnisations selon le niveau de maladie dont les membres sont atteints. Il permet, selon la progression de la maladie, de recevoir des indemnités additionnelles. Selon le modèle, il est également possible pour les membres infectés en 1986-90, dont les symptômes apparaissent après la conclusion des ententes, de réclamer le régime de compensation pourvu que les réclamations surviennent dans les trois ans du diagnostic.

[70] Dans le cadre de la requête en approbation des ententes et des requêtes en approbation des honoraires des avocats, ceux-ci ont exprimé que les ententes présentées sont équitables et raisonnables. Il fut alors souligné que les membres n'ont pas eu à démontrer la faute des gouvernements à qui l'on reproche le manque de rigueur dans l'imposition de tests de dépistages aux sociétés administrant les banques de sang, et ce, malgré les données scientifiques connues et l'expérience américaine.

[71] Une des grandes inconnues durant les négociations, lors de l'approbation des ententes et même maintenant, est le nombre de personnes à indemniser. Les estimations initiales sont de 22 000 membres. Par la suite, un chiffre d'environ 8 000 membres semble plus près de la réalité lors de la conclusion des ententes.

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[13] Les avocats utilisent en anglais l'expression « over compensation ».

[72] Le nombre de victimes étant une variable très importante, le modèle de compensation a été établi en partageant entre les victimes potentielles les montants disponibles.

[73] L'on craint initialement un déficit ne permettant pas d'indemniser les membres en versant l'ensemble des compensations permises (ce qui aurait pour effet de pénaliser les plus jeunes victimes et celles plus récentes se joignant plus tard au groupe, alors que les fonds seraient épuisés). Il est apparu en premier au juge Winkler suivi du juge Smith puis de la juge Morneau que dans l'éventualité de surplus de fonds, c'est-à-dire non requis pour indemniser à pleine hauteur les membres, il faut alors, avec l'expérience du vécu, revoir à qui et en quelle portion ces surplus peuvent être alloués.

[74] Il est prévu dans les ententes et en ce sens, cela est conforme à la jurisprudence, qu'en soupesant une série de critères pour décider de cette question (ainsi que tout autre critère que le Tribunal estime devoir appliquer) que les Tribunaux doivent s'abstenir, malgré le libre exercice de leur discrétion, de modifier substantiellement les termes des ententes.

[75] Ainsi, le Tribunal doit exercer sa discrétion de manière juste et raisonnable pour toutes les parties en cause. Pour ce faire, il peut soupeser différents critères. En effet, le Tribunal n'est pas lié par ces critères énoncés aux ententes et peut même en soustraire ou en ajouter. C'est au Tribunal d'évaluer le poids des critères énoncés.

[76] Il va sans dire que cette évaluation doit se faire en tenant compte le texte des ententes, le contexte, l'intention des parties et la réalité telle qu'illustrée par l'application des ententes de 1999 à 2013 ainsi qu'aux perspectives raisonnablement prévisibles en ce qui concerne le futur jusqu'à la fin de la mise en œuvre des ententes.

[77] Pour le Tribunal, à la lumière de l'analyse des facteurs à considérer et des particularités des demandes, il est possible qu'il en résulte une distribution additionnelle des bénéfices aux membres.

[78] Peut-on néanmoins parler de surcompensation? En écoutant le récit tragique des membres qui ont voulu s'exprimer devant le Tribunal et en lisant les nombreux témoignages de membres ayant mis par écrit leur récit ou ceux dont les propos ont été rapportés dans les affidavits confectionnés à la suite des rencontres de consultation des membres à travers le pays à l'été 2015, il est discutable ou difficile de parler de «surcompensation».

[79] Tel que le mentionne le juge Winkler dans sa décision[14], aucune compensation ne sera jamais adéquate pour les victimes de l'hépatite C qui sont, rappelons-le, toutes des victimes innocentes. De même, malgré la mort de membre de famille infecté, ces victimes indirectes continuent de souffrir.

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[14] Précitée (Winkler), note 7, par. 133.

[80] Néanmoins, le Tribunal comprend qu'il ne peut être animé par la compassion, mais doit tenir en compte toutes les circonstances de cette triste affaire pour décider ce qui est juste et raisonnable afin de respecter les principes juridiques.

[81] Procédant maintenant à analyser les critères offerts au Tribunal pour sa considération, nous procéderons ensuite à la revue des demandes du comité conjoint pour les évaluer une à une.

Critère 1) Le nombre de membres des recours collectifs et membres des familles

[82] Selon les données compilées au dossier, à la date du 31 décembre 2013, il y a 5 283 membres du groupe infectés par le VHC ayant été approuvés, ayant transmis une réclamation ou ayant été considérés approuvés[15]. De ceux-ci : 1 585 sont déjà décédés (959 à cause du VHC); 240 des personnes infectées toujours vivantes ont déjà développé une cirrhose et 121 des personnes décédées ont progressé au stade de la cirrhose à la date de leur décès; et 137 des personnes infectées toujours vivantes ont déjà progressé au niveau 6 de la maladie. Parmi les personnes décédées, 467 ont progressé au niveau 6 de la maladie au moment de leur décès[16].

[83] Il y a également 390 réclamations en cours de traitement au 30 septembre 2015 incluant 265 réclamations de personnes infectées et 125 réclamations de membres de la famille, soit 207 personnes directement infectées et transfusées, 29 hémophiles directement infectés et 29 personnes indirectement infectées. Parmi les réclamations en traitement provenant de personnes infectées, 23 sont décédées avant le 1er janvier 1999, 87 sont décédées après le 1er janvier 1999, et 155 sont toujours vivantes en septembre 2015[17].

[84] La taille ultime de l'ensemble du groupe des victimes directes et indirectes demeure une donnée inconnue. Il subsiste encore un risque réduit de sous évaluation de membres à venir, la certitude n'étant pas possible. Les actuaires en ont tenu compte en appliquant pour ces fins une réserve du capital requis. Si le nombre est erroné, l'impact financier est de 5 300 000 $ pour chaque tranche de 25 personnes additionnelles qui s'ajoutent au groupe de membres.

[85] Les gouvernements FPT s'appuient de façon très importante sur le nombre moins élevé qu'anticipé de membres reconnus, pour soutenir que la mise de fonds de 1 118 000 000 $ est trop élevée au départ.

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15 Selon l'estimation de départ, il devait y avoir 9 825 victimes, soit 8 180 victimes issues de transfusions et 1 645 hémophiles.

16 Mémoire du comité conjoint, par. 61.

17 *Id.*, par. 62.

[86] Les gouvernements FPT estiment que le nombre réduit de réclamants est à la base de leur demande de remboursement en leur faveur. En examinant le modèle de compensation basé sur une distribution entre les membres selon leur niveau de sévérité d'atteinte du virus, ils concluent que moins de réclamants signifient que les surplus doivent leur être retournés.

[87] Pour le Tribunal, il s'agit d'une donnée qui a un impact favorisant un excédant de capital important.

[88] Par ailleurs, il ne faut toutefois pas oublier le phénomène des réclamations tardives et nous traiterons plus loin de la question. Ces personnes ayant réclamé après la date limite auraient peut-être pu être incluses dans le groupe. Elles sont au nombre de 246. Depuis le 31 décembre 2013, le comité conjoint évalue à 24 par année le nombre moyen de personnes qui formule une nouvelle réclamation.

[89] Une des explications données par les membres dans leur déclaration orale, écrite ou rapportée a trait à la complexité du processus.

[90] Les personnes atteintes du virus de l'hépatite C souffrent toutes de fatigue et de manque de concentration à des degrés variables selon le stade de la maladie. Plusieurs ont ainsi exprimé leurs grandes difficultés à accomplir le processus de réclamation. Les nombreux questionnaires, les preuves médicales requises sont pour certains un obstacle insurmontable.

[91] Il s'agit d'une donnée parmi d'autres qui peut expliquer le nombre moins élevé de réclamations par rapport aux chiffres anticipés.

Critère 2) L'expérience du Fonds

[92] Le Fonds est administré par des gestionnaires indépendants. Les sommes versées par le gouvernement fédéral sont investies afin de les faire fructifier au bénéfice des membres, bien qu'ils n'en soient pas propriétaires. Les coûts d'administration du programme sont prélevés à même le Fonds.

[93] Les coûts cumulés depuis les débuts sont de près de 39 M$[18].

[94] Chaque partie plaide que le surplus du Fonds lui est exclusivement attribuable. Pour le comité conjoint, ils soutiennent que les coûts de supervision précités sont financés par les membres puisqu'ils proviennent du Fonds.

[95] Le Fonds est une entité autonome au bénéfice des membres. Des coûts d'administration sont inhérents. En effet, sans gestionnaire ni supervision, le Fonds est à risque d'être déficitaire.

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[18] Affidavit Heather Rumble Peterson du 1er avril 2016.

[96] Enfin, le gouvernement fédéral plaide que c'est grâce à sa mise de fonds initiale que le surplus existe. C'est sans doute une partie de la réponse. Cependant, l'on ne peut ignorer que si le Fonds avait investi ses actifs en bon du Trésor, tel que les gouvernements le souhaitaient, les actuaires reconnaissent qu'au lieu d'avoir un surplus excédentaire au 31 décembre 2013, il y aurait un déficit actuariel de 348 M$[19].

[97] Il faut par ailleurs tenir en compte que les gouvernements ont consenti à renoncer au prélèvement d'impôt sur les sommes investies dans le Fonds. Cet élément a une valeur de 357 953 000 $ au bénéfice de la rentabilité du Fonds[20], car cette somme aurait pu être déduite.

[98] Le Tribunal retient de ces éléments que ce critère n'est pas déterminant à la position de l'une ou l'autre des parties.

Critère 3) La progression de la maladie

[99] Selon ce critère, le Tribunal est invité à comparer le modèle médical considéré en 1999 aux fins d'établir le mode d'indemnisation avec les données maintenant connues. Il s'agit de prendre en compte le niveau de la maladie dont les membres sont atteints ainsi que la progression anticipée et réelle de la maladie.

[100] Ainsi, le modèle initial est basé sur les connaissances médicales de l'époque et il n'est pas possible de pouvoir prédire avec justesse quelle serait la progression de la maladie pour les membres en particulier.

[101] Au fil du temps et des révisions actuarielles triennales, les données relatives aux membres du groupe ont pu être évaluées. Par ces analyses, à la lumière de l'expérience du groupe et des avancées de la science, il a été possible de réévaluer les besoins financiers pour assurer le paiement des indemnités conformément aux ententes.

[102] Selon un tableau résumé préparé par l'actuaire Eckler, l'on constate que les variations ont été fort variables entre les déficits et les surplus.

[103] Peu à peu, le modèle médical utilisé s'est basé sur les données des membres du groupe. L'une des conséquences de l'incorporation de ces informations a été la variation des résultats actuariels selon lesquels[21] :

a) de la date d'approbation du règlement à 2001, les résultats actuariels se sont détériorés de 84 millions de dollars (les obligations financières ayant augmenté)[22];

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19 Affidavit de Gorham du 29 janvier 2016, vol. 6, onglet 26, exhibit B, par. 83-87, pages 2324-2325.

20 Factum AG Canada, par. 35; Affidavit Peter Gorham 29 janvier 2016, exhibit A, par. 77 vol. 6, tab. 26, p. 2323.

21 Mémoire du comité conjoint, par. 73.

22 À la suite de changements dans le modèle médical combinés avec d'autres expériences de gains et pertes.

b) de 2001 à 2004, les résultats actuariels se sont améliorés de 5 millions de dollars;

c) de 2004 à 2007, les résultats actuariels se sont détériorés de 44 millions de dollars;

d) de 2007 à 2010, les résultats actuariels se sont détériorés de 62 millions dollars;

e) de 2010 à 2013, les résultats actuariels se sont améliorés de 305 millions de dollars partiellement réduits de 146 millions dollars en frais de traitement.

[104] Revenant à la question de la progression de la maladie en lien avec le niveau de capital excédentaire, les paragraphes 94 et suivants du factum du comité conjoint décrivent en détail l'étendue des dommages causés par le virus de l'hépatite C, les traitements développés ainsi que les conséquences et effets secondaires.

[105] En bref et sans rendre justice à l'impact de la maladie sur ses victimes, nous retenons ce qui suit.

[106] L'hépatite C signifie une inflammation du foie. Il s'agit dans 75 % des cas d'une maladie chronique et progressive, menaçante pour la vie avec ou sans traitement.

[107] 25 % des victimes pourront se débarrasser de l'hépatite C de façon spontanée dans les 12 premiers mois de son apparition. Au-delà de cette période, il est très rare qu'elle disparaisse.

[108] Dans les cas d'infection chronique, l'inflammation du foie peut entraîner la cirrhose du foie, ce qui peut nécessiter une greffe. Certaines personnes décèdent néanmoins. Le cancer hépatocellulaire est une des conséquences connues.

[109] Au chapitre des effets de la maladie, même à son stade le plus bénin, la fatigue, les problèmes de concentration, la dépression et l'anxiété sont présents et courants.

[110] L'hépatite C est traitée par traitement antiviral.

[111] Les principales formes de traitements antiviraux ont été jusqu'en 2011 la monothérapie à l'Interferon par injection ou une combinaison d'Interferon et Ribarivine, soit par injection et/ou comprimés. Ces derniers étant associés à des effets secondaires très significatifs[23].

[112] En 2011, une nouvelle médication apparaît, le DAA qui peut être prise avec Interferon et Ribavirine. Les effets secondaires très graves continuent et les essais de cette nouvelle drogue cessent.

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[23] La durée du traitement étant de 48 semaines, plusieurs victimes ont décrit dans leur témoignage oral et écrit leur état d'incapacité totale durant toute cette période et pour certains leur abandon durant le traitement, étant incapable de supporter les effets secondaires.

[113] En 2014, une nouvelle génération de drogue DAA apparaît, cette dernière étant nettement plus prometteuse tant dans la possibilité réelle qu'elle entraîne la disparation de la maladie (ou du moins la cessation de sa progression) qu'une réduction importante des effets secondaires.

[114] Selon l'expert du gouvernement fédéral, la nouvelle médication peut entraîner la guérison complète.

[115] Selon l'expert médical du comité conjoint, les symptômes de fatigue, maux de tête, insomnie, etc. demeurent présents. Il soutient également que malgré que le DAA 2014 soit très prometteur, les affres causées par une maladie présente pendant 20 ou 25 ans demeurent importantes.

[116] Enfin, mentionnons que les deux experts actuaires ont pris en considération les médicaments DAA approuvés jusqu'en 2014 pour leur évaluation du surplus excédentaire au 31 décembre 2013.

[117] Avec la nouvelle génération de DAA ayant moins d'effets secondaires, les perspectives de qualité de vie des victimes de l'hépatite C continuent d'augmenter.

[118] Cependant, de l'avis des deux experts médicaux, malgré la guérison de la maladie pour certains, les victimes demeurent à risque.

[119] Ainsi, en ce qui concerne la progression de la maladie et des traitements offerts, le Tribunal retient que grâce à la mise au point de nouveaux médicaments, des thérapies prometteuses sont accessibles aux patients. Cela entraine une différence importante par rapport au modèle médical anticipé en 1999.

[120] Soulignons que la plus récente génération de DAA n'est pas encore approuvée par Santé Canada, mais que les experts consultés sont d'avis qu'elle devrait être approuvée avant la fin de la présente année.

[121] La progression de la médication offerte est certes favorable aux victimes. Il faut néanmoins reconnaître que ces nouveaux médicaments n’effacent pas toutes les conséquences d’avoir vécu avec la maladie durant plusieurs décennies.

[122] L'inflammation du foie, un organe majeur du corps humain, est une condition grave qui laisse des traces, malgré les perspectives de guérisons

Critère 4) Le fait que les indemnités prévues par les régimes peuvent dans certains cas ne pas refléter le régime de responsabilité en matière extracontractuelle

[123] Le gouvernement fédéral soutient que selon les termes des ententes et vu la structure des régimes, il ne faut pas surcompenser les victimes. Les catégories étant

établies afin de pouvoir répondre à la progression de la maladie lorsqu'une personne infectée voit sa condition détériorée.

[124] Si un seul montant avait été attribué par jugement, il n'aurait pas été possible de corriger le tir par la suite.

[125] L'hépatite C a comme particularité de pouvoir progresser après une longue période de temps en latence.

[126] La juge Morneau l'a reconnu dans son jugement approuvant les ententes qu'en comparaison de l'application de l'article 1615 C.c.Q., cette disposition permet de réclamer une compensation accrue dans les trois ans d'une indemnité pour préjudice corporel versée par jugement.

[127] Le modèle de compensation basé sur les six niveaux de progression de maladie permet aux victimes de réclamer en lien avec le stade présenté durant toute la durée des ententes est nettement favorable aux victimes.

[128] On s'éloigne donc du modèle de compensation découlant du régime d'indemnisation extracontractuel.

[129] Il est donc inapproprié, selon le gouvernement fédéral, de rouvrir les termes des ententes, sinon il en résulterait une surcompensation si le Tribunal suivait les recommandations du comité conjoint.

[130] Le gouvernement fédéral est d'avis que les quittances consenties par les membres en contrepartie de leur participation aux régimes empêchent ces derniers de réclamer à nouveau compensation.

[131] Nous avons déjà traité de ce point dans une section précédente et vu le texte complet des ententes, une telle reconsidération est possible en présence d'un surplus excédentaire, et ce, malgré les quittances. Ces dernières ne peuvent faire échec à une allocation du capital excédentaire à une partie qui en fait la demande.

[132] Le Tribunal, dans le cadre de l'analyse des revendications du comité conjoint, est conscient qu'il ne doit pas en résulter une nouvelle entente ni un phénomène de surcompensation.

Critère 5) L'article 1036 C.p.c.

[133] Cet article s'applique lorsque les distributions des indemnités en vertu d'un recours collectif ont été faites et qu'il reste un reliquat. Les parties sont d'avis, tout comme le Tribunal, que nous ne sommes pas gouvernés par cette situation, car nous

ne sommes pas en présence d'un reliquat selon le texte de l'article 597 C.p.c. actuellement en vigueur[24].

Critère 6) Le maintien de l'intégrité de la convention et le versement des indemnités prévues au régime assuré

[134] La question du maintien de l'intégrité de la convention est centrale au présent jugement.

[135] Le pouvoir du Tribunal est limité à décider du sort du capital excédentaire. Ce dernier étant établi après avoir tenu compte du paiement de l'ensemble des indemnités prévues aux régimes auxquels s'ajoutent des réserves estimant les scénarios les plus catastrophiques afin de pallier à l'inconnu.

Critères 7) et 8) Le fait que les contributions des gouvernements FPT soient limitées et le fait que les membres des recours collectifs et les membres des familles assument le risque d'insuffisance du Fonds

[136] Il s'agit d'éléments centraux aux ententes intervenues. Les deux parties l'ont reconnu dans leur mémoire et en plaidoirie, il s'agit de conditions *sine qua non* de règlement. Les gouvernements FPT refusent d'être appelés à verser davantage aux victimes advenant l'insuffisance de fonds. Il est même anticipé que le Fonds soit déficitaire. Les victimes le savent et ont néanmoins accepté les ententes.

[137] C'est précisément en mesurant l'impact de la limite de contribution et la clause 12.03 des conventions de règlement selon laquelle un résidu du Fonds à la fin des ententes (soit 80 ans plus tard) retournerait aux gouvernements FPT que les ententes ont été modifiées.

[138] C'est en analysant le spectre, peu réaliste en 1999, d'un surplus excédentaire que le juge Winkler a répondu favorablement à l'argument de la Société canadienne de l'hépatite C afin d'inviter les parties à renégocier cet élément. D'où l'incorporation du remède qui donne aujourd'hui au Tribunal l'autorité de se livrer au présent exercice.

Critère 9) La source du Fonds et ses autres éléments d'actifs

[139] Le gouvernement fédéral soutient que l'excédant de capital est la preuve qu'il y a eu financement excessif du Fonds de sa part.

[140] Pour le Tribunal, au même titre que les membres ont assumé le risque d'insuffisance de fonds, les gouvernements FPT, qui ont décidé que le montant de compensation est de 1 118 000 000 $, ont pris le risque de contribution excessive.

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[24] Le nouvel article 597 C.p.c. ayant remplacé l'ancien article 1036 C.p.c. est au même effet.

[141] Il est prévu qu'à la fin de la mise en œuvre des ententes, tout surplus est destiné à être remboursé aux gouvernements y ayant contribué. Le jugement ayant approuvé les ententes modifiées prévoit la possibilité de remettre du capital excédentaire en tout ou en partie aux membres et aux gouvernements FPT au cours de la mise en œuvre des ententes.

[142] Ainsi, n'eut été de cette modification, les gouvernements auraient été contraints d'attendre l'expiration des ententes, soit 80 ans, avant de pouvoir récupérer une partie des sommes investies.

[143] Les gouvernements FPT ont négocié et accepté cette éventualité. Lesdits montants et modalités devant être établis par les Tribunaux.

[144] Il est certain que le versement au début du régime de toute la contribution fédérale et la renonciation à prélever de l'impôt sur cette somme a permis de faire fructifier le Fonds.

[145] La bonne gestion par des professionnels compétents dont les coûts sont prélevés à même le Fonds a également permis l'accumulation d'un capital excédentaire.

[146] Pour le Tribunal, ces éléments ont contribué à la réalisation du surplus de capital et permis aux membres d'avoir une assurance que les indemnités promises leur seraient payées.

Critère 10) Tout autre fait

[147] Le Tribunal ne juge pas nécessaire d'inclure d'autres critères d'analyse.

ANALYSE DES CHEFS D'INDEMNITÉS RÉCLAMÉES PAR LE COMITÉ CONJOINT

[148] Les demandes formulées par le comité conjoint seront analysées tenant en compte les commentaires précédents.

1) Réclamations tardives

[149] Selon les ententes, les membres doivent formuler leur réclamation avant l'échéance du 30 juin 2010[25].

[150] Entre le 30 juin 2010 et le 30 septembre 2015, 246 personnes (ne bénéficiant pas des exceptions) ont formulé une réclamation. Ces dernières ont été rejetées au motif de tardiveté, mais avant d'avoir fait l'objet d'une analyse quant à leur bien fondé.

[151] Le comité conjoint demande au Tribunal d'autoriser l'arbitre à recevoir leurs demandes tardives afin de les étudier. L'arbitre pourra décider si le motif de tardiveté

[25] Certaines exceptions s'appliquent à ce délai.

est sérieux et raisonnable. Par la suite, si l'arbitre est satisfait, il pourra alors évaluer la réclamation pour déterminer si le réclamant rencontre les termes des ententes afin de se qualifier comme membre.

[152] Le coût de cette mesure est évalué par les actuaires à 32 450 000 $ avec des frais administratifs de 51 000 $.

[153] Les gouvernements FPT s'opposent avec force à cette mesure. Ils estiment qu'une telle allocation a pour effet de permettre aux Tribunaux de réécrire les termes des ententes, ce qui n'est pas conforme à la jurisprudence et est contraire aux ententes.

[154] En l'absence d'un consentement de toutes les parties, un tel changement n'est pas possible.

[155] Dans son argumentaire, le gouvernement fédéral s'appuie sur une distinction sibylline entre une compensation aux membres faite à leur bénéfice, ce qui est permis selon les ententes et une allocation de fonds au bénéfice des membres non permise.

[156] Ils ajoutent qu'aucun paiement direct ne peut être avancé aux membres, seule la mise en place d'un programme au bénéfice des membres peut être envisagée.

[157] Le Tribunal n'est pas d'accord.

[158] Les ententes permettent précisément au Tribunal de disposer, dans le libre exercice de sa discrétion, de surplus de capital soit au bénéfice des membres ou des gouvernements. Il est également possible pour le Tribunal d'allouer des fonds pour un programme qui serait mis sur pied au bénéfice des membres, aucune des parties n'a formulé une demande en ce sens.

[159] La demande du comité conjoint de reconsidérer les réclamations tardives peut être accueillie à condition qu'elle puise ses sources de paiement uniquement à l'intérieur des fonds de capital de surplus. Il ne peut y avoir de retrait de fonds provenant du capital initial investi, fiscalement alloué.

[160] Selon les nombreux témoignages des membres recueillis, un problème récurrent auquel ils semblent tous faire face, même au niveau plus bénin de la maladie, réside dans le manque de concentration et de la fatigue. Les victimes éprouvent de la difficulté de s'astreindre à lire, comprendre et compléter les démarches requises en vertu des ententes pour pouvoir se qualifier et réclamer des indemnités.

[161] C'est donc dans ce contexte très particulier qu'il faut aborder la question des réclamants retardataires.

[162] Étant donné que le comité conjoint propose de donner à l'arbitre le pouvoir d'évaluer le caractère raisonnable du motif de tardiveté avant d'évaluer le mérite de la demande, le Tribunal est d'avis qu'il y a lieu d'accorder cette réclamation.

[163] En effet, seules les demandes exposant des raisons valables permettront l'étude des demandes. Ces indemnités seront alors, payées uniquement à même les fonds distincts du capital excédentaire. Une fois que l'arbitre aura évalué les réclamations tardives, le Tribunal demande au comité conjoint de formuler des recommandations aux Tribunaux afin de proposer un plan d'indemnisation à être approuvé.

[164] Le gestionnaire du Fonds devra donc opérer une gestion distincte du montant de capital excédentaire de 32 450 000 $ plus les frais d'administration pour que les allocations requises en proviennent uniquement, le cas échéant.

[165] Ainsi, il n'y aura pas de charge financière additionnelle pour les gouvernements provinciaux et territoriaux.

2) La réclamation concernant les paiements fixes

[166] Le comité conjoint demande de hausser le montant payable aux membres à titre de paiements fixes. Il s'agit de montants forfaitaires qui sont payables aux membres en vie ou aux membres décédés après le 1er janvier 1999 à titre de dommages généraux non pécuniaires aux divers niveaux de maladie. Les options de paiements fixes de 50 000 $ et 120 000 $ concernant les membres qui sont décédés avant le 1er janvier 1999 à cause de l'infection au VHC et les options de 50 000 $ et 72 000 $ visant les hémophiles co-infectés au VIH.

[167] Selon la recommandation modifiée du comité conjoint, l'augmentation de ces paiements est de 8,5 %, indexée à compter du 1er janvier 2014. Cette mesure aurait pour effet d'indemniser 5 320 membres et 1 650 successions. Le coût de cette mesure est de 51 320 000 $.

[168] Le gouvernement fédéral s'oppose à cette mesure pour les mêmes motifs que ceux discutés précédemment. Cependant, à titre alternatif, le gouvernement accepte cette indemnité dans la mesure où il est d'avis que cette réclamation n'implique pas une modification substantielle aux ententes.

[169] Le Tribunal a voulu s'assurer que cette réclamation augmentant les dommages non pécuniaires n'a pas pour effet de sortir du cadre jurisprudentiel reconnu et suivi au Canada depuis la trilogie de 1978[26]. Le Tribunal a voulu s'assurer que le plafond est respecté notamment pour les victimes du niveau 6, soit les victimes les plus marquées.

[170] La recommandation du comité conjoint d'augmenter les sommes forfaitaires de 8,5%, indexées en 2014, équivaut à une indemnité évaluée à 329 569 $[27].

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[26] *Andrews* v *Grand & Toy Alberta Ltd*, [1978] 2 RCS 229; *Arnold* c. *Teno*, [1978] 2 RCS 287; *Thornton* c. *School Dist. No57 (Prince George)*, [1978] 2 RCS 267.

[27] Factum du comité conjoint par. 243.

[171] Pour le Tribunal, cette augmentation est non seulement justifiée, mais raisonnable. Elle respecte les paramètres de la jurisprudence et peut soulager un peu plus les victimes et leurs familles.

3) Augmentation de l'indemnisation des enfants de plus de 21 ans et aux parents des victimes de 5 000 $ à 9 600 $

[172] Le comité conjoint recommande une augmentation d'indemnité additionnelle de 4 600 $ indexable, pour les enfants de plus de 21 ans et pour les parents des victimes. Le coût total de cette mesure est de 22 449 000 $.

[173] Ici encore, bien que le gouvernement s'oppose de prime abord à la demande, à titre alternatif, il accepte que cet item soit indemnisé.

[174] Le Tribunal estime la demande raisonnable pour ces victimes. Il est entendu qu'aucune somme ne peut compenser adéquatement la perte d'un être cher, mais dans un contexte d'allocation de capital excédentaire, cette demande est juste et raisonnable.

4) Paiement rétroactif pour compenser les déductions faites en vertu de programmes

[175] Le comité conjoint demande au Tribunal d'éliminer la déduction faite à l'égard des bénéfices collatéraux lors du calcul de la perte de revenus et de soutien.

[176] Selon l'expert du comité conjoint, le coût de cette mesure est de 27 530 000 $ plus 143 000 $ de frais d'administration. Selon l'actuaire du gouvernement fédéral, le coût serait de 36 094 000 $.

[177] Selon le comité conjoint, les membres du groupe font face à des réductions importantes dans le calcul de leur perte de revenus. Ces déductions ont trait aux prestations d'invalidité reçues du programme de pensions du Canada et du programme de pension du Québec, les prestations d'assurance-emploi, les prestations d'assurance-maladie, assurance-accident ou assurance-invalidité ainsi que les indemnités versées par les programmes d'aide extraordinaire (EAP), le programme provincial et territorial d'assistance (PPTA) ainsi que le programme de compensation de la Nouvelle-Écosse, tous établis à l'égard du VIH.

[178] Selon le gouvernement fédéral, cette mesure aurait pour effet d'impliquer une double indemnisation. Pour eux, il en résulterait une compensation excédentaire (avec compensation) pour une majorité de réclamants (2/3) et sous-compensation pour le reste (1/3).

[179] Pour les représentants des provinces et territoires, cette mesure emporterait un changement significatif des termes des ententes négociées. De plus, il en résulterait

d'importantes disparités tant au sein qu'entre les résidents des divers territoires et provinces.

[180] Toutes les parties s'appuient sur l'arrêt *Cunningham* c. *Wheeler*[28] pour soutenir leur position.

[181] Dans cet arrêt, une victime d'un acte fautif pourra recevoir une indemnisation pour ses blessures, mais elle n'a pas droit à la double compensation. Le Tribunal reconnaît deux exceptions dans le cas de dons de charité et lorsque des prestations d'assurance sont reçues en contrepartie d'un paiement de la victime.

[182] Dans ce cas précis, le Tribunal retient que malgré le régime particulier qui découle de l'article 1608 C.c.Q. au Québec et la jurisprudence connue depuis l'arrêt *Cunningham* précité, les parties aux ententes ont négocié ce volet en toute connaissance de cause.

[183] Ces déductions sont le résultat d'importantes concessions faites par les membres à la suite de demandes en ce sens provenant de l'ensemble des gouvernements FPT.

[184] Si le Tribunal accepte cette réclamation du comité conjoint, cela emporte un changement fondamental auquel les défendeurs s'opposent.

[185] De plus, une allocation de surplus ne peut être adoptée si elle a des effets discriminatoires entre les membres. Vu la multiplicité des différents programmes à l'échelle du pays et les résultats variables qu'une telle indemnité importante, le Tribunal est d'avis qu'il n'y a pas lieu de faire droit à cette demande du comité conjoint.

[186] Le Tribunal exerce ainsi sa discrétion judiciaire tenant en compte tous les intérêts en cause et refuse ce chef de réclamation.

5) Réclamation d'une hausse de la perte de rémunération afin de tenir en compte la perte liée aux fonds de pension

[187] Le comité conjoint réclame une hausse de 10 % de la perte de salaire en lien avec la maladie afin de compenser les victimes qui ont également perdu la possibilité d'accumuler un fond de pension.

[188] Le coût de cette mesure pour le passé et l'avenir est de 19 787 000 $ selon Eckler[29].

[189] Le gouvernement fédéral s'oppose à cette demande estimant qu'il s'agit d'une nouvelle réclamation et donc, qu'elle déborde du cadre établi concernant l'allocation de capital excédentaire.

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[28] [1994] 1 RCS 359.
[29] Eckler report, R-5 p. 11, annexe B p. 29.

[190] Le comité conjoint pour sa part estime que cette réclamation n'est que le prolongement d'un chef d'indemnité sous compensé.

[191] En ce qui concerne la compensation pour les revenus dont les victimes ont été privées à cause de l'hépatite C, les ententes prévoyaient un revenu maximal de 75 000 $ aux fins du calcul de l'indemnité.

[192] Au fil du temps, ce plafond a éventuellement été levé afin de compenser la perte de revenus jusqu'à un maximum de 200 000 $.

[193] Le Tribunal est d'avis que la présente demande de compensation découle de l'indemnisation de la compensation pour perte de revenus. Il ne s'agit pas d'une demande entièrement nouvelle dénuée de lien avec les termes des ententes négociées.

[194] Dans un contexte d'allocation de surplus excédentaire, cette réclamation limitée aux augmentations de 10 % des pertes de revenus demeure assujettie au plafond de 200 000 $ établi en 2014. Le Tribunal conclut que la réclamation est fondée et raisonnable.

- Réclamation présentée par M. Polley représentant une victime hémophile

[195] Un membre du groupe est intervenu afin de demander que la limite imposée par le plafond soit levée en ce qui le concerne, et ce, malgré l'absence de soutien de sa demande par le comité conjoint.

[196] Le client de l'avocat M. Polley est un cas unique.

[197] Hémophile de naissance, son parcours de vie est ponctué d'un nombre très élevé d'embûches apparaissant insurmontables.

[198] Jeune adulte ayant non seulement vécu avec l'hémophilie, il combat deux cancers. Il poursuit ses études et obtient un doctorat en physique puis en administration. Il fait carrière dans le monde de la finance.

[199] Il connaît un très grand succès professionnel, gagnant des millions de dollars annuellement à titre de rémunération.

[200] Il contracte l'hépatite C et continue de se battre en élevant sa famille, subissant les traitements les plus débilitants et poursuivant son travail jusqu'à ce qu'il n'en soit plus capable.

[201] Il réclame l'abolition de tout plafond de rémunération. En 2013, l'arbitre lui accorde une compensation de 2 300 000 $ pour le passé, lorsque le plafond de salaire est élevé à 200 000 $. Pour lui, cette indemnisation n'est pas adéquate.

[202] Il indique que quatre autres membres ont établi gagner une rémunération supérieure à 200 000 $. L'un d'eux étant décédé, les deux autres ayant une rémunération de 200 000 $ à 300 000 $. Il est le seul à avoir gagné plus d'un million de dollars au moment où la maladie l'a rendu inapte au travail. Il estime être victime de discrimination.

[203] Le comité conjoint maintient leurs recommandations telles qu'actuellement formulées, donc en maintenant un plafond.

[204] Le Tribunal éprouve de la compassion, mais surtout beaucoup d'admiration pour le client de M. Polley. Comment quelqu'un peut-il conserver la force de se battre après avoir vécu toutes ces situations dramatiques?

[205] Cependant, en acceptant de souscrire aux termes des ententes, cette personne renonce à obtenir plus que ce qui est négocié. À l'époque, l'indemnité de remplacement de revenus est limitée à 75 000 $ avec en plus une retenue de 25 % afin de vérifier au fil du temps, à l'issue des révisions triennales, si les fonds sont suffisants. Par la suite, une fois les retenues levées et payées aux membres, le plafond salarial de 75 000 $ en 1999 a été élevé à 200 000 $ en 2014.

[206] En participant aux règlements, le client de M. Polley accepte un important compromis. Le Tribunal est d'avis qu'il n'y a pas lieu d'accorder cette réclamation particulière.

6) Réclamation pour la perte de services domestiques

[207] Le comité conjoint demande une indemnisation pour perte de services domestiques payables aux membres du groupe ainsi qu'aux personnes à charge des membres du groupe décédés et dont le décès est attribuable au VHC. Selon les ententes, les réclamations pour perte de services domestiques sont limitées à un maximum de 20 heures par semaine indemnisables au taux de 12 $ de l'heure et ne peuvent pas être réclamées en plus de la perte de revenus et de soutien.

[208] Plusieurs représentations écrites et verbales formulées par les membres du groupe et les membres de la famille décrivent l'indemnité pour perte de services domestiques comme étant vitale à leur survie et insuffisante (le taux actuel est de 16,50 $) pour couvrir les frais de remplacement pour l'exécution des travaux domestiques.

[209] Le comité conjoint recommande d'augmenter la compensation en haussant de deux heures par semaine l'indemnisation versée pour compenser les membres et leur personne à charge de la perte de services domestiques, vu la maladie dont sont atteintes les membres.

[210] Le coût de cette mesure est de 34 364 000 $ plus 196 000 $ en frais administratifs selon le rapport Eckler. Selon Morneau Sheppell, le coût de cette demande est de 37 384 000 $.

[211] Le gouvernement s'y oppose selon les mêmes arguments déjà discutés. Il accepte à titre alternatif la mesure, cette indemnité n'ayant pas pour effet de changer les ententes de façon substantive.

[212] Le Tribunal est d'avis que dans le libre exercice de sa discrétion, il est juste et raisonnable que l'allocation de surplus excédentaire compense les membres à ce chapitre.

[213] Les témoignages des victimes sont fort éloquents en ce qui concerne leur inhabilité de vaquer à leurs occupations personnelles à la hauteur de ce qu'ils souhaitent et vu leur dépendance à l'entourage.

[214] Également, les salaires que doivent débourser les victimes sont souvent supérieurs à ce qui est prévu au sein des ententes. La demande d'indemnité est donc des plus raisonnables.

7) Recommandations concernant l'indemnisation des frais engagés pour des soins

[215] Cette demande du comité conjoint vise une augmentation des frais en lien avec les soins requis par le niveau 6 de la maladie. Les frais en question sont ceux qui ne sont pas couverts par un régime d'assurance santé publique ou privée ou inclus dans l'indemnisation pour perte de services domestiques.

[216] La recommandation vise à faire passer le maximum payable pour les victimes du niveau 6 de 50 000 $ à 60 000 $ incluant des frais d'administration. Le coût de cette mesure est de 627 000 $ plus 2 000 $ de frais d'administration.

[217] Comme pour le chapitre précédent, le gouvernement s'oppose à cette demande, mais l’accepte à titre alternatif.

[218] Le Tribunal est d'avis que cette indemnité est raisonnable, les victimes devant documenter leur demande de remboursement.

[219] En conclusion, en exerçant sa libre discrétion, le Tribunal est d'avis que cette indemnité est juste et raisonnable.

8) Réclamation pour compenser les membres de la famille accompagnant les victimes à leurs rendez-vous médicaux

[220] Cette demande d'indemnisation vise le remboursement d'une somme maximale de 200 $ pour des frais ou dépenses engagés par les membres de la famille, accompagnant les victimes à leurs rendez-vous médicaux, ces dernières n'étant aucunement indemnisées en vertu des ententes.

[221] Le comité conjoint recommande d'indemniser les membres des familles de façon prospective, c'est-à-dire uniquement pour l'avenir. Ainsi, les témoignages recueillis lors des consultations font abondamment état des difficultés issues du besoin d'aide des victimes d'hépatite C lors de leurs rendez-vous médicaux. Celles devant être accompagnées comptent sur leurs proches. Ces derniers doivent très souvent s'absenter du travail sans compensation et assumer seuls les dépenses encourues qui en découlent.

[222] Le coût de cette mesure, selon Eckler, est de 1 957 000 $, alors que Morneau Sheppell, ce coût est de 8 370 000 $. Le gouvernement fédéral s'oppose à cette demande d'indemnité.

[223] La différence entre les deux évaluations repose sur l'appréhension des experts du gouvernement fédéral que cette indemnisation entraînera une augmentation significative du nombre de personnes se faisant dorénavant accompagnées pour leurs visites médicales.

[224] La réalité toutefois est qu'un nombre élevé de victimes de l'hépatite C dépend des membres de leur famille, vu leur état fragilisé par la maladie.

[225] Le Tribunal est d'avis que cet item découle indirectement de la réclamation fort limitée de la perte des services domestiques.

[226] La présente réclamation est en quelque sorte une application différente, mais de même nature que cette dernière indemnité ayant pour objectif de pallier aux limitations importantes à l’autonomie des personnes affectées par la maladie.

9) Les frais funéraires

[227] Le comité conjoint recommande l'augmentation du remboursement des frais funéraires non assurés pour que le plafond passe de 5 000 $ à 10 000 $.

[228] Ainsi, sur présentation de factures, le comité conjoint recommande la hausse de ce montant, puisque dans plusieurs cas, les coûts sont plus élevés que le maximum présentement alloué.

[229] Selon les actuaires Eckler, le coût de cette mesure est de 2 050 000 $, alors que pour les actuaires du gouvernement fédéral Morneau Sheppell, le coût est plutôt de 2 025 000 $.

[230] Le gouvernement fédéral s'oppose à cette mesure, mais à titre de mesure alternative l'accepte.

[231] Le Tribunal ne peut accorder cette demande, et ce, malgré la position exprimée par le gouvernement fédéral.

[232] En effet, les frais funéraires sont une dépense inévitable qui va varier selon les choix des individus. Les réclamations soumises montrent que pour certains, l'allocation de 5 000 $ est raisonnable, bien que pour d'autres, elle puisse être insuffisante. Il y a trop de variables liées aux choix personnels effectués par les familles.

[233] Le Tribunal est donc d'avis qu'il n'y a pas lieu d'accorder ce chef d'indemnité.

RÉCLAMATIONS PARTICULIÈRES

[234] Lors des auditions, différentes victimes de l'hépatite C présentes à Toronto, Vancouver et Montréal ont voulu exprimer aux Tribunaux en quelques mots leur situation particulière.

[235] Plusieurs souhaitent communiquer de vive voix aux Tribunaux leur soutien aux recommandations du comité conjoint. Certains veulent mettre en lumière leurs difficultés quotidiennes rencontrées, vu leur statut de porteur de l'hépatite C, étant tous, rappelons-le, des victimes innocentes.

[236] Trois des membres sont intervenus par avocat. Le Tribunal a déjà traité du cas du client de M. Polley.

[237] D'autres, dont le membre du Québec a fait valoir l'injustice dont il s'estime victime.

[238] Le Tribunal traite ci-après de ces particuliers.

i) Client N^{o} 1 de M. Dermody, membre no. 2213

[239] Cette victime de l'hépatite C représentée par M. Dermody est venue faire valoir sa situation particulière en s'adressant aux Tribunaux.

[240] Selon les ententes, une victime de l'hépatite C ayant également contracté le virus du VIH peut opter afin de recevoir dès 1999 ou 2000 un paiement forfaitaire unique de 50 000 $.

[241] Cette mécanique a été mise sur pied afin de permettre à ces victimes, dont les perceptives de survie sont extrêmement limitées, de recevoir rapidement un seul paiement forfaitaire en échange d'une quittance.

[242] Ce client est venu expliquer qu'à l'époque où il a signé les ententes, il est très malade, confus et en colère. Déjà père de deux jeunes enfants, il est fort inquiet pour l'avenir de sa famille.

[243] Ce membre appuie les recommandations du comité conjoint. Il souhaite cependant pouvoir réviser son choix, puisque les ententes lui auraient permis d'obtenir une compensation nettement plus généreuse.

[244] Pour le Tribunal, il est souhaitable que le comité conjoint prenne en considération cette situation aux fins de répondre aux besoins de telles victimes et formule les recommandations appropriées.

ii) Client N^{o} 2 de M. Dermody, membre no 7438

[245] Le second client représenté par M. Dermody est une victime indirecte de cette tragédie.

[246] Cette personne souffre d'un handicap et a toujours été dépendante de son parent mort de l'hépatite C.

[247] Il a reçu une compensation pour perte d'un parent pour un certain temps. La rente a cessé au moment où ce parent serait décédé selon l'indice de survie des Canadiens.

[248] Cette personne handicapée est demeurée dépendante de la rente. La cessation du paiement de la rente lui est extrêmement préjudiciable.

[249] Il demande aux Tribunaux d'en poursuivre le versement, sans identifier la période selon laquelle la rente doit continuer d'être versée.

[250] Ici encore, il revient au comité conjoint de prendre en compte cette situation et de faire une recommandation s'il l'estime nécessaire.

iii) Membre québécois

[251] Une victime de l'hépatite C a pris la parole depuis la salle d'audience à Montréal.

[252] Il déclare qu'avant de recevoir des indemnités provenant des ententes et avant d'être infecté par l'hépatite C, il est déjà prestataire de rentes d'indemnisations. Ces dernières sont alors versées sans lien avec l'hépatite C.

[253] Or, lorsque son revenu a été analysé aux fins de son droit à l'indemnisation, ces autres rentes ont été déduites de sa capacité de gain aux fins de la détermination de ses revenus manquants.

[254] Il semble que cette personne soit injustement pénalisée. Une rente sans lien aucun avec l'hépatite C ne devrait pas être déduite aux fins de calculer sa perte de capacité de gain.

[255] Il s'agit également d'un cas qui doit être soumis au comité conjoint et qu'une recommandation peut être potentiellement formulée.

[256] Pour conclure, le Tribunal est d'avis qu'il n'y a pas lieu de remettre de sommes résiduelles du capital excédentaire au gouvernement fédéral qui ne sont pas promises aux membres en vue de déboursés à venir. En effet, malgré le refus d'accorder certaines des réclamations formulées par le comité conjoint, une partie des sommes qualifiées de capital excédentaire ne seront allouées à aucune des parties.

PAR CES MOTIFS, LE TRIBUNAL :

[257] **DÉCLARE** que :

a) les sommes à partir desquelles les « bénéfices » réclamés sont payables le sont uniquement et exclusivement à partir des actifs de la fiducie correspondant aux sommes payées dès le départ par le gouvernement du Canada et investies aux termes de la Convention et de l'Accord de financement;

b) aucune demande de fonds additionnels ne sera formulée à l'endroit du gouvernement du Québec, à l'égard de ces « bénéfices » et que les obligations financières de ce dernier prévues à la Convention ne seront aucunement modifiées ou affectées de quelque manière que ce soit;

c) les paiements mensuels que fait et continuera de faire le gouvernement du Québec ne seront d'aucune manière modifiés ou affectés du fait de cette allocation de « bénéfices ».

[258] **DÉCLARE** que le Fiduciaire de la Convention de Règlement de l'Hépatite C 1986-1990 (la « Convention de Règlement ») détient 206 920 000 $ d'actifs ne faisant pas l'objet d'une attribution actuarielle à la date du 31 décembre 2013 (le « Capital excédentaire »);

[259] **ORDONNE** que les restrictions sur les paiements des montants pour les réclamations de perte de revenus prévues à l'article 4.02(2)(b)(i) du Régime à l'intention des transfusés infectés par le VHC et à l'article 4.02(2)(b)(i) du Régime à l'intention des hémophiles infectés par le VHC et pour la perte de soutien prévue aux termes des articles 6.01(1) du Régime à l'intention des transfusés infectés par le VHC et 6.01(1) du Régime à l'intention des transfusés infectés par le VHC, comme précédemment modifiées, ne soient pas autrement modifiées ou supprimées en tout ou en partie à ce stade-ci;

[260] **ORDONNE** l'attribution d'actifs excédentaires au bénéfice des Membres des recours incluant les Membres de la famille en approuvant ce qui suit :

a) le Protocole proposé pour les demandes de réclamations tardives suivant la date limite du 30 juin 2010 afin de permettre aux Membres des recours qui ont omis de faire leur première réclamation avant la date limite du 30 juin 2010, d'obtenir les formulaires de réclamation initiale et de voir leur réclamation soumise à une nouvelle demande du comité conjoint dans la mesure où ils auront convaincu un Arbitre que leur délai était dû à des raisons hors de leur contrôle ou qu'il existe une explication raisonnable pour leur délai, ces sommes devant être perçues d'un fonds distinct d'un montant de 32 450 000 $ plus les frais administratifs, le tout devant être soumis aux Tribunaux pour approbation;

b) une augmentation de 8,5%, indexée au 1er janvier 2014, en ce qui concerne: les montants fixes payables en vertu de l'article 4.01(1) du Régime à l'intention des transfusés infectés par le VHC et les sommes forfaitaires de 50 000 $ (en dollars de 1999) et de 120 000,00 $ (en dollars de 1999) payables en vertu des articles 5.01(1) et 5.01(2) du même régime; les montants fixes payables en vertu de l'article 4.01 du Régime à l'intention des hémophiles infectés par le VHC et la somme forfaitaire de 50 000 $ (en dollars de 1999) payable en vertu de l'article 4.08(2) du même régime; la somme forfaitaire de 50 000 $ (en dollars de 1999) payable en vertu de l'article 5.01(1) du Régime à l'intention des hémophiles infectés par le VHC, la somme forfaitaire de 120 000 $ (en dollars de 1999) payable en vertu de l'article 5.01(2) du même régime ainsi que la somme forfaitaire de 72 000 $ (en dollars de 1999) payable en vertu de l'article 5.01(4) du Régime à l'intention des hémophiles infectés par le VHC; à être payée rétroactivement et prospectivement;

c) une augmentation du montant fixe octroyé à un Enfant âgé de 21 ans ou plus à la date de décès d'une Personne Infectée par le VHC en vertu de l'article 6.02(c) du Régime à l'intention de transfusés infectés par le VHC et l'article 6.02(c) du Régime à l'intention des hémophiles infectés par le VHC, faisant passer cette indemnité de 5 000 $ (en dollars de 1999) à 9 600 $ (en dollars de 1999), indexée au 1er janvier 2014, à être payée rétroactivement et prospectivement;

d) une augmentation du montant fixe octroyé à un Parent en vertu de l'article 6.02(d) du Régime à l'intention des transfusés infectés par le VHC et de l'article 6.02(d) du Régime à l'intention des hémophiles infectés par la VHC, faisant passer cette indemnité de 5 000 $ (en dollars de 1999) à 9 600 $ (en dollars de 1999), indexée au 1er janvier 2014, à être payée rétroactivement et prospectivement;

e) une augmentation de 10% des montants payés pour perte de revenus et perte de soutien en vertu de l'article 4.02 du Régime à l'intention des transfusés infectés par le VHC et l'article 4.02 du Régime à l'intention des hémophiles infectés par le VHC, calculée sur une perte de revenu maximale de 200 000 $ pour les années

[261] **ORDONNE** que tous les paiements rétroactifs soient effectués au moyen d'un versement global aux Membres des recours et/ou aux Membres de la famille ou à leur Représentant personnel tel que défini à l'article 1.01 des Régimes;

[262] **ORDONNE** que toutes les sommes payables aux Membres des recours et aux Membres des familles soient payées à partir du Fonds en fiducie;

[263] **ORDONNE** que le solde du Capital excédentaire doive être conservé dans le Fonds en fiducie, à l'exception du montant visé au paragraphe 260a), sujet à toute autre ordonnance du Tribunal;

[264] **ORDONNE** que le présent jugement ne prendra effet qu'à partir du moment où des ordonnances similaires auront été rendues par la Cour supérieure de l'Ontario et la Cour suprême de la Colombie-Britannique;

[265] **DISPOSE** en même temps de la requête de la procureure générale du Canada pour l'attribution des actifs ne faisant l'objet d'une attribution actuarielle portant la date du 29 janvier 2016;

[266] **LE TOUT**, sans frais de justice.

Chantal Corriveau

CHANTAL CORRIVEAU, j.c.s.

Kathryn Podrebarac, Sharon D. Matthews, Q.C., Harvey Strosberg, Q.C., Heather Rumble Peterson, J.J. Camp, Q.C., Me Michel Savonitto, Me Martine Trudeau et Me Arnaud Sauvé-Dagenais
Avocats du Comité conjoint

Paul B. Vickery, John Spencer, Bill Knights, Me Nathalie Drouin, Me Stéphane Arcelin, Sarah-Dawn Norris, Matthew Sullivan, Natalie Hamam et Me Véronique Forest
MINISTÈRE DE LA JUSTICE CANADA
Avocats du Procureur général du Canada

Me Manon Des Ormeaux
BERNARD ROY (JUSTICE-QUÉBEC)
Avocate du Procureur général du Québec

Me Philippe Dufort-Langlois
MCCARTHY, TÉTRAULT
Conseiller juridique du Fonds (Québec)

John E. Callaghan
Avocat du Fonds (Ontario)

[266] **LE TOUT**, sans frais de justice.

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Mark Polley
Avocat des membres de la classe contestée

William P. Dermody
Avocat de demandeurs 2213 and 7438

D. Clifton Prowse, Q.C. and Keith L. Johnson
Avocats de Sa Majesté la Reine de la Colombie-Britannique

Lise Favreau and Erin Rizok for
Avocats de Sa Majesté la Reine du Chef de l'Ontario

Caroline Zayid and H. Michael Rosenberg
Avocats des Intervenants représentant les provinces et territoires

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Endean v. The Canadian Red Cross Society,* 2016 BCSC 1506

Date: 20160816
Docket: C965349
Registry: Vancouver

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

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for Joint Committee:	Harvey Strosberg, Q.C., J.J. Camp, Q.C., Sharon D. Matthews, Q.C., Kathryn Podrebarac, Heather Rumble Peterson, Michel Savonitto, Maritine Trudeau, and Arnaud Sauvé-Dagenais
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Counsel for Fund Counsel for Ontario:	John E. Callaghan
Counsel for Fund Counsel for British Columbia:	Gordon J. Kehler
Counsel for Fund Counsel for Quebec:	Philippe Dufort-Langlois
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Counsel for Intervenor, Ontario	Lise Favreau and Erin Rizok
Counsel for Intervenors representing Provinces and Territories:	Caroline Zayid and H. Michael Rosenberg
Place and Date of Trial/Hearing:	Toronto, Ont. June 20–22, 2016
Place and Date of Judgment:	Vancouver, B.C. August 16, 2016

Introduction

[1] These are my Reasons for Judgment on two applications in the administration of a settlement under the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

[2] Identical applications were made in the parallel class actions, namely:

a) *Parsons v. The Canadian Red Cross Society*, (the "Transfused Action") and *Kreppner v. The Canadian Red Cross Society*, (the "Hemophiliac Action") in Ontario under that Province's *Class Proceedings Act, 1992*, S.O. 1992, c. 6; and

b) *Honhon c. Canada (Procureur général)* and *Page v. Canada (Procureur général)* in Québec under the *Code of Civil Procedure*, C.Q.L.R. c. C-25, art. 1036.

[3] The applications were heard in Toronto at a special joint-hearing of the Superior Courts of British Columbia, Ontario, and Québec.

[4] I have had the substantial advantage of conferring with Mr. Justice Perell of the Ontario Superior Court of Justice and Madam Justice Corriveau of the Superior Court of Quebec both during and after the hearing of the applications. In particular, I have reviewed, in draft form, the exhaustive and compelling reasons for decision of Mr. Justice Perell in the Ontario actions. Although, as pointed out by Perell J., the applications are interdependent in the sense that for a party to obtain an operative order, the party must succeed in all three Courts, as I agree with his reasoning and his disposition of the applications, I will make liberal reference to his draft reasons, but will avoid duplicating his analysis.

Background

[5] The actions all concern those who were directly or secondarily infected with the Hepatitis C virus ("HCV") by transfusion of blood from the Canadian blood supply between January 1, 1986, and July 1, 1990, and in some cases, their family members and estates.

[6] As Perell J. noted, the class actions in the three provinces were brought on behalf of:

a) persons who received blood transfusions between January 1, 1986 and July 1, 1990 and who were infected with 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.

[7] In 1999, all of the actions settled pursuant to an agreement known as the 1986-1990 Hepatitis C Settlement Agreement, which I refer to in these reasons simply as the "Settlement Agreement". The applications now before the three Courts are to enforce or apply a provision of the Settlement Agreement that Perell J. labelled the excess capital allocation provision. I will refer to that provision in the same manner.

Positions of the Parties

[8] As Perell J. pointed out in his reasons for decision, the Joint Committee, which represents Class Members, and the Attorney General of Canada ("Canada") disagree as to the amount of the actuarially unaccounted capital. Like Perell J., I would grant the Joint Committee's request that the actuarially unallocated money and assets be taken as $207 million, to take into account the circumstance that Class Members might be reclassified because of the degenerating nature of HCV.

[9] Canada seeks the return of the actuarially unallocated capital from the fund created by the Settlement Agreement, whereas the Joint Committee seeks orders that $192,760,000 of the actuarially unallocated capital from the fund be allocated for the benefit of Class Members.

[10] I adopt the summary of the Joint Committee's claims set out by Perell J. at para. 13 of his reasons for decision as follows:

> (1) $32,450,000 for a Late Claims Protocol for Class Members who had been diagnosed with HCV but missed the claims deadline [valued by the

actuarial assessment by Eckler, an actuarial consulting firm, at $32,399,000 before administrative costs].

…

(2) $51,392,000 for an increase in fixed payments by either: (a) a 10% increase in respect of all fixed payments as at the date the fixed payment was originally paid, payable retroactively and prospectively; or (b) an 8.5% increase in respect of all fixed payments indexed to January 1st, 2014 payable retroactively and prospectively irrespective of the date at which the original fixed sum was paid.

…

(3) $22,449,000 for an increase in the compensation paid to some defined Family Law Class Members by either: (a) an increase of $5,000 for Family Class Members indexed to the date the benefit was originally paid payable retroactively and prospectively; or (b) an increase of $4,600 indexed to January 1, 2014 payable retroactively and prospectively.

…

(4) $27,682,000 for loss of income payments to a living class member and loss of support payments to dependants of a deceased Class Member whose death was due to HCV. This allocation, which would increase lost income compensation, would be implemented by eliminating the deduction of collateral benefits; i.e., by eliminating the deduction for CPP/QPP disability, UEI/EI, sickness, accident or disability insurance, and EAP/MPTAP/Nova Scotia Compensation Plan in calculating loss of income and loss of support benefits.

(5) $19,787,000 to compensate for lost income and loss of pension income by the payment of 10% of gross loss of income, capped to a $200,000 increase payable retroactively and prospectively.

…

(6) $34,364,000 for loss of services for living Class Members and for loss of services payments to dependants of a deceased Class Member whose death was due to HCV. This allocation would be made by increasing the maximum number of hours for loss of services by two hours per week (for a total of 22 hours) payable retroactively and prospectively.

…

(7) $629,000 for costs of care reimbursed at disease level 6 to increase the maximum award by $10,000.

…

(8) $1,957,000 for a $200 allowance payable for vacation/sick days and/or wages that were lost by Family Class Members when they accompanied Class Members to medical appointments.

…

(9) $2,050,000 for uninsured funeral expenses payable by increasing the limit on reimbursement of funeral expenses from $5,000 to $10,000 made retroactively and prospectively.

[11] Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, the Yukon, the Northwest Territories, and Nunavut did not take a position about the requests of Canada or the Joint Committee, save that they opposed the Joint Committee's request to eliminate the deduction of collateral benefits for loss of income or loss of support compensation.

[12] The Provincial and Territorial governments identified in para. 11 above took the position that the Courts could not amend the Settlement Agreement without the consent of the parties.

[13] The Provincial and Territorial governments also submitted that if the Courts did authorize allocations, the allocations had to be implemented as a special distribution rather than by enhancing the benefits payable under the existing compensation plans. The explanation for the provinces' and territories' submission about the manner of implementation of any capital allocations was that enhancements to any plan benefits would prejudice them by accelerating their funding obligations and by enlarging their tax relief obligations, which adjustments, they submitted, would require an amendment to the Settlement Agreement. A special distribution would avoid these prejudicial effects.

[14] British Columbia and Quebec took the position that the Joint Committee's recommendation for a removal of the collateral deductions would constitute an impermissible amendment to the Settlement Agreement.

[15] British Columbia, Ontario and Quebec took the position that any order granted on the applications should not adversely affect their obligations to make payments under the Settlement Agreement or increase their tax relief obligations.

[16] British Columbia opposed the Joint Committee's recommendation for an allocation for Class Members who had missed the claims deadline, submitting that it would be an impermissible amendment to the Settlement Agreement.

Methodology

[17] I agree with and adopt the methodology applied at paras. 22 – 27 of the reasons for decision of Perell J., and have nothing to add to what he has said with respect thereto.

Settlement Agreement and Orders Approving the Settlement

[18] Perell J. also set out the relevant provisions of the Settlement Agreement at paras. 29 and 31 – 40 of his reasons for decision, so I will not repeat them here. At para. 30, he also referred to the orders approving the settlement of the actions in the three Provinces, and set out the wording of the Ontario approval order. The wording in the British Columbia order similarly stated that:

> (c) in exercising their unfettered discretion under subparagraph 5(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 34(5) of the British Columbia *Class Proceedings Act*;
>
> (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.

[19] I also agree with and adopt the comments of Perell J. concerning the Apologia, which he discussed at paras. 41 – 52 of his reasons for decision.

[20] I expressly adopt the summary of contractual interpretation set out by Perell J. at paras. 55 – 56 of his reasons for decision and his conclusion at para. 61, where he stated:

> [55] The Settlement Agreement is a court enforced and administered contract between the governments and the Class Members. The Class Members released their claims in exchange for the performance of the terms of this court approved settlement. The Class Members had the choice of proceeding to a trial and possibly recovering more or less or nothing at all but they chose to settle in accordance with a contract that was subject to court approval under the Class Proceedings Act, 1992.
>
> [56] The fundamental principle of contract interpretation in British Columbia and Ontario is to ascertain the intent of the parties by reading the contract as a whole and by giving the words used their ordinary and grammatical meaning in the context of the surrounding circumstances known to the parties at the time of formation of their contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21 at para. 27; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4.
>
> …
>
> [61] The court does not have the jurisdiction to rewrite the Settlement Agreement and 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.

[21] At paras. 73 – 91 of his reasons for decision, Perell J. provided an unassailable summary of the pathology and treatment of HCV from the evidence before us on the applications, including the fact that there are six forms or genotypes of the virus, some of which are more resistant to treatment than the others. I can add nothing more to his summary.

[22] At paras. 92 – 105 of his reasons for decision Perell J. fully discussed the history of the litigation in the three Courts, and the negotiation of the settlement of $1.118 billion and the Settlement Agreement. I adopt his discussion on these points and expressly adopt the summary of the terms of the Settlement Agreement by Perell J. at paras. 106 – 107 of his reasons for decision, which I will set out here, for the assistance of those reading my reasons for judgment:

[106] The Settlement Agreement pays benefits 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. All Class Members who qualify as HCV infected persons are entitled to a fixed payment as compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical condition at the time of qualification under the Plan. However, the Class Member will be subsequently entitled to additional compensation if and when his or her medical condition deteriorates to a medical condition described at a higher compensation level. The fixed payments range from a single payment of $10,000, for a person who has cleared the disease and only carries the HCV antibody, to payments totaling $225,000 for a person who has decompensation of the liver or a similar medical condition. In addition, Class Members at disease level 3 or higher whose HCV caused loss of income or inability to perform his or her household duties, were entitled to compensation for loss of income or loss of services in the home.

[107] Details of how compensation was paid under the Settlement Agreement, with some commentary relevant to the recommendations of the Joint Committee as to how excess capital might be allocated, are as follows:

- Compensation was payable based on the severity of a Class Member's medical condition using a six level scale that reflected the levels of seriousness of the disease.

- There were fixed sum payments as compensation for pain and suffering (general damages) for each stage of the disease. The fixed payments could accumulate, but the maximum payable to a Class Member was $225,000.

    - It should be noted that as of January 1999, the maximum amount recoverable for general damages under the Supreme Court's trilogy of *Andrews v. Grand & Toy Alberta Ltd*., [1978] 2 S.C.R. 229, *Thornton v. Prince George Board of Education*, [1978] 2 S.C.R. 267 and *Arnold v. Teno*, [1978] 2 S.C.R. 287, was $260,500.

    - Based on consultations with Class Members and their submissions about the nature of HCV's chronic and progressive harm, the Joint Committee submitted that excess capital should be used to redress that compromises had been made in determining the fixed payments for general damages for pain and suffering.

- Loss of income compensation, which was calculated net of income tax and collateral benefits and which was paid periodically until age 65, was available for disease level 3 Class Members who elected to forgo a fixed payment and for Class Members at disease level 4 or higher.

    - The accounts of Class Members revealed that some Class Members elected a fixed payment instead of loss of income compensation because they felt that this was the

better choice given an anticipated short lifespan and working life. When these Class Members survived, they sometimes found themselves without any income to live on.

- o There was no compensation for loss of employee benefits including loss or diminishment of pension.

- o The loss of income and loss of support benefits available under the Plans represented the single largest compromise from the tort model. The inadequacy of compensation for lost income evoked the greatest amount of concern from Class Members who were consulted about the allocation of excess capital. They particularly objected to the deduction of collateral benefits which was the source of considerable hardship.

- As a substitute for loss of income compensation, Class Members at disease level 4 or higher could claim loss of services in the home compensation, if they normally performed household duties. Compensation was calculated at a rate of $12 per hour to a maximum of $240/week, equivalent to 20 hours per week. This benefit was also available for disease level 3 Class Members who did not elect a fixed payment.

  - o Many communications from Class Members described loss of services payments as being vital to their survival and many commented that the compensation was inadequate to actually replace the work.

- A Class Member at disease level 6 who incurred care costs that were not recoverable under any public or private healthcare plan was entitled to be reimbursed those costs to a maximum of $50,000 per calendar year.

  - o For approximately 10% to 15% of the eligible Class Members, the current benefit did not reimburse them for the expenditure incurred for cost of care.

- A Class Member was entitled to reimbursement for uninsured out-of-pocket expenses based on rates contained in the Financial Administration Act regulations.

  - o The Joint Committee and Class Members submitted that the reimbursement for out-of-pocket expenses were inadequate particularly because of the loss of time, vacation days, sick days, and wages by Family Class Members when they accompanied Class Members to medical appointments.

- A Class Member was entitled to reimbursement for uninsured treatment and medication costs.

- A Class Member at disease level 3 or higher who took Compensable HCV Drug Therapy (i.e., interferon or ribavirin or any other treatment with a propensity to cause adverse side effects that has been approved by the Courts) was entitled to be paid $1,000 for each completed month of therapy.

- Hemophiliac Class Members who are co-infected with HIV could elect to be paid $50,000 in full satisfaction of all claims, past, present or future, including potential claims by their dependents or other Family Class Members.

- For Class Members who died before January 1, 1999 from HCV, their estate could claim an all-inclusive $50,000 plus up to $5,000 for reimbursement of uninsured funeral expenses and their dependent Family Class Members could claim loss of guidance, care and companionship payments. Alternatively, the estate, dependents, and Family Class Members collectively could claim an all-inclusive $120,000 plus up to $5,000 for uninsured funeral expenses. For hemophiliac Class Members who were co-infected with HIV the alternative was an all-inclusive payment of $72,000 without proof of death due to HCV.

- For Class Members who died after January 1, 1999, their estate could claim any unpaid benefits and post-death loss of services and Family Class Members could make their claims.

- Family Class Members living with a class member at the time of the class member's death received fixed payment compensation for loss of support. The payments ranged from $500 for a grandchild to $25,000 for a spouse.

    - Family Class Members do not receive loss of guidance, care and companionship benefits while the infected Class Member is alive contrary to statutory provisions in some jurisdictions but consistent with the case law in other jurisdictions; for example British Columbia, where the statute has been interpreted to provide compensation for family members only if the injuries to a person resulted in death. See *Porpaczy (Guardian ad litem of) v.Truitt*, [1990] B.C.J. No. 2018 (B.C.C.A.).

    - The Joint Committee and Class Members submitted that these fixed payments were miserly. The Joint Committee recommended an increase to the benefits payable to children 21 years or older and to parents which were divergent from the benefits payable to spouses and to children under age 21.

- Dependents living with Class Members at the time of their death were entitled to a loss of support claim calculated in the same manner as a loss of income claim less a 30% discount and payable until the 65th anniversary of the Class Member's birth after which the dependent could switch to a loss of services in the home claim.

- Dependents living with a Class Member at the time of the Class Member's death could claim compensation for loss of services as an alternative to the loss of support claim. This benefit was payable until the earlier of the dependent's death or the statistical lifetime of the infected Class Member calculated without regard to the HCV infection.

> • Class Members whose claim was based on blood transfusions and who had already been diagnosed with HCV had to submit a claim by the "First Claim Deadline", which was June 30, 2010.
>
> • Class Members who had not been diagnosed were not affected by the First Claim Deadline and were entitled to make a claim within three years of diagnosis.

[23] The Settlement was approved by the three Courts and in particular in this Court on September 23, 1999, by Mr. Justice Smith, whose later reasons for judgment are indexed as *Endean v. Canadian Red Cross Society*, [1999] B.C.J. No. 2180 (S.C.). At para. 14 of those reasons for judgment, Smith J. adopted the reasoning in *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (Sup. Ct. J.) [*Parsons*] and *New Home Warranty Program v. Chevron Chemical Co*., [1999] O.J. No. 2245 (Sup. Ct. J.) that the Court's settlement approval analysis does not expect perfection, but rather requires that the settlement fall within a range of reasonable outcomes. In assessing whether a settlement represents a reasonable resolution, the Court applies "an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation": *Parsons* at para. 70.

[24] At paras. 18 – 19, Smith J. continued:

> [18] I can do no more on this application than to say that, in my opinion, the proposed settlement is beneficial to such class members generally and that, considering the interests of the class as a whole, it is a fair and reasonable settlement, subject to the qualifications identified by Winkler J. in *Parsons*.
>
> [19] Many objections were raised to the proposed settlement. I do not mean to minimize the importance of the objections to those who made them. However, having regard to the principle that I must be concerned with the best interests of the class as a whole as opposed to the individual interests of particular class members, I have concluded that none of the objections are of such significance as to render the proposed settlement inappropriate. The objections raised before me were similar to those before Madame Justice Morneau and Mr. Justice Winkler and were dealt with fully by those learned judges. I need say no more about them except for those relating to the sufficiency of the fund.

[25] Smith J. explained that he raised with counsel the question of whether he should ask for another independent actuary to advise the Court with respect to the

reliability of the actuarial opinion of Eckler Partners Ltd., but concluded at para. 22 that:

> The difficulty with the use of conservative assumptions is that the risk of error is borne almost entirely by the claimants. In other words, if the assumptions turn out to be unduly pessimistic, the claims on the fund will be less and there will be an undistributed surplus. The corollary of that, of course, is that the benefits paid to the claimants could have been more generous. However, this is not a situation where the parties have negotiated the global settlement amount by estimating its constituent parts, as is the usual case in litigation. Here, the global amount was predetermined, and the benefits payable had to be made to fit within it. As well, it is a term of the settlement that the claimants bear the risk of insufficiency of the fund. Thus, it was open to the plaintiffs to instruct the actuaries to use neutral or liberal assumptions and to provide for more generous benefits to claimants with a concomitant increase in the risk of the fund turning out to be insufficient. In these circumstances, 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 under compensation of individual claimants, on the other.

[26] As Perell J. noted at para. 121 of his reasons for decision, the parties resolved the matters of concern to Justices Winkler and Smith, by consent approval orders that amended the Settlement Agreement to include the excess capital allocation provision.

[27] I see nothing useful to add to the description of the claims experience under the Settlement Agreement described by Perell J. at paras. 122 – 124 of his reasons for decision. As he pointed out, as of December 31, 2013, $776.9 million in payments had been made to Class Members and their dependents.

[28] At paras. 125 – 130 of his reasons for decision, Perell J. discussed the disposition of the earlier application to the three Courts to approve a late claims protocol, which, as he noted at para. 130, was not approved because of a divergence amongst the Courts.

[29] At paras. 131 - 136 of his reasons for decision, Perell J. discussed the amount available to be allocated. As I agree with and adopt his analysis and conclusion in this regard, I will set out that part of his reasons for decision for the sake of those reading my own reasons for judgment:

> [131] Under the Approval Orders, the courts are required to conduct triennial reviews to determine the sufficiency of the Trust Fund and to determine whether there are any actuarially unallocated amounts; i.e. any unallocated excess capital.
>
> [132] Following the triennial financial sufficiency review triggered on December 31, 2013, the courts issued consent orders. For example, in Ontario, by Order dated July 10, 2015, I ordered that the assets of the Trust Fund exceeded the liabilities by $236.3 million to $256.6 million. Those amounts were based on actuarial forecasts contained in reports prepared by Eckler and Morneau Sheppell and commissioned by the Joint Committee and Canada respectively.
>
> [133] The excess capital was a product of the investment strategy undertaken by the Trustee acting on the instructions of the Joint Committee. Had the compensation not been pre-funded and invested, there would have been a $348 million deficit and the contributions of the provincial and territorial governments would have been exhausted by 2026.
>
> [134] After the Sufficiency Orders, in the course of preparing for the applications now before the courts, the Joint Committee identified a liability that was not reflected in the financial position of the Trust in respect of those Class Members at disease level 2 who might transition to disease level 3 and become entitled to the $30,000 fixed payment associated with level 3 based upon the provisions in the Settlement Agreement concerning Compensable HCV Drug Therapy.
>
> [135] The Joint Committee asked its actuaries to identify the cost of the advancement from disease level 2 to disease level 3 based upon the protocol for Compensable HCV Drug Therapy on a conservative basis, and financial consequences of this progression are approximately $29,421,000. Therefore, the Joint Committee requested a downward restatement of the amount available to be allocated.
>
> [136] As noted above, I am satisfied that this restatement is prudent and is justified by the evidence. I, therefore, shall order this adjustment to the determination of the amount of the excess capital.

Discussion

[30] I agree with Perell J. that the excess capital allocation provision stipulates that in their unfettered discretion, the Courts may order that all or any portion of the actuarially unallocated trust money be: (a) allocated for the benefit of the Class Members; (b) paid to the federal, provincial, or territorial governments; or (c) retained.

[31] As Perell J. has stated, and I agree, the only restrictions on the Courts' unfettered discretion to allocate the unallocated capital are that the allocations must:

(a) be reasonable; (b) not discriminate based upon where the Class Member received blood; and (c) not discriminate based upon where the Class Member resides. The approval order provides some non-binding guidelines for the exercise of the Courts' discretion.

Canada's Claim

[32] I agree with the analysis of Canada's claim to some or all of the unallocated capital engaged in by Perell J. at paras. 160 – 178 of his reasons for decision, and in particular with his conclusion at paras. 175 – 176 that:

> [175] … In the exercise of my unfettered discretion, for the reasons discussed next, I rather approve of the allocation of the excess capital for the purposes of seven of the Joint Committee's recommendations. While that would leave about $30 million of unallocated excess capital that could be allocated to Canada, I have not been persuaded that I should make any such allocation.
>
> [176] In interpreting and applying the excess capital allocation provision for Canada, there is a gap between what could be done and what should be done with the excess capital. Canada's submission that the money would be used for the benefit of all Canadians is not persuasive. The money is already being used for the benefit of all Canadians, who one can hope would at least share the empathy if not the liability or the responsibility to compensate the suffering Class Members, all of whom are innocent fellow citizens grievously injured from tainted blood. Put simply, beyond persuading me that I could allocate excess capital to Canada, I am not persuaded that I should do so.

[33] I too am not persuaded that any of the unallocated capital should be allocated to Canada.

Individual Submissions

[34] After discussing the Class Member consultations that preceded the applications with which we are dealing, Perell J. discussed the individual submissions that were made by three Class Members. He described the first as "the Objecting Class Member". As Perell J. explained, this Class Member is a hemophiliac, who contracted both HCV and HIV through tainted blood products. For this Class Member, these diseases cut short what was an extraordinarily successful career, at the height of which he was earning over $2 million per year. He opposed the $200,000 cap on the recommendation to increase compensation for lost income.

[35] I agree with Perell J. that this Class Member's submission of unfairness ignores, among other things, how favourably and preferentially he has been treated as compared with some of his fellow Class Members. Under the Settlement Agreement, income compensation is not available at all for disease level 1 and 2 Class Members, and lost income compensation is available only for disease level 3 Class Members who have elected to forgo a fixed payment. For these reasons, I am not prepared to afford this Class Member the relief he sought on the hearing before the three Courts, and dismiss his application.

[36] The second class member who made individual submissions was identified to the Courts as Claimant 2213, a hemophiliac primarily infected with HCV, but who was also infected with HIV from tainted blood. As Perell J. explained, because he believed he was not going to live very long, this member elected to be paid $50,000 rather than to receive a long term of periodically paid benefits, but as events turned out, his decision was a pathetically wrong choice, because he did not die.

[37] The third class member who made individual submissions was identified as and is referred to by Perell J. as Claimant 7438, and who suffers from a debilitating disease, making him totally dependent on his mother for support. His mother was infected with HCV by a blood transfusion and received compensation under the Settlement Agreement until her death at age 71 on December 24, 2000. This Claimant received loss of services compensation under the Settlement Agreement until October 1, 2012. At that time, the Administrator terminated further payments on the basis that October 1, 2012 was the actuarially determined life expectancy for this Claimant's mother. The termination of any compensation left Claimant 7438 destitute.

[38] Claimant 7438 appealed the Administrator's decision to a Referee, who upheld the decision of the Administrator. On a further appeal, the decision of the Referee was in turn upheld.

[39] I am prepared to approve that some portion of the unallocated capital could be used to correct what, with the benefit of hindsight, were unfortunate decisions

that affected these two Class Members. I invite the Joint Committee to prepare a benefit proposal for these two Class Members, for specific approval by the Courts.

Joint Committee Recommendations

[40] Turning next to the Joint Committee's recommendations, I agree that those identified by Perell J., (specifically those referred to as recommendations 1, 2, 3, 5, 6, 7, and 8) are reasonable, non-discriminatory based upon where the Class Member received blood, and non-discriminatory based upon where the Class Member resides, and should be granted. I also agree that recommendations 4 and 9 should not be approved. Finally, in this regard, I further agree with Perell J. that those portions of the unallocated capital that should be allocated should be allocated by way of special distribution, which manner of allocation addresses the concerns of the Provinces and Territories.

[41] I prefer, however, to explain my own reasoning in approving the recommendations that I approve, and those that I do not approve.

Unapproved Recommendations

Recommendation 4 - Loss of Income and Loss of Support Payments to Dependants of Deceased Class Members

[42] I will firstly address the recommendations of the Joint Committee of which I do not approve.

[43] Recommendation 4 was for the allocation of $27,682,000 from the unallocated capital for loss of income payments and loss of support payments to dependants of a deceased Class Member whose death was due to HCV.

[44] While I accept that the deduction of collateral benefits has imposed hardship and difficulties on some Class Members, the deduction of these benefits, like the claims deadline, was specifically discussed in the Settlement Agreement and would constitute a change to the Settlement Agreement which can only be achieved by the consent of all parties to the Agreement. No such consent has been reached, and I therefore reject this recommendation.

Recommendation 9 - Reimbursement of Uninsured Funeral Expenses

[45] Recommendation 9 was for the allocation of $2,050,000 from the unallocated capital for reimbursement of uninsured funeral expenses. I regard the initial provision for $5,000 for such expenses as a reasonable compromise for this kind of expense. While it may appear callous to make the observation, those who have died either due entirely or in part to complications arising from their HCV status would inevitably have reached their demise from some cause but for their HCV status, and thus their families would have nonetheless and at some point faced funeral expenses. In my view it would be unreasonable to simply choose another arbitrary figure for these expenses, and I am unable to accept that the Joint Committee's new figure can be preferred over the initial figure.

Approved Recommendations

Recommendation 1 - Late Claimants

[46] Turning then to the recommendations of the Joint Committee which I do approve, I will address them in the order that they are discussed by Perell J.

[47] As Perell J. discussed at para. 128 of his reasons for decision, I was unable to agree with his disposition of the application for the approval of a new late claims protocol.

[48] I remain of the view that the recommendation for a $32,450,000 allocation for a Late Claims Protocol falls outside of the ambit of the excess capital allocation provision, but agree that a $32,450,000 allocation can be made from unallocated capital for Class Members who were diagnosed with HCV but who missed the claims deadline. These individuals are and always were Class Members.

[49] The failure of these Class Members to meet the final claims deadline did not eliminate them from the Class; it simply prevented them from advancing their claims outside the final deadline. Now that it is clear that there is unallocated capital that can be made available for the benefit of Class Members, I am satisfied that an allocation to those Class Members who missed the deadline is both reasonable and

non-discriminatory in any way that could offend any possible restrictions on the Courts' discretion with respect to unallocated capital, and is thus permissible.

[50] That said, it is my view that to permit those Class Members who missed the claims deadline to be treated in the same way as those who did not, would be tantamount to creating a new late claims protocol, which I have previously found would constitute a change to the Settlement Agreement.

[51] In the result, I am prepared to approve a discrete benefits plan for Class Members who missed the deadline and who prove that they are indeed Class Members and that they satisfy the other criteria for benefits under the discrete benefit plan, so long as that discrete plan does not provide better, different or equal benefits than those provided to other Class Members.

[52] I therefore approve that some portion of the unallocated capital up to $32,450,000 can be allocated for Class Members who qualify for such a discrete benefits plan, and I authorize the Joint Committee to prepare a benefit plan for these Class Members, for specific approval by the Courts.

Recommendation 2 - Increase in Fixed Payments

[53] The Joint Committee's second recommendation was for the allocation of $51,392,000 from the unallocated capital to increase fixed payments by either: (a) a 10% increase in respect of all fixed payments as at the date the fixed payment was originally paid, payable retroactively and prospectively; or (b) an 8.5% increase in respect of all fixed payments indexed to January 1st, 2014 payable retroactively and prospectively irrespective of the date at which the original fixed sum was paid. I agree with Perell J. that the 8.5% increase is more favourable.

Recommendation 3 – Increased Compensation for Family Class Members

[54] The Joint Committee's third recommendation was the allocation of $22,449,000 from the unallocated capital to increase the compensation paid to some defined Family Class Members by either: (a) an increase of $5,000 for Family Class

Members indexed to the date the benefit was originally paid payable retroactively and prospectively; or (b) an increase of $4,600 indexed to January 1, 2014 payable retroactively and prospectively. I agree with Perell J. that the $4,600 increase is more favourable.

Recommendation 5 – Compensation for Lost Income

[55] The Joint Committee's fifth recommendation was the allocation of $19,787,000 from the unallocated capital to compensate for lost income and loss of pension income by the payment of 10% of gross loss of income, capped to a $200,000 increase payable retroactively and prospectively.

[56] I approve of this recommendation.

Recommendation 6 – Allocation for Loss of Services

[57] The Joint Committee's sixth recommendation was for an additional allocation of $34,364,000 for loss of services for living Class Members and for loss of services payments to dependants of a deceased Class Member whose death was due to HCV. This allocation would be made by increasing the maximum number of hours for loss of services by two hours per week (for a total of 22 hours) payable retroactively and prospectively.

[58] I am satisfied that the original allocation for loss of services was insufficient to meet the needs of those who lost such services and that this increase is reasonable and permissible.

Recommendation 7 – Reimbursement of Costs of Care

[59] The Joint Committee's seventh recommendation was for an additional allocation of $629,000 for costs of care reimbursed at disease level 6, to increase the maximum award by $10,000.

[60] I am satisfied that the original allocation for cost of care for those who reached level 6 was insufficient to meet the needs of those who are unfortunate enough to reach this level, and that this increase is reasonable and permissible.

Recommendation 8 – Allowance for Lost Vacation and Sick Days for Family Class Members

[61] The Joint Committee's eighth recommendation was for an additional allocation of $1,957,000 for a $200 allowance payable for vacation days, sick days and/or wages that were lost by Family Class Members when they accompanied Class Members to medical appointments. Again, it is my view that the original allocation for allowances for such losses was insufficient, and I find that this recommendation is fair for those who have or will suffer such shortfalls and thus approve of this recommendation for them.

Conclusion

[62] I allow the Joint Committee's request for a restatement of the amount of the excess capital.

[63] For the reasons set out above, and those of Perell J., I dismiss Canada's application.

[64] I accept the Joint Committee's recommendations 2, 3, 5, 6, 7, and 8 and I also accept the Joint Committee's recommendation 1, subject to my review of a specific plan by the three Courts. I also accept that some portion of the unallocated capital could be used to address the circumstances of Class members 2213 and 7438, upon receipt of a benefit proposal for these two Class Members, for the specific approval by the three Courts. I order that the excess capital to address these recommendations be allocated by way of special distribution, which manner of allocation addresses the concerns of the provinces and territories.

"The Honourable Chief Justice Hinkson"

PARSONS et al.	vs. THE CANADIAN RED CROSS	Court File No. 98-CV-141369 CP00
KREPPNER et al.	SOCIETY et al.	98-CV-146405
Plaintiffs	Defendants	

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT TORONTO

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