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

Counsel for Objecting Class Member: Mark Polley

Counsel for Claimants 2213 and 7438: Williams P. Dermody

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
Counsel for Canada (Attorney General):	Paul B. Vickery, John Spencer, Bill Knights, Nathalie Drouin, Stephanie Arcelin, Sarah-Dawn Norris, Matthew Sullivan and Natalie Hamam
Counsel for Intervenor, British Columbia:	D. Clifton Prowse, Q.C. and Keith L. Johnson
Counsel for Intervenor, la Procureure générale du Québec:	Manon Des Ormeaux
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"