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	*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
– and –	*Mark Polley* for Objecting Class Member
THE CANADIAN RED CROSS SOCIETY, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and THE ATTORNEY GENERAL OF CANADA Defendants	*William P. Dermody* for Claimants 2213 and 7438
– and –	*John E. Callaghan* for Fund Counsel for Ontario
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	*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:

[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.
>
> ….
>
> 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.
>
> ….
>
> 131. …. I am prepared to approve the settlement with these changes.
>
> ….
>
> 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