Court File No. 98-CV-141369 CP00

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiffs

and

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

Defendants

and

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF ALBERTA,
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF SASKATCHEWAN,
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF MANITOBA,
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NEW BRUNSWICK,
HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF PRICE 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*

Court File No. 98-CV-146405

B E T W E E N:

JAMES KREPPNER, BARRY ISAAC, NORMAN LANDRY, as Executor of the Estate of the late SERGE LANDRY, PETER FELSING, DONALD MILLIGAN, ALLAN GRUHLKE, JIM LOVE and PAULINE FOURIER 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 PRICE 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*

No. C965349
Vancouver Registry

In the Supreme Court of British Columbia

Between:

Anita Endean, as representative plaintiff

Plaintiff

and:

The Canadian Red Cross Society
Her Majesty the Queen in Right of the Province of
British Columba, and The Attorney General of Canada

Defendants

and:

Prince George Regional Hospital, Dr. William Galliford,
Dr. Robert Hart Dykes, Dr. Peter Houghton, Dr. John Doe,
Her Majesty the Queen in Right of Canada, and
Her Majesty the Queen in Right of the Province of
British Columbia

Third Parties

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

C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

NO: 500-06-000016-960

SUPERIOR COURT

Class action

DOMINIQUE HONHON

Plaintiff

-vs-

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

Defendants

-and-

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

PETITIONER

-and-

FONDS D'AIDE AUX RECOURS COLLECTIFS

-and-

LE CURATEUR PUBLIC DU QUÉBEC

Mis-en-cause

C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

NO: 500-06-000068-987

SUPERIOR COURT

Class action

DAVID PAGE

Plaintiff

-vs-

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

Defendants

-and-

FONDS D'AIDE AUX RECOURS COLLECTIFS

-and-

LE CURATEUR PUBLIC DU QUÉBEC

Mis-en-cause

FACTUM OF THE PROPOSED INTERVENOR

March 17, 2016

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PART I - OVERVIEW

1. The proposed intervenor is a group of seven eminent physicians, researchers and scientists from across Canada who have dedicated their careers to improving the lives of Canadians suffering from the hepatitis C virus ("**HCV**"). These seven individuals make up the Steering Committee of a national healthcare initiative aimed at delivering comprehensive HCV care across the country and at improving future HCV care and treatment ("**National HCV Initiative**").

2. The goals of the National HCV Initiative are twofold: first, to improve diagnosis rates, increase treatment uptake, and optimize delivery of care for Class Members and other Canadians living with HCV, including underserved rural and First Nations populations. This goal will be accomplished by substantially improving access to the expertise needed to treat hepatitis C infections and manage the complications of the disease. The second goal is to further improve future prevention, care and treatment of HCV through the development of focused, highly relevant areas of research to eliminate this deadly disease from Canada. The National HCV Initiative will therefore directly benefit Class Members and their families by translating gains in drug development into improved health outcomes.

3. The Steering Committee seeks to intervene as an added party in the upcoming motion regarding the allocation of excess capital held by the Trustee of the 1986-1990 Hepatitis C Settlement Agreement ("**Joint Hearing**"), for the purpose of submitting that some of the excess capital should be allocated to the National HCV Initiative.

4. If the Steering Committee is denied an opportunity to participate in this motion, the National HCV Initiative will not go forward. The result is that Class Members will be deprived of the opportunity to access the most innovate, life-saving, hepatitis C care and treatment.

PART II - SUMMARY OF FACTS

1. Background to the Settlement of the Class Proceeding

5. Between 1996 and 1998, class actions were commenced in British Columbia, Quebec and Ontario for transfused persons and persons with hemophilia who received blood or blood products between January 1, 1986 and July 1, 1990 and were infected with HCV. The provinces and territories not named as defendants ultimately became intervenors in the Ontario action, making the class actions national in scope.[1]

6. Negotiations between counsel in the class actions and the federal and provincial governments began in 1998. On December 18, 1998, the parties reached an agreement in principle, and on June 15, 1999, signed a settlement agreement ("**Settlement Agreement**").[2] The Settlement Agreement is "Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years."[3]

7. On the motion for approval of the Settlement Agreement in Ontario, Justice Winkler modified three provisions of the Settlement Agreement, including section 12.03(3), which had mandated that any surplus of the assets remaining in trust following termination of the Settlement Agreement revert back to the governments. [4]

8. In analysing how any surplus should be allocated, Justice Winkler concluded that:

> …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.

---

[1] The background to the class proceeding is set out in Affidavit #13 of Heather Rumble Peterson, sworn October 16, 2015 ("**Peterson Affidavit**") in particular, at paragraphs 2 – 9 (Motion Record of the Joint Committee, Tab 002, p.6).
[2] Peterson Affidavit, at para. 5 (Motion Record of the Joint Committee, Tab 002, p.6).
[3] *Parsons v. Canadian Red Cross Society* [1999] O.J. No. 3572 at para. 75 (Brief of Authorities of the Proposed Intervenor ("**Intervenor BOA"**), Tab 1).
[4] *Parsons, supra* note 3, at para. 133 (Intervenor BOA, Tab 1).

> This is ***not to say*** that it is necessary, as the Society suggests, ***that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement***. ***There are a range of possible uses to which any surplus may be put so as to benefit the class*** as a whole without focusing on any particular class member or group of class members. This is in keeping with the CPA which provides in s. 26(4) that ***surplus funds may "be applied in any manner that may reasonably be expected to benefit class members, even though the allocation does not provide for monetary relief to individual class members...***"[5]

9. In other words, Justice Winkler did not agree with the submission made at the motion that in order for surplus to benefit Class Members, the surplus must "only be used to augment the benefits within the settlement agreement." He expressly recognized that there are a "range of possible uses" to which surplus may be put so as to benefit Class Members, even if the surplus does not provide monetary relief to individual Class Members.

10. As a result of Justice Winkler's comments, paragraph 9(b) of the Ontario settlement approval order provides that the Courts may order, in their unfettered discretion, actuarially unallocated money and other assets be: (i) allocated for the benefit of Class Members/ Family Class Members; (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 to the governments or (iv); retained within the trust.[6]

11. On the motion for approval of the Settlement Agreement in British Columbia, Justice Smith concurred with Justice Winkler that a modification to the "reversion" clause was required. In his reasons for judgment, Justice Smith stated:

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[5] *Parsons, supra* note 4, at paras. 122 -123 (emphasis added) (Intervenor BOA, Tab 1).
[6] Judgment of Winkler J. dated October 22, 1999 in *Parsons, supra* note 2 at para. 9 ((Intervenor BOA, Tab 2). See also Peterson Affidavit, at para. 8 (Motion Record of the Joint Committee, Tab 002, pp.6-7).

> ... I agree with the decision of Mr. Justice Winkler as set out in his reasons released yesterday. In particular, I agree with his comments concerning modifications in respect of opting-out claimants and ***concerning the provision for surplus*** and I adopt his remarks ....[7]

12. A parallel provision to paragraph 9(b) is found at paragraph 5 of the British Columbia settlement approval order.[8]

13. Although the decision of Justice Morneau of the Superior Court of Quebec in *Honhon c. Canada (Procureur général)*[9] was handed down a day before Justice Winkler released his decision in Ontario, ultimately, Justice Winkler's modifications to section 12.03 of the Settlement Agreement were incorporated through a modification to the Quebec judgment approving the Settlement Agreement. A parallel provision to paragraph 9(b) in the Ontario settlement approval order is found at paragraph 1 of the Quebec schedule.[10]

14. Thus, all three judges recognized that surplus funds need not be allocated only within the parameters of the settlement agreement. There are range of possible uses to which surplus funds may be put, even if the allocation does not provide monetary relief to individual Class Members.

2. Background to the Upcoming Joint Hearing

15. On July 10, 2015, Justice Perell of the Ontario Superior Court ordered that as of December 31, 2013, the assets of the trust exceeded liabilities, after taking into account an amount to protect class members from major catastrophic adverse experience or catastrophe, by an amount between $236,341,000 to $256,594,000 ("**Excess Capital**").

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[7] *Endean v. Canadian Red Cross Society* [1999] B.C.J. No. 2180 (emphasis added) (Intervenor BOA, Tab 3).
[8] Peterson Affidavit, at para. 8 (Motion Record of the Joint Committee, Tab 002, pp.6-7).
[9] [1999] J.Q. No. 4370 (Intervenor BOA, Tab 4).
[10] Peterson Affidavit, para 8 (Motion Record of the Joint Committee, Tab 002, p.7). See also *Honhon c. Canada (Procureur général)* [1999] J.Q. no 5324 at p. 6 (Intervenor BOA, Tab 5).

16. On October 15, 2015, pursuant to paragraph 9(b)(i) of the Ontario settlement approval order, the Joint Committee brought a motion for, among other things, an order that the Court exercise its discretion to allocate the Excess Capital in certain ways, namely, by increasing the entitlements in the Settlement Agreement.

17. The Federal Government resists the relief sought by the Joint Committee and, in reliance on paragraph 9(b)(iii) of the Ontario settlement approval order, seeks an order that the Excess Capital revert to Canada.

18. The Steering Committee seeks party status for the purpose of submitting that, pursuant to paragraph 9(b)(ii) of the Ontario settlement approval order (and its parallel provisions in British Columbia and Quebec), Excess Capital should be allocated to the National HCV Initiative, as this Initiative will directly benefit Class Members and their families by improving their quality, and length, of life. Justice Winkler contemplated that Excess Capital could be put to precisely this use.

3. The National HCV Initiative and its Benefits to Class Members

19. The National HCV Initiative is intended to better the lives of Class Members and other HCV- infected Canadians regardless of how they were infected or where they now reside.

20. HCV can be cured.[11] Canadian researchers have pioneered the development of highly effective, well-tolerated anti-viral medications. The results of recent clinical trials led by the University Health Network in Toronto found that a simple drug regimen given for 12 weeks cured 99% of patients treated, including patients with 5 of the 6 known strains of the virus.[12] While this

[11] Affidavit of Jordan Feld, sworn March 16, 2016 ("**Feld Affidavit**"), at para. 8.
[12] Feld Affidavit, at para. 6.

is a momentous discovery, there are a number of hurdles that prevent the elimination of the disease from the Canadian population.

21. One hurdle is that because hepatitis C is asymptomatic until very advanced stages, most infected persons remain unaware of their infections. Unfortunately, this means that many infected persons, including Class Members, may have unwittingly passed the infection to family members or other intimate contacts, who also remain unaware of their infection.[13] Indeed, there are still Class Members who may not even be aware that they could be claimants.

22. Another hurdle is that even if infected persons are properly diagnosed, they may not have access to life-saving treatment, largely due to geographic barriers. Currently, only an estimated 15% of Canadians infected with HCV ever receive therapy for their disease, and given the poor treatment effectiveness of older drugs, only about 7% of Canadians have been cured of HCV.[14]

23. The National HCV Initiative seeks to improve diagnosis rates, increase access to curative treatments, and optimize delivery of care for Class Members and all Canadians living with HCV by implementing a national "ECHO" project. ECHO stands for "Extension for Community Health Outcomes". The ECHO project will use video-conferencing networks to connect healthcare providers in rural and indigenous communities with leading physicians who have expertise in all aspects of hepatitis C care.[15] The ECHO projects will ensure that Class Members who live in northern or isolated communities, or who are otherwise unable to access specialized clinics, receive top-tier hepatitis C care that would otherwise be nearly impossible for them to access.[16]

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[13] Feld Affidavit, at para. 7. See also Exhibit "B" to the Feld Affidavit, the National HCV Initiative Proposal, at p. 14.
[14] Feld Affidavit, at para. 7. See also Exhibit "B" to the Feld Affidavit, the National HCV Initiative Proposal, at p. 13.
[15] Feld Affidavit, at para. 10. See also Exhibit "B" to the Feld Affidavit, the National HCV Initiative Proposal, at pp. 17-18.
[16] Feld Affidavit, at para. 10.

24. The National HCV Initiative also seeks to fund biomedical research projects to overcome gaps in HCV prevention and future care. These research projects include:

(a) Vaccine development to prevent the spread and reinfection of the disease;

(b) Development of point-of-care diagnostics for screening and on-treatment monitoring to overcome the enormous under-diagnosis and under-treatment of hepatitis C

(c) Outcomes research to assess the effectiveness of the ECHO program and the changing epidemiology of the disease and its complications; and

(d) Development of screening tests and new therapies for liver cancer, which is one of the most feared complications of HCV infection.[17]

25. These research projects are specifically aimed at improving clinical outcomes for persons infected with HCV, including Class Members, and at ultimately eliminating the disease from the Canadian population.[18]

26. With appropriate funding, the National HCV Initiative is poised to become the most effective and efficient pan-Canadian program that provides Class Members and others infected with HCV state of the art screening and diagnosis, specialized care and access to curative treatments, and preventative care to ensure that the disease is not transmitted.[19]

[17] Feld Affidavit, para. 12.
[18] Feld Affidavit, paras. 11-12. See also Exhibit "B" to the Feld Affidavit, the National HCV Initiative Proposal, at pp. 22-28.
[19] Feld Affidavit, at para. 13.

PART III - STATEMENT OF ISSUES

27. There are only two issues to be decided on this motion:

(a) Does the Steering Committee meet the tests to be granted party status?

(b) Is the Steering Committee's purpose for intervening consistent with Justice Winkler's reasons for modifying the Settlement Agreement?

28. The Steering Committee submits that the answer to both questions is yes.

PART IV - LAW & AUTHORITIES

1. The Steering Committee Meets the Tests to Be Granted Party Status

29. The rules of civil procedure in Ontario, British Columbia and Quebec permit the Steering Committee to seek leave to be added as a party to the upcoming motion.

30. Although the wording of the rule in each province varies slightly, the underlying requirement in each province is that the Steering Committee demonstrates that it has a real interest in subject-matter or relief sought at the upcoming motion. The Steering Committee has such an interest.

31. The courts in all three provinces also consider whether the proposed intervention will increase the length and cost of the litigation. The Steering Committee's intervention will not appreciably increase the length or cost of the motion.

A. Ontario

32. In Ontario, a person who is not a party to a proceeding may seek leave to intervene as an added party pursuant to Rule 13.01 of the *Rules of Civil Procedure.* The jurisprudence is clear that a party may intervene in a motion, not just in an action or application.

33. For instance, in *Trempe v. Reybroek*[20], after a careful analysis of the case law and the *Rules*, the court concluded that "interpreting rule 13.01 as only applying to actions is unduly restrictive."[21] The court goes on to find that "there is scope within rule 13.01 to permit the addition of a person as a party to a motion."[22]

34. In *Finlayson v. GMAC Leaseco Ltd./GMAC Location ltée*[23], the court allowed an intervention on a motion simply by exercising its inherent jurisdiction to control its own process. The Court concluded that "such jurisdiction includes determining the important issue of whether a person may intervene as an added party to a motion."[24]

35. Rule 13.01(1) provides that a person may be granted party status if the person claims:

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

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[20] (2002), 57 OR (3d) 786 (Ont. S.C.J.) [*Reybroek*] (Intervenor BOA,Tab 6).
[21] *Reybroek, supra* note 20 at para. 22 (Intervenor BOA, Tab 6).
[22] *Reybroek, supra* note 20 at para. 22 (Intervenor BOA, Tab 6). See also *M. v. H*, 20 OR(3d), at paras. 23-25, where Epstein J., then a judge at the Superior Court, held that interpreting Rule 13.01 as permitting interventions on a motion "clearly allows for a just, expeditious and inexpensive determination of the merits of the matters before the court."
[23] [2007] O.J. No. 597 [*Finlayson*] (Intervenor BOA, Tab 7).
[24] *Finlayson, supra* note 23 at paras. 25-26 (Intervenor BOA, Tab 7).

36. Where the proposed intervenor meets any of these criteria, the court then assesses whether the intervention would unduly delay or prejudice the determination of the rights of the parties. If not, the court may exercise its discretion and add the intervenor as a party on certain terms.[25]

37. On some motions under Rule 13.01, courts have also considered whether the proposed intervenor will be able to make a "useful contribution to the resolution of the motion" (although this test is more frequently applied when a person seeks to intervene as a friend of the court).[26] In *Fairview Donut Inc. v. TDL Group Corp.*[27], Justice Lax considered whether a group of franchisees, who sought leave to intervene as an added party, could make a "useful addition or contribution to the resolution of the issues" as well as whether the group could "offer something more than the repetition of another party's evidence or argument or a slightly different emphasis on arguments that will be before the court."[28] Ultimately, Justice Lax denied leave on the basis that the group "may serve to take the proceeding off into a tangent" and, in any event, "has not identified any evidence or argument that would differentiate its position from the position of the defendant."[29]

38. Importantly, the use of the word "or" in subrule 13.01(1) means that clauses (a), (b) and (c) are disjunctive tests rather than conjunctive ones.[30] A proposed intervenor must only meet one of three requirements in order to be granted leave. Here, the Steering Committee meets all three requirements to be granted party status.

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[25] See Rule 13.01(2).
[26] The "useful contribution" test emanates from the decision of Chief Justin Dubin in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada*, [1990] O.J. No. 1378(Ont. C.A.) at para. 10 (Intervenor BOA, Tab 8).
[27] [2008] O.J. No. 4720 [*Fairview Donut*] (Intervenor BOA, Tab 9).
[28] *Fairview Donut, supra* note 27 at para. 5 (Intervenor BOA, Tab 9).
[29] *Fairview Donut, supra* note 27 at paras. 9-10 (Intervenor BOA, Tab 9).
[30] *Finlayson, supra* note 23 at para 31 (Intervenor BOA, Tab 7).

(i) The Steering Committee has a real interest in the subject matter of the motion

39. First, the Steering Committee has a real interest in the subject matter of the Joint Hearing. The issue to be decided at the Joint Hearing is whether and how the Courts should exercise their discretion to allocate Excess Capital. The Steering Committee has a *lis* with the parties on this issue since the purpose of its intervention is to submit that Excess Capital should be allocated to the National HCV Initiative, given that the Initiative will directly benefit Class Members, including those who may not even be aware that they are claimants.

40. Although the underlying dispute between the Class Members and the federal and provincial governments was based on the alleged tortious conduct of the governments, the dispute is not purely private. Rather, it "engaged matters of public concern and interest"[31] and "elements of public importance."[32] The alleged tortfeasors were acting in their role as administrators of public health care. The Class Members are Canadians who accessed this public health care system. And, as Justice Winkler noted in his reasons on the motion for approval of the Settlement Agreement in Ontario: "[t]he settlement is Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years."[33] This dispute is not one that affects only the plaintiff and defendant by virtue of a privately defined relationship.

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[31] *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* 2008 CarswellOnt 2083 (Ont. Div. Court) at paras. 10-11. (Intervenor BOA, Tab 10). Although this case concerned a motion for leave to intervene as a friend of the court, not as an added party, the Divisional Court's discussion on public v. private litigation is salient.

[32] See *1162994 Ontario Inc. v. Bakker*, [2004] O.J. No. 816 [*Bakker*] (Intervenor BOA, Tab 11). In this case, Former Chief Justice McMurty discusses his reasons for judgment in a previous case, *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2001), 147 O.A.C. 355 (Ont. C.A. [In Chambers]). He explains that this case contained elements of public importance, and that the reason he ultimately refused intervention status was not because the litigation was private but because the proposed intervenor was not in a position to contribute to the analysis of the legal concepts that formed the core issues of that appeal.

[33] *Parsons, supra* note 1 at para. 75 (Intervenor BOA, Tab 1).

41. In any event, as then Chief Justice McMurtry explained in Ontario, the reason that private litigation should be carefully scrutinized before intervention status is granted is to "ensure that such intervention does not unnecessarily complicate the litigation or unduly add to the expense to the parties."[34] Permitting the Steering Committee to intervene as an added party will not complicate the litigation or add to the expense of the parties. The Steering Committee seeks leave to intervene as a party on the Joint Hearing solely for the purpose of submitting that National HCV Initiative is worthy of Excess Capital, as it intended to benefit Class Members and their families.

(ii) <u>The Steering Committee and its work could be adversely affected by a judgment on the motion</u>

42. Second, the Steering Committee, and the intended beneficiaries of the Steering Committee's proposal – Class Members, Family Class Members and Class Members who are not even aware that they are claimants – could be adversely affected by a judgment in the motion.

43. To be a party adversely affected by a judgment, the proposed intervenor must show it will be affected in a greater way than any member of the general public, but the party need not show that the adverse effect is direct.[35]

44. In this case, if the Courts render a judgment at the Joint Hearing in favour of either the Joint Committee or the governments, the Steering Committee will cease to exist and its work, the National HCV Initiative, will not move forward.[36] In this circumstance, Class Members and Family Class Members will be denied the opportunity to access the life-saving care and treatment the National HCV Initiative intends to make available.

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[34] *Bakker*, *supra* note 32 at para. 5 (Intervenor BOA, Tab 11).
[35] *Schofield v. Ontario (Minister of Consumer & Commercial Relations)* (1980) 28 OR (2d) 764 at para. 31(Intervenor BOA, Tab 12)
[36] Feld Affidavit, at para. 28.

(iii) There are overlapping questions of law

45. Third, the question of law to be decided at the Joint Hearing is whether and how the Courts should exercise their discretion pursuant to paragraph 9(b) of the Ontario settlement approval order (and the parallel provisions in B.C. and Quebec) to allocate Excess Capital. The Steering Committee seeks to make submissions on this question of law and will be relying on the same paragraph (albeit a different subparagraph) of Justice Winkler's settlement approval order (paragraph 9(b)) to argue that the Courts should allocate some Excess Capital to the National HCV Initiative.

46. The Steering Committee does not intend to raise any new or different questions of law to be decided by the Courts at the Joint Hearing.

(iv) The Steering Committee will not cause delay or prejudice

47. The intervention of the Steering Committee will not cause delay or prejudice to the existing parties. The Steering Committee is prepared to accept the record as it is, save for presenting the National HCV Initiative Proposal to the Court. It does not intend to request any adjournments of the motion and is prepared to attend at the Joint Hearing in June.[37]

48. Neither the Joint Committee nor the respondent governments will be prejudiced by the Steering Committee being added as a party to the Joint Hearing and making submissions as to why the National HCV Initiative is a worthy project to fund. The parties will still be able to present their submissions as to whether and how Excess Capital should be allocated, including rebutting the Steering Committee's position.

(v) The Steering Committee will make a contribution that no other party is making

[37] Feld Affidavit, at para 29.

49. No other party is proposing that Excess Capital be allocated in a manner pursuant to paragraph 9(b)(ii) of the Ontario settlement approval order.[38] No other party is proposing that Excess Capital be put to use in a way that directly improves the livelihood of Class Members.

50. The National HCV Initiative is the only comprehensive, pan-Canadian research project of its kind in the country. It is the most unique and direct program under consideration in Canada. It would clearly benefit Class Members and their families, as well as have significant collateral benefits for many other Canadians and the future of HCV treatment and research in Canada.[39]

51. The Steering Committee consists of experts in the field of HCV research, care and treatment and by submitting that Excess Capital be allocated to the Initiative, the Steering Committee is doing much more than simply echoing the submissions of another party. It is offering an alternative to the submissions of the immediate parties, an alternative that Justice Winkler contemplated.

B. British Columbia

52. The rule in British Columbia governing when a person may be granted party status on a motion is similar to the rule in Ontario.

53. Rule 6-2(7) of the *Supreme Court Civil Rules*[40] governs applications to add, remove or substitute parties. It provides, in relevant part, that at any stage of a proceeding, the court, on application by any person, may:

---

[38] Notice of Motion of the Attorney General of Canada, at para. 18.
[39] Feld Affidavit, at para 30.
[40] BC Reg 168/2009 (emphasis added). Prior to recent amendments, the relevant rule was Rule 15(5)(a). It is this rule that is therefore referred to in much of the case law.

> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a *question or issue relating to or connected with*,
>
> (i) any *relief* claimed in the proceeding, or
>
> (ii) the *subject matter* of the proceeding
>
> that, in the opinion of the court, it would be *just and convenient* to determine as between the person and that party.

54. A court will order a person to be added as a party when the person demonstrates that he or she has an interest in the outcome of the proceedings, that he or she would be directly affected by an outcome of the proceeding, or that his or her participation is necessary for effectual adjudication.[41]

55. The courts retain considerable discretion to add a person as a party. The jurisprudence is clear that such discretion "should be generously exercised so as to enable effective adjudication upon all matters in dispute without the delay, inconvenience and expense of separate actions and trials."[42] As in Ontario, the typical concern that will cause a court to deny a person's motion to be added as a party is where the person is effectively seeking to hijack the proceedings by increasing the number of parties, issues and overall scope of the litigation with resulting costs and delay.[43]

(i) The Steering Committee's interest is direct

56. Here, there exists between the Steering Committee and the immediate parties a question of law in common. As discussed above, at the Joint Hearing, the Courts will decide whether and how to allocate Excess Capital. The Steering Committee's reason for intervening is to ask the Courts to allocate some Excess Capital to the National HCV Initiative, given that the Initiative is expected to significantly benefit class members. The Joint Committee, the governments, and the Steering

[41] *Courtenay (City) v. Lin*, 2014 BCSC 391, at para. 9 (Intervenor BOA, Tab 13).
[42] *Robson Bulldozing Ltd. v. Royal Bank* (1985), 62 BCLR 267 (BCSC), at para. 7 (Intervenor BOA, Tab 14).
[43] *Gladue v. British Columbia (AG)*, 2010 BCSC 788, at para. 13 [*Gladue*] (Intervenor BOA, Tab 15).

Committee are therefore all asking the Courts to decide the same issue: how to exercise their discretion pursuant to s. 9(b) of the Ontario settlement approval order (and its parallel provisions).

57. The Steering Committee and its work would be affected by the precise outcome between the parties. The National HCV Initiative will not be implemented absent some allocation of Excess Capital.

(ii) It would be just and convenient to add the Steering Committee as a party

58. The Steering Committee is not attempting to "hijack"[44] the Joint Hearing. It is presenting for the Courts consideration at the Joint Hearing, a proposal that is poised to become the most effective and efficient Canadian-wide program that provides Class Members and others infected with HCV with disease prevention, diagnosis, care, and treatment. It would be an efficient use of court resources to hear all proposals as to how Excess Capital should be allocated before the Courts exercise their discretion under paragraph 9(b)(ii). The addition of the Steering Committee at the Joint Hearing will not prejudice the legal rights of the plaintiffs or the defendants, or drive up costs or lead to delay.

C. Quebec

59. As a matter of Quebec law, the Steering Committee's motion for leave to intervene is a voluntary intervention, per section 184 al. 2 of the *New Code of Civil Procedure* ("***NCCP***").

60. A voluntary intervention may take three forms, but only two allow the intervenor to become a party to the proceedings. These two forms of intervention are aggressive and conservative. [45] The Steering Committee's intervention would be classified as aggressive, since it

[44] *Gladue, supra* note 41 at paras. 13-14 (Intervenor BOA, Tab 15).
[45] s. 185 par. 2 NCPC

does not seek to be substituted for one of the parties in order to represent it, or to be joined with one of the parties in order to assist it or support its claims.

61. As with the *Old Code of Civil Procedure*, the *NCCP* does not provide any definition of "proceeding" ("*instance*"). It is generally understood, however, to mean any procedural steps flowing from the filing of a motion to introduce proceedings.[46] A motion like the Joint Hearing is therefore a "proceeding" in which the Steering Committee can intervene.

62. The only requirement that a person must meet in order to be added as a party intervenor is the one of interest.[47] A person seeking to intervene, either aggressively or conservatively, does not have to seek leave from the court. Section 186 of the *NCCP*, which restates the law in force under the *Old Code of Civil Procedure*,[48] provides that the proposed intervenor must notify the other parties of its intention to be added to the proceeding. In the absence of a challenge by a current party to the proceeding, the interest of the proposed intervenor is presumed.

63. Although the Steering Committee anticipates that a party may challenge its intervention, the Steering Committee nonetheless has the requisite interest to bring an aggressive intervention.

(i) <u>The Steering Committee has a sufficient interest in the motion</u>

64. As per s. 85 of the *NCCP*, a person must have a "*sufficient interest*"[49] to be added as a party. Generally, in purely private law matters, "interveners must demonstrate more than just a simple general interest in the dispute in progress. They must establish the existence of a

[46] See Hubert Reid, *Dictionnaire de droit québécois et canadien*, 4th ed. (Montreal: Wilson & Lafleur, 2010), *sv* "instance" (Intervenor BOA, Tab 16).
[47] *Droit de la famille – 1549*, [1992] RJQ 855. (Intervenor BOA, Tab 17).
[48] Please note that the NCCP did not introduce any change in this respect and one can thus rely on the decisions issued under the previous regime.
[49] *Agence du revenu du Québec c Jenniss*, 2013 QCCA 1839, at para. 14 (Intervenor BOA, Tab 18).

plausible interest based on a legal relationship, either to one or another of the parties to the dispute, or to the object thereof."[50]

65. However, for three reasons, this narrow definition of "sufficient interest" should not be the only definition considered. First, this case raises elements of public importance: it is not a "purely private" dispute. Courts have shown some flexibility in the application of private/public law distinction in the assessment of the interest of the intervenor. In one case (albeit where the intervenor was bringing a conservative intervention) Gascon, J.S.C. held that, because there were issues in the proceeding that "go beyond" the purely private interests of the parties, it was appropriate to rely on the criteria used in public law matters to assess whether the interest of the proposed intervenor was sufficient to allow it to intervene.[51] Gascon, J.C.S., therefore considered, among other things: that the association's presence would allow the court to have a fuller picture of the issues and that the proceedings would benefit from the association's perspective[52] These same principles should apply to the Steering Committee's intervention.

66. Second, the narrow definition of what is "sufficient interest" is driven by the concern that courts will become "overburdened" with interventions by persons who have no real or direct interest whatsoever in a proceeding.[53] As discussed above, this concern will not arise in this case, as the intervention by the Steering Committee will not unduly burden the parties or the process.

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[50] *Soterm c. Terminaux portuaires du Québec* [1993] R.D.J. 549 (Que. C.A.) at para. 22 [Translation] (Intervenor BOA, Tab 19).
[51] *Institution royale pour l'avancement des sciences, de gouverneurs de l'Université McGill (Université McGill) c Commission de l'équité salariale*, EYB 2005-87213 (QC SC), at para. 23-26 [*Commission de l'équité salariale*] (Intervenor BOA, Tab 20).
[52] *Commission de l'équité salariale*, *supra* note 51 at para. 25 (Intervenor BOA, Tab 20).
[53] *Syndicat des travailleuses et travailleurs des Épiciers unis Métro Richelieu (CSN) c Commission des relations de travail*, 2006 QCCS 101881, at para. 14: "Le Tribunal retient que le législateur a voulu protéger les litiges de l'encombrement d'intervention intempestive au moment où des tiers sans intérêt tentent de s'y infiltrer, en cas de démonstration convaincante de l'absence d'intérêt du tiers, l'intervention devrait être refusée." (Intervenor BOA, Tab 21).

67. Third, a court's insistence that the intervenor have a legal interest at stake flows from the prohibition of using the name of somebody else for bringing a claim ("*nul ne peut plaider pour autrui*").[54] The Steering Committee is not using the name of somebody else.

68. In these circumstances, the Steering Committee submits that it is appropriate for the Courts to recognize the Steering Committee's interest in both the subject-matter and relief sought on the motion as a "sufficient" interest.

2. Modifications to the Settlement Agreement Support Proposed Intervention

69. As mentioned, on the motion for approval of the Settlement Agreement in Ontario, Justice Winkler modified the automatic "reversion" clause in the Settlement Agreement to permit "a range of possible uses to which any surplus may be put so as to benefit the class as a whole". The settlement approval order expressly provides, at paragraph 9(b)(ii), that the Courts may make an order allocating surplus in any manner that "may reasonably be expected to benefit class members, ***even though the allocation does not provide for monetary relief to individual class members***..."[55]

70. This is consistent with s. 26(4) of the *Class Proceedings Act*, which provides that the court may order that an award that has not been entirely distributed in a time set by the court may be applied "in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class member."

71. Thus, in allocating Excess Capital, the Court is permitted to make an allocation order to a project, like the National HCV Initiative, that does not directly compensate Class Members, but

[54] *Procureur général du Québec c Corneau*, 2008 QCCS 1205, at paras. 38-42 (Intervenor BOA, Tab 22).
[55] *Parsons, supra* note 1 at paras. 122- 123 (emphasis added) (Intervenor BOA, Tab 1).

benefits Class Members and Family Class Members by increasing the quality and longevity of their lives. Not all "benefits" to a class must be measured in dollars.

72. Justice Winkler's modifications to the Settlement Agreement provide that a "Party" can request that the Courts allocate Excess Capital. Although "party" is defined in the Settlement Agreement as either the plaintiffs or the federal and provincial governments, the case law is clear that once a person is successful in his or her intervention to be added as a party and is granted party status, he or she has all the same rights as any other party. In *Ontario (Attorney General) v. Ballard Estate*[56] the court explained:

> The general rule and guiding principle is that ***the added party intervenor is granted all the same rights and obligations as the original parties*** to the proceeding, subject to any express limitations or conditions imposed by the court in granting the motion. ***In short, once granted added party status, the added party intervenor is indistinguishable from other parties in the proceeding in terms of rights and liabilities***. Thus, an added party intervenor should, in the normal course of events, have the opportunity to file full pleadings, introduce new issues, exercise the rights of discovery, together with other pre-trial rights, as well as introduce evidence at trial, cross-examine on the evidence then on the record and appeal the decision.

73. Therefore, the Steering Committee should be given full party status on this motion such that it can apply pursuant to paragraph 9(b)(ii) that Excess Capital be allocated to the National HCV Initiative.

PART V - ORDER REQUESTED

74. The Steering Committee of the National HCV Initiative respectfully requests that it be granted party status at the upcoming Joint Hearing for the purposes of asking the Court to allocate Excess Capital to the National HCV Initiative, pursuant to paragraph 9(b)(ii) of the Ontario settlement approval order (and its parallel provisions in British Columbia and Quebec).

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[56] [1994] O.J. No. 2487 (emphasis added) (Intervenor BOA, Tab 23).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of March, 2016.

FOR:

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SCHEDULE "A"

LIST OF AUTHORITIES

Tab	Case Citation
1.	*Parsons v. Canadian Red Cross Society* [1999] O.J. No. 3572
2.	Judgment of Justice Winkler in *Parsons v. Canadian Red Cross Society* [1999] O.J. No. 3572
3.	*Endean v. Canadian Red Cross Society* [1999] B.C.J. No. 2180
4.	*Honhon c. Canada (Procureur général)* [1999] J.Q. No. 4370
5.	*Honhon c. Canada (Procureur général)* [1999] J.Q. No. 5324
6.	*Trempe v. Reybroek (*2002), 57 O.R. (3d) 786 (Ont. S.C.J.)
7.	*Finlayson v. GMAC Leaseco Ltd./GMAC Location ltée* (2007), 84 O.R. (3d) 680
8.	*Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada*, [1990] O.J. No. 1378 (Ont. C.A.)
9.	*Fairview Donut Inc. v. TDL Group Corp.*, [2008] O.J. No. 4720
10.	*Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal),* 2008 CarswellOnt 2083 (Ont. Div. Court)
11.	*1162994 Ontario Inc. v. Bakker*, [2004] O.J. No. 816
12.	*Schofield v. Ontario (Minister of Consumer & Commercial Relations)* (1980), 28 OR (2d) 764
13.	*Courtenay (City) v. Lin,* 2014 BCSC 391
14.	*Robson Bulldozing Ltd. v. Royal Bank (1985),* 62 BCLR 267 (BCSC)
15.	*Gladue v. British Columbia (AG),* 2010 BCSC 788
16.	Hubert Reid, *Dictionnaire de droit québécois et canadien*, 4th ed. (Montreal: Wilson & Lafleur, 2010)
17.	*Droit de la famille – 1549*, [1992] RJQ 855
18.	*Agence du revenu du Québec c Jennis*, 2013 QCCA 1839
19.	*Soterm c. Terminaux portuaires du Québec* [1993] R.D.J. 549 (Que. C.A.)
20.	*Institution royale pour l'avancement des sciences, de gouverneurs de l'Université McGill (Université McGill) c Commission de l'équité salariale*, EYB 2005-87213 (QC SC)
21.	*Syndicat des travailleuses et travailleurs des Épiciers unis Métro Richelieu (CSN) c Commission des relations de travail*, 2006 QCCS 101881
22.	*Procureur général du Québec c Corneau*, 2008 QCCS 1205
23.	*Ontario (Attorney General) v. Ballard Estate*, [1994] O.J. No. 2487

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

ONTARIO:

Rule 1 Citation, Application and Interpretation

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

Rule 13 Intervention

Leave to intervene as added party

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

> (a) an interest in the subject matter of the proceeding;
> (b) that the person may be adversely affected by a judgment in the proceeding; or
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding. R.R.O. 1990, Reg. 194, r. 13.01 (1).

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. R.R.O. 1990, Reg. 194, r. 13.01 (2).

BRITISH COLUMBIA:

Rule 6-2 Change of Parties

Adding, removing or substituting parties by order

(7)At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

> (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
> (b) order that a person be added or substituted as a party if

(i) that person ought to have been joined as a party, or

(ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

(c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with

(i) any relief claimed in the proceeding, or

(ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

QUEBEC:

New Code of Civil Procedure (in force since January 1, 2016)

184. Intervention is either voluntary or forced. Intervention is voluntary when a person who has an interest in a proceeding but is not a party or whose participation in a proceeding is necessary in order to authorize, assist or represent an incapable party intervenes in the proceeding as a party. It is also voluntary when a person wishes to intervene for the sole purpose of participating in argument during the trial. Intervention is forced when a party impleads a third person so that the dispute may be fully resolved or so that the judgment may be set up against that third person. It is also forced when a party intends to exercise a recourse in warranty against the third person.	**184.** L'intervention est volontaire ou forcée. Elle est volontaire lorsqu'une personne qui a un intérêt dans une instance à laquelle elle n'est pas partie ou dont la participation est nécessaire pour autoriser, assister ou représenter une partie incapable, intervient comme partie à l'instance. Elle l'est aussi lorsque la personne demande à intervenir dans le seul but de participer au débat lors de l'instruction. Elle est forcée lorsqu'une partie met un tiers en cause pour qu'il intervienne à l'instance afin de permettre une solution complète du litige ou pour lui opposer le jugement; elle est aussi forcée si la partie prétend exercer une demande en garantie contre le tiers.
185. Voluntary intervention is termed aggressive when the third person seeks to be acknowledged as having, against the parties or one of them, a right which is in dispute. It is termed conservatory when the third person wishes to be substituted for one of the parties in order to represent it, or to be joined with one of the parties in order to assist it or support its claims. A third person is said to intervene as a friend of the court when seeking only to participate in argument during the trial. A third person who intervenes for aggressive or conservatory purposes becomes a party to the proceeding.	**185.** L'intervention volontaire est dite agressive lorsque le tiers demande que lui soit reconnu, contre les parties ou l'une d'elles, un droit sur lequel la contestation est engagée; elle est dite conservatoire lorsque le tiers veut se substituer à l'une des parties pour la représenter ou qu'il entend se joindre à elle pour l'assister ou pour appuyer ses prétentions. L'intervention est dite amicale lorsque le tiers ne demande qu'à participer au débat lors de l'instruction. Le tiers qui intervient à titre conservatoire ou agressif devient partie à l'instance.
186. A third person who wishes to intervene for conservatory or aggressive purposes notifies a declaration of intervention to the parties, setting out the person's interest in the case and claims, the conclusions sought and the facts justifying such	**186.** Le tiers qui entend intervenir à titre conservatoire ou agressif notifie aux parties un acte d'intervention dans lequel il précise son intérêt pour agir, ses prétentions et les conclusions qu'il recherche et les faits qui les justifient. Il doit de plus proposer dans cet acte, en tenant compte du

conclusions. The declaration of intervention must also propose an intervention procedure, with due regard for the case protocol. The parties have 10 days to notify their opposition to the third person and the other parties. If no opposition is notified, the third person's interest is presumed to be sufficient and the proposed intervention procedure to be accepted on the filing of the declaration of intervention with the court office. If opposition is notified, the third person presents the declaration of intervention before the court in order to obtain a ruling on the person's interest and the intervention procedure.	protocole de l'instance, les modalités de son intervention. Les parties disposent d'un délai de 10 jours pour notifier leur opposition au tiers et aux autres parties. S'il n'y a pas d'opposition, l'intérêt du tiers intervenant est présumé suffisant et les modalités d'intervention acceptées dès le dépôt de l'acte d'intervention au greffe. S'il y a opposition, le tiers présente cet acte au tribunal pour que celui-ci statue sur son intérêt et sur les modalités de l'intervention.

DIANNA LOUISE PARSONS, et al.

Plaintiffs

-and- THE CANADIAN RED CROSS SOCIETY, et al.
Defendants

-and- HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF ALBERTA, et al.
Intervenors

Court File No. 98-CV-141369 CP00

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE PROPOSED INTERVENOR

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