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 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

Court File No. 98-CV-146405

B E T W E E N:

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

Plaintiffs

and

THE CANADIAN RED CROSS SOCIETY, THE ATTORNEY GENERAL OF CANADA and 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

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 Columbia, and The Attorney General of Canada**

Defendants

and:

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

Third
Parties

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

CANADA

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

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-

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

PETITIONER

-and-

FONDS D'AIDE AUX RECOURS COLLECTIFS

-and-

LE CURATEUR PUBLIC DU QUÉBEC

Mis-en-cause

CANADA

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

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 ATTORNEY GENERAL OF CANADA IN RESPONSE TO THE PROPOSED INTERVENOR

OVERVIEW

1. A group of doctors seeks funding of a proposed healthcare initiative, aimed at expanding the diagnosis and treatment of hepatitis C across Canada. Aware that there is at least $236 million of actuarially unallocated funds in the 1986-1990 hepatitis C class action settlement fund, the doctors seek leave to intervene at a hearing where the funds will be allocated, to ask for approximately $155 million. However laudable their initiative may be, their quest to fund it by appealing to the Court for money from a class action settlement to which they are not a party is misdirected. They have no legal basis for requesting the funds, and therefore cannot have an interest in the hearing, nor can they be said to be disadvantaged by the outcome. They should not be permitted to complicate a private dispute to which they have no relationship, in order to lobby for public healthcare funds outside of the normal channels of government.

PART 1: FACTS

Class actions, settlement and funding

2. Between 1996 and 1998, class actions were initiated in British Columbia, Quebec and Ontario on behalf of transfused persons and persons with hemophilia who received blood or blood products between January 1, 1986 and July 1, 1990 and were infected with the Hepatitis C virus ("HCV").

3. In the fall of 1999, a pan-Canadian settlement of these actions ("Settlement Agreement") was approved by orders of the Superior Courts of Ontario, British Columbia and Quebec ("Approval Orders").

   Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (SC)
   Parsons v. Canadian Red Cross Society, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC)

   Endean v. Canadian Red Cross Society, [1999] B.C. J. No. 2180 (SC)
   Endean v. Canadian Red Cross Society, Judgment dated October 28, 1999 (entered on November 12, 1999) per Smith J. (BC SC)

   Honhon c. Canada (Procureur général), [1999] J.Q. no 4370 (CS)
   Honhon c. Canada (Procureur général), [1999] J.Q. no 5324 (CS)

   Page c. Canada (Procureur général), [1999] J.Q. no 4415 (CS)
   Page c. Canada (Procureur général), Judgment dated November 19, 1999, per Morneau J (QSC)

4. The Settlement Agreement provided for the creation of a trust to be funded by the federal, provincial and territorial governments ("FPT governments") in an amount totaling $1.118 billion plus interest from April 1, 1998. The federal government was to pay 8/11ths of this amount and the provincial and territorial governments were to pay 3/11ths.

   Settlement Agreement: section 4.01 and Schedule D Funding Agreement, sections 1.01 and 4.01

5. Canada satisfied its obligation up-front, by transferring its full share in the amount of $877.82 million to the trust on or about the settlement approval date in 1999. The provincial and territorial governments satisfy their obligation by periodic payments of the liability, as it arises.

   Settlement Agreement: section 4.01 and Schedule D Funding Agreement, sections 4.01, 4.02

6. The FPT governments agreed to forego the collection of taxes on the investment income earned by the trust, and on amounts paid to Class Members under the Settlement Agreement, resulting in a significant increase in the value of the settlement funds.

Settlement Agreement: section 4.01 and Schedule D Funding Agreement, section 3.02

7. The trust fund, and the tax-free investment income it generated, are used to pay scheduled benefits, in accordance with plans incorporated into the Settlement Agreement, 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.

Settlement Agreement, Schedules A and B

Affidavit of Heather Rumble Peterson sworn October 16, 2015 at para. 20, Exhibit A

Excess capital and interim allocation

8. The Settlement Agreement says that on judicial declaration of the termination of the agreement, once the Plans and programs have been fully administered and all obligations satisfied, any assets which remain in the trust are to be the sole property of and transferred to the FPT governments.

Settlement Agreement, s.10.01 (1) (o) and s. 12.03

9. In the interim, the Approval Orders require that the Courts do triennial reviews to determine the sufficiency of the trust and the existence of any actuarially unallocated amounts. In the event of such an amount being identified at any interim point, the plaintiffs, the FPT governments or the Joint Committee may apply to the Courts to have the amount allocated according to the terms of the Approval Orders, detailed below.

Settlement Agreement, ss.1.01, 10.01 (1) (i)

Endean v. Canadian Red Cross Society, Judgment dated October 28, 1999 (entered on November 12, 1999) per Smith J. (BC SC), at paras. 1(mm), 5(b)

Parsons v. Canadian Red Cross Society, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC), at paras. 2(q), 9(b)

Honhon c. Canada (Procureur général), Judgment dated November 19, 1999, per Morneau J (QSC) at para. 16 and Annexe F

Page c. Canada (Procureur général), [1999] J.Q. no 5325 (CS) at para. 11 and Annexe F

10. The October 22, 1999 Ontario Approval Order sets out the procedure for the interim distribution of actuarially unallocated funds at paragraph 9 ("Paragraph 9"). The Superior Courts in British Columbia and Quebec also approved provisions that are substantially the same as Paragraph 9. For the sake of simplicity, this factum will refer only to Paragraph 9.

Parsons v. Canadian Red Cross Society, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC), at para.9(b)

Endean v. Canadian Red Cross Society, Judgment dated October 28, 1999 (entered on November 12, 1999), per Smith J. (BC SC), at para. 5(b)

Honhon c. Canada (Procureur général), Judgment dated November 19, 1999, per Morneau J (QSC) at para. 16 and Annexe F

Page c. Canada (Procureur général), [1999] J.Q. no 5325 (CS) at para. 11 and Annexe F

11. Paragraph 9(b) provides that the Courts may order interim allocations of Excess Capital "at the request of any Party or the Joint Committee":

    a. For the benefit of the Class Members and/or the Family Class Members in the Class actions [para. 9(b)(i)];

    b. 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 [para. 9(b)(ii)];

c. Paid, in whole or in part, to the FPT Governments or some or one of them considering the source of the money and other assets which comprise the Trust Fund [para. 9(b)(iii)]; and/or

d. Retained, in whole or in part, within the Trust Fund [para. 9(b)(iv)].

Parsons v. Canadian Red Cross Society, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC), at para.9(b)

12. "Party" is in turn defined at paragraph 2(q) of the October 22, 1999 Ontario Approval Order as "any one of the FPT Governments or the Class Action Plaintiffs".

Parsons v. Canadian Red Cross Society, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC), at para. 2(q)

See also:

Endean v. Canadian Red Cross Society, Judgment dated October 28, 1999 (entered on November 12, 1999), per Smith J. (BC SC), at para. 1(mm)

Honhon c. Canada (Procureur général), Judgment dated November 19, 1999, per Morneau J (QSC) at para.16 and Annexe F

Page c. Canada (Procureur général), [1999] J.Q. no 5325 (CS) at para.11 and Annexe F

Settlement Agreement, ss.1.01

* Note: In Quebec, the relevant definition of "Party" is that at Section 1.01 of the Settlement Agreement.

13. As of December 3, 2013, despite $776.9 million in payments made to Class Members and their dependents over the life of the trust, there was an accrued balance of $1.1902 billion remaining to meet the present and future liabilities of the compensation plan.

Affidavit of Peter Gorham, sworn April 8, 2015, Exhibit B: "Actuarial Report Assessing the Financial Sufficiency of the 1986-1990 Hepatitis C. Trust Fund as at 31, December 2013", at p.39, Table 154, in the Attorney General of Canada's materials in support of its motion for the allocation of actuarially unallocated funds, filed January 29, 2016

14. The Ontario, British Columbia and Quebec Superior Courts made orders, respectively, on July 10, 2015; July 23, 2015; and July 16, 2015 that as at December 31, 2013, the assets of the trust fund exceeded the liabilities by $236.3-$256.6 million (the "Excess Capital").

    Parsons v. Canadian Red Cross Society, Judgment dated July 10, 2015, per Perell J. (ONSC), at para. 3

    Endean v. The Canadian Red Cross Society, Order dated July 23, 2015 per Hinkson, J. (BC SC) at para. 3

    Honhon v. The Canadian Red Cross Society, Order dated July 16, 2015 per Corriveau , J. (QSC) at para.3

15. The Joint Committee and Canada each seeks an interim allocation of the Excess Capital further to Paragraph 9(b)(i) and 9(b)(iii), respectively. A hearing has been scheduled for June 20-22, 2016 to determine whether, and to whom, an allocation should be made (the "Allocation Hearing").

16. The steering committee of a proposed national healthcare initiative aimed at delivering HCV care across Canada (the "Steering Committee") now seeks to intervene as an added party in the Allocation Hearing. It wishes to ask that a substantial portion of the Excess Capital, estimated at $154,889,000, go to fund its proposed healthcare initiative.

PART 2: POINTS IN ISSUE

17. Should the Steering Committee be granted party status for the purpose of seeking an interim allocation of the Excess Capital?

PART 3: SUBMISSIONS

The Steering Committee has no capacity to intervene

18. As a preliminary point, the request for leave to intervene is brought by a group of medical professionals styling themselves as a "steering committee", which is not a corporation or other recognizable form of legal personality. The basis upon which the Steering Committee, as an organization, may be a legal entity capable of appearing before the Court is not apparent from the Steering Committee's factum or evidence. As the Steering Committee is not a legal entity capable of suing or being sued, its request for party status must be dismissed.

The Steering Committee does not meet the tests to be granted party status

19. The Steering Committee seeks to intervene as a party in the Allocation Hearing under Rules 13.01(1) of the Ontario *Rules of Civil Procedure*; Rule 6-2(7) of the British Columbia *Supreme Court Civil Rules*; and section 184 of the Quebec *New Code of Civil Procedure*. It does not meet the test for intervention in any of these jurisdictions.

Tests for leave to intervene

Ontario

20. R. 13.01(1) of the *Rules of Civil Procedure* says that 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.

Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194 at R. 13.01(1)

21. If one or more of the above criteria is met, the court must then consider "whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding…"

Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194 at R. 13.01(2)

British Columbia

22. The Steering Committee moves under Rule 6-2(7)(c) of the British Columbia *Supreme Court Civil Rules,* which holds that "[a]t any stage of a proceeding, the court, on application by any person, may…

> (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.

Supreme Court Civil Rules, B.C. Reg. 168/2009, R. 6-2(7)(c)

23. As noted by the Steering Committee, a court will order a person to be added as a party when the person demonstrates that she has an interest in the outcome of the proceedings, that she would be directly affected by an outcome of the proceeding, or that his or her participation is necessary for effectual adjudication. In determining whether granting party status "is just or convenient" the court must consider whether the intervenor will increase the number of parties, issues and overall scope of the litigation with resulting costs and delay.

Gladue v. British Columbia (AG), 2010 BCSC 788 at paras. 11, 13

Quebec

24. The Steering Committee wishes to be added as a party as a voluntary, aggressive intervenor under sections 184 and 185 of the *New Code of Civil Procedure*:

184. ...Intervention is voluntary when a person who has an interest in the proceeding but is not a party...intervenes in the proceeding as a party.

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.

Factum of the Proposed Intervenor dated March 17, 2016 at paras. 59-60

New Code of Civil Procedure, CQLR c C-25.01, ss. 184-185

25. "Interest in the proceeding" is the only criterion for a voluntary intervention. The interest must be "plausible, and based on a legal relationship, either to one or another to the parties to the dispute, or to the object thereof".

Terminaux Portuaires du Québec Inc. C. Société du parc industriel et portuaire de Bécancour (C.A. Que.) [1993] J.Q. no 1038 (QCA), at para. 22

Cieslukowski c 9109-6453 Québec inc., 2013 QCCA 1027 at paras. 5-9

Michaud c Groupe Vidéotron ltée, [2003] R.J.Q. 3087 at paras. 57-66

The Steering Committee does not have a sufficient interest in the Allocation Hearing

26. As noted above, all three provinces require a proposed intervenor to have sufficient interest in the proceeding. The Steering Committee has not demonstrated that it possesses a sufficient interest to be added as a party to the Allocation Hearing.

No legal basis for requesting an allocation of Excess Capital

27. The Steering Committee wants to intervene as an added party so that it can seek some allocation of the available capital to fund its proposal, even though it lacks the capacity to advance such a claim under either Paragraph 9 or the Settlement Agreement itself. Without any legal basis to underpin the very reason it seeks to intervene, the Steering Committee does not have a true interest in the proceeding.

28. Paragraph 9 is a modification to a negotiated settlement agreement to which the Steering Committee is not a party. Paragraph 9(b) clearly says that only a "Party or the Joint Committee" may request an interim allocation of Excess Capital. The Steering Committee acknowledges that "Party" is defined in the Settlement Agreement as either the plaintiffs or the federal and provincial governments. It is also specifically defined in the Ontario and British Columbia Approval Orders modifying the Settlement Agreement as "any one of the FPT Governments or the Class Action Plaintiffs".

    Factum of the Proposed Intervenor dated March 17, 2016 at para. 72

    Parsons v. Canadian Red Cross Society, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J. (ONSC), at paras. 2(q), 9(b)

    Endean v. Canadian Red Cross Society, Judgment dated October 28, 1999 (entered on November 12, 1999) per Smith J. (BC SC), at paras. 1(mm), 5(b)

    Honhon c. Canada (Procureur général), Judgment dated November 19, 1999, per Morneau J (QSC) at para. 16 and Annexe F

    Page c. Canada (Procureur général), [1999] J.Q. no 5325 (CS) at para. 11 and Annexe F

    Settlement Agreement, s. 10.01

29. The Steering Committee says that once granted party status as an intervenor, a person has all the same rights as any other party. This is true for procedural rights in the proceeding; but not for substantive rights arising from a negotiated agreement. Becoming a party to the Allocation Hearing cannot make the Steering Committee a party for the purposes of the Settlement Agreement, as modified by the Approval Orders.

30. The Steering Committee cites Ontario *(Attorney General) v. Ballard* in support of the point that having party status as an intervenor translates into having all of the same rights as any other party. However the Steering Committee refers to a paragraph from *Ballard* that speaks specifically to procedural rights:

    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.
>
> *Ontario (Attorney General) v. Ballard*, [1994] O.J. No. 2487 at para. 19.

31. The Court in *Ballard* did say that a proposed intervenor may be granted party status for the purpose of bringing a claim, if the claim is substantially similar to those of the main action; however it also acknowledged that intervenors should generally not be permitted to advance their own distinct claims. In this case, the Steering Committee moves for a different allocation on different grounds than either of the parties, and therefore is not bringing a "substantially similar" claim.

> *Ontario (Attorney General) v. Ballard*, [1994] O.J. No. 2487 at para. 22.

32. More fundamentally, *Ballard* does *not* say that an intervenor acquires, by virtue of its status as intervenor, rights arising from an agreement to which it is not a party.

33. The lack of legal basis for requesting an allocation of Excess Capital is particularly fatal to the Quebec requirement for "interest in the proceeding", which, as acknowledged by the Steering Committee, has been explicitly interpreted to require "the existence of a plausible interest based on a legal relationship, either to one or another of the parties to the dispute, or to the object thereof". The Steering Committee has no legal relationship to the plaintiffs, the FPT governments, the Settlement Agreement as modified by the Approval Orders, or the Excess Capital. It has no legal basis for requesting an allocation of Excess Capital.

> *Terminaux Portuaires du Québec Inc. C. Société du parc industriel et portuaire de Bécancour (C.A. Que.)* [1993] J.Q. no 1038 (QCA) at para.22.
>
> *Cieslukowski c 9109-6453 Québec inc.*, 2013 QCCA 1027 at paras. 5-9
>
> *Michaud c Groupe Vidéotron ltée,* [2003] R.J.Q. 3087 at paras. 57-66

34. The Steering Committee cites *Commission de l'equité salariale* in support of a looser test for "interest" where there are issues that "go beyond" the purely private interests of the parties. However, in *Commission de l'equité salariale* the Court underlined the conservative nature of the proposed intervention, noting that conservative interventions must be approached more liberally than aggressive ones; and emphasized that the proposed intervenor was intimately involved in the history of the issue in dispute, and was repeatedly mentioned in the petitioner's pleadings. Neither of these factors is present in this case. Furthermore, as discussed below, the Allocation Hearing is an essentially private dispute.

> *Institution royale pour l'avancement des sciences, de gouverneurs de l'Université McGill (Université McGill) c Commission de l'equité salariale*, EYB 2005-87213 (QC SC) at paras. 9-13.

Essentially private dispute

35. A proposed intervenor will have difficulty establishing sufficient interest in a private dispute. As the Ontario Superior Court has said: "while it is theoretically possible to intervene in a purely private dispute…the moving party faces a serious challenge".

> *Whirlpool Canada Co. v. Chavila Holdings Ltd.*, 2015 ONSC 2080 at para.52.

36. B.C. courts have similarly held that intervention is more likely to be permitted in proceedings concerned with issues of public rather than private law, particularly where the proposed intervenor does not have a direct legal interest in the proceeding.

> *MacMillan Bloedel Ltd. v. Mullin et al.* (1985) 66 B.C.R.L. 207 (BCCA) at p.210
>
> *Gaudagni v. Workers' Compensation Board of British Columbia* (1988) 30 B.C.L.R. (2d) 259 (BCCA), p. 263.
>
> *International Forest Products ltd. V. Kern* [2000] B.C.J. No. 1462 at para. 20

37. The Ontario Court of Appeal elaborated the distinction between private and public disputes in *Authorson*, saying that many cases will "fall somewhere between the constitutional and

strictly private litigation continuum, depending on the nature of the case and the issues to be adjudicated", and "...the burden on the moving party should be a heavier one in cases that are closer to the 'private dispute" end of the spectrum."

Authorson (Litigation Guardian of) v. Canada (Attorney General), [2001] O.J. No. 2768 (ONCA) at para. 9.

38. In *Authorson*, even though the case involved a class action relating to funds administered by the Crown under statute, the Court found that it "retain[ed] significant elements of private litigation".

Authorson (Litigation Guardian of) v. Canada (Attorney General), [2001] O.J. No. 2768 (ONCA) at para. 11.

39. The Allocation Hearing involves a predominantly private dispute: the settlement of civil claims on behalf of a defined group of people who were infected with HCV as a result of contaminated blood products received during a 5-year period. More specifically, the Allocation Hearing involves a dispute between parties to a settlement agreement as to the interim allocation of excess funds under that agreement.

40. The motion does not raise constitutional or public policy issues. There is no possibility of a precedential interpretation of law. The facts alone that the FPT governments are parties and that the funds in question originate from and may go back to the public purse do not qualify the matter as a public interest dispute.

41. Contrary to the Steering Committee's submission, this dispute affects only the class members and the defendant by virtue of a privately defined relationship. The fact that it arises in the context of a pan-Canadian class action affecting a significant number of class members does not vitiate the private nature of the dispute. Otherwise, any large multi-jurisdictional class action would be public for the purpose of third–party intervention.

42. Furthermore, in Quebec, there are specific criteria which must be met for interventions in proceedings raising matters of public interest, as outlined in *Agence du revenue du Quebec c. Jenniss*. Even if it could be said that the Allocation Proceeding raises matters of public interest, which Canada denies, the Steering Committee clearly does not does not meet those criteria.

Agence du revenue du Quebec c. Jenniss, 2013 QCCA 1839 at para. 20

The Steering Committee is not a party to the Settlement Agreement

43. The Ontario Superior Court has said that a proposed intervenor does not have an interest in the subject matter of the proceeding where the subject matter is a determination of the rights of parties to an agreement, and where the proposed intervenor is not such a party.

Whirlpool Canada Co. v. Chavila Holdings Ltd., 2015 ONSC 2080 at paras. 89-90.

44. The subject matter of the Allocation Hearing is the determination of the appropriate allocation of Excess Capital further to the terms of a settlement agreement to which the Steering Committee is not a party.

The Steering Committee's interest is not the interest of the Class Members

45. The Steering Committee argues that its proposed healthcare initiative will benefit class members, and that if it cannot access the Excess Capital, "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".

Factum of the Proposed Intervenor dated March 17, 2016 at paras. 19,44.

46. This is premised on the assumption that there are many class members who remain undiagnosed and unaware of their condition, or cannot access appropriate medical treatment. However, the Steering Committee provides no evidence to support those assumptions.

> Factum of the Proposed Intervenor dated March 17, 2016 at paras. 21-23.

47. In contrast, the Joint Committee has filed voluminous material from a consultation process with class members that are known to exist. These class members, who are ably represented by the Joint Committee, are asking for an allocation of Excess Capital that is at odds with the Steering Committee's request.

48. Moreover, it is clear that the Steering Committee's proposal aims primarily to benefit Canadians at large who are infected with HCV. The interest of class members in the proposal, if it can be said to exist at all, is at best ancillary.

49. To the extent that the Steering Committee attempts to establish its interest in the Allocation Hearing by seeking to tether itself to the interest of class members, it cannot succeed. As stated by the Ontario Court of Appeal:

> … class proceedings are by their very nature premised upon experienced counsel for the class bringing together and articulating the perspectives of the class members and the scope of the litigation. There is little room for a proposed intervenor to add a perspective that ought not already to be advanced by class counsel.
>
> *Phaneuf v. Ontario*, 2010 Carswell 10754 (ONCA, in chambers), at para.2.

The Steering Committee is acting as a lobbyist for funding

50. The Ontario Court of Appeal has said that "[a]n intervenor's interest must not be that of a lobbyist"; and the Quebec Court of Appeal has said that a simple economic interest in the proceeding is insufficient. The Steering Committee's true interest in the Allocation Hearing is precisely that of a lobbyist, seeking funding for its proposed public healthcare initiative.

Halpern v. Toronto (City), [2000] O.J. No. 4514 (ONSC (div)) at para. 25
Agence du revenue du Québec v. Archambault, 2014 QCCA 1336 at para. 21

51. The Steering Committee seeks, through the courts, access to large sums of money originating from the public purse, in order to pursue a public health initiative. However commendable that initiative may be, the Allocation Hearing is not the appropriate forum to lobby for its funding.

52. Moreover, the Steering Committee provides no accountability or governance framework which would ensure that those funds, if allocated, would be appropriately spent. To permit the Steering Committee to lobby for funding of a public health initiative through the judicial process would usurp the function of government to make sound policy decisions regarding public healthcare spending, and to require appropriate checks and balances.

The Steering Committee will be not be affected by the outcome of the Allocation Hearing

53. The law in both Ontario and British Columbia contemplates granting party status to a proposed intervenor who will be affected by the outcome of the proceeding. In Ontario, R. 13.01(1)(b) specifically refers to being "adversely affected by a judgment in the proceeding".

Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194 at R. 13.01(1), (2)

Gladue v. British Columbia (AG), 2010 BCSC 788 at para. 11

54. As a preliminary matter, "judgment" is defined in subrule 1.03(1) of the Ontario *Rules of Civil Procedure* as "a decision that finally disposes of…an action on its merits". Any decision of the court in the present matter is an interlocutory decision dealing with the interim allocation of Excess Capital in advance of a judicial declaration of the termination of the settlement. It is therefore not a "judgment for the purpose of Rule 13.01(1)(b).

Finlayson v. GMAC Leaseco Ltd., [2007] O.J. No. 597 (ONSC) at para. 29

55. Furthermore, the Steering Committee has no greater claim or right to the Excess Capital than any other member of the public, and will accordingly not be any more affected by a decision of the Court than any other member of the general public. In being denied intervenor status, the most that can be said is that it will lose a chance at obtaining funds, which chance it created in the first place by applying for leave to intervene.

56. Moreover, the Ontario Superior Court has said that loss of opportunity or potential economic advantage is not sufficient to establish that a proposed intervenor will be "adversely affected", as any such loss does not impact any legal or proprietary right. The Steering Committee has no legal or proprietary right in the Excess Capital.

Gould Outdoor Advertising v. London (City) (1997), 29 O.T.C. 236 (ON SC.), para. 21
Crown Trust Co. et al. v. Rosenberg et al., 1986 CanLII 2760 (ON SC)

There is no question of law or fact in common between the Steering Committee and the parties to the proceeding

57. In Ontario, R. 13.01(1) contemplates granting party status to a proposed intervenor where she can establish that there is a question of law or fact in common with the parties to the proceeding.

Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194 at R. 13.01(1), (2)

58. Somewhat similarly, Quebec jurisprudence holds that the requisite interest in the proceeding must be on the main point of contention, and not an interest of a different nature, personal to the intervenor.

Kowarsky c. Procureur général du Québec [1988] R.D.J. 147 (C.A.), p.149

59. As previously discussed, the Steering Committee has no legal basis for seeking an allocation of Excess Capital to fund its proposed healthcare initiative. Furthermore, it seeks an allocation based on Paragraph 9(b)(ii), which is an entirely different ground than either of the

parties are seeking. Permitting the Steering Committee to intervene will expand the litigation and require the parties and the Courts to engage with an additional issue.

60. The Steering Committee does not seek to add a different dimension to a common question of fact or law, but instead it seeks to argue for a different outcome on a different basis than either of the other parties. There is no question of law or fact in common.

Granting the Steering Committee Intervenor Status will Prejudice the Parties

61. In all three of Ontario, British Columbia and Quebec, the Courts must consider prejudice to the parties in determining whether to grant intervenor status.

> Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194 at R. 13.01(2)
>
> *Gladue v. British Columbia (AG),* 2010 BCSC 788 at para. 13
>
> *Uashaunnuat (Innus d'Uashat et Mani-Utenam) c. Quebec (Procureur General)* [2010] J.Q. no 8311 at paras. 65-68
>
> *Syndicat des travailleuses et travailleurs des Épiciers unis Metro Richelieu (CSN) c Commission des relations de travail,* 2006 101881 at para 14

62. The Ontario Court of Appeal has said that "intervention of third parties into essentially private disputes should be carefully considered as any intervention can add to the costs and complexity of the litigation, *regardless of an agreement to restrict submissions."*

> *Authorson (Litigation Guardian of) v. Canada (Attorney General),* [2001] O.J. No. 2768 (ONCA) at para. 8
>
> See also: *Whirlpool Canada Co. v. Chavila Holdings Ltd.*, 2015 ONSC 2080 at para. 62.

63. The Steering Committee is seeking a substantial allocation of Excess Capital for an entirely different purpose and on an entirely different ground than the other parties. Moreover, Canada reserves its right to cross-examine on any evidence submitted by the Steering Committee, and to file additional evidence in response; this would create more work and

likely impact the litigation schedule. The parties' time and therefore costs would increase if they had to address a third party request for an allocation under Paragraph 9(b)(ii).

PART 4: ORDER SOUGHT

64. That the proposed intervenor be refused party status at the upcoming Surplus Allocation Hearing;

65. Such further and other relief as counsel may request and this Honourable Court may direct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Toronto, in the Province of Ontario, this 31st day of March, 2016.

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