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

C A N A D A

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

SUPERIOR COURT

Class action

NO : 500-06-000016-960

DOMINIQUE HONHON

Plaintiff

-vs-

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

Defendants

-and-

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

PETITIONER

-and-

FONDS D'AIDE AUX RECOURS COLLECTIFS

-and-

LE CURATEUR PUBLIC DU QUÉBEC

Mis-en-cause

C A N A D A

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

SUPERIOR COURT

Class action

NO : 500-06-000068-987

DAVID PAGE

Plaintiff

-vs-

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

Defendants

-and-

FONDS D'AIDE AUX RECOURS COLLECTIFS

-and-

LE CURATEUR PUBLIC DU QUÉBEC

Mis-en-cause

FACTUM/SUBMISSIONS/WRITTEN ARGUMENT OF THE JOINT COMMITTEE
(Responding to Request to be Added as a Party Intervenor or Party)

TABLE OF CONTENTS

PAGE

PART I - INTRODUCTION

1. The Joint Committee submits this factum/submissions/written argument in response to the factum dated March 17, 2016 filed by a group of seven physicians, scientists and researchers, who refer to themselves as a Steering Committee, in support of their request to be added as party intervenors (in the case of Ontario and Quebec actions) and parties (in the case of British Columbia actions). By requesting that they be added as parties, the Steering Committee members seek to have the superior courts of Ontario, British Columbia, and Quebec (collectively, the "**Courts**") grant them the substantive right to request an allocation of the actuarially unallocated funds held by the Trustee pursuant to the 1986-1990 Hepatitis C Settlement Agreement (the "**Excess Capital**"). In particular, they wish to acquire a substantive right to request that the Courts allocate approximately $155 million to them to fund a proposal they have developed, aimed at delivering comprehensive care to Canadians infected with the Hepatitis C virus ("HCV"), regardless of the source or date of their infection, and research directed at preventing HCV infection and improving future care. The Joint Committee opposes the Steering Committee members' request.

2. The Steering Committee members have no legal basis to be added as parties or to make a request for these funds. They are complete strangers to the underlying litigation and the resulting 1986-1990 Hepatitis C Settlement Agreement (the "**Settlement Agreement**"), as amended by the Courts' Settlement Approval Orders. Nothing in the Settlement Agreement, the Courts' Settlement Approval Orders or the Rules and Civil Code provisions of the various provinces permits a stranger to make a claim on funds to which they have no entitlement.

3. The provisions of the Settlement Approval Orders are clear. Only a Party (which is defined in the Orders to mean "any one of the FPT Governments or the Class Action Plaintiffs") and the Joint Committee have the ability to request the Courts to allocate all or any portion of the Excess Capital. The Steering Committee members are not and cannot be a Party -- they did not give any consideration for the Settlement Agreement; they did not give up any rights; they did not contribute any funds.

4. The Rules and Civil Code provisions are equally clear. To be added as a party, a person must have a legal interest at stake connected to the proceeding or a cause of action. The Steering Committee members have no such interest or cause of action. Indeed, as strangers to the underlying litigation and resulting Settlement Agreement, they can have no such interest.

5. The Settlement Agreement and Settlement Approval Orders do not permit, and the Courts do not have the jurisdiction to allow, the Steering Committee members to make a request for the allocation of the Excess Capital. To grant the Steering Committee members the relief they seek would be wholly unfair to the Parties who negotiated and gave consideration for the Settlement Agreement. It would also fail to give effect to the intention of the Parties, expressed explicitly in the consent Settlement Approval Orders that amended the Settlement Agreement, that the Joint Committee is the only entity outside of the Parties themselves that has the ability to request an allocation of the Excess Capital. The Steering Committee members' requests must be denied.

PART II - THE FACTS

A. Background

6. Between 1996 and 1998, class actions were commenced in each of British Columbia, Quebec and Ontario seeking damages for personal injury and wrongful death on behalf of transfused persons and persons with hemophilia who received blood or certain blood products in Canada between January 1, 1986 and July 1, 1990 and were infected with HCV. The Ontario actions included claims for persons wherever located who were not included in the British Columbia and Quebec actions and claims in respect of certain family members of infected persons.[1]

7. The defendants in the various actions included the Canadian Red Cross Society and The Attorney General of Canada and, in their respective province, Her Majesty the Queen in Right of the Province of British Columbia, le Gouvernement du Quebec, or Her Majesty the Queen in Right of Ontario. The provinces and territories not originally named as defendants in the Ontario transfused action were given notice in September 1997 of an intended transfused action and they ultimately became intervenors in the Ontario actions, making the class actions, when viewed collectively, national in scope.[2]

8. On December 18, 1998, the Parties reached an agreement in principle to settle the class actions which was followed by a formal agreement to settle the class actions nationally. The central issue on which the negotiations turned was that Class Members agreed to accept the risk that the settlement sum would be insufficient to pay the benefits provided for in the settlement

---

1 Affidavit of Heather Rumble Peterson sworn October 16, 2015 ("**Peterson Affidavit**"), para 2

2 Peterson Affidavit, para 3

and the funding parties (the FPT Governments) would never be called upon to contribute funds in excess of the settlement sum.[3] The Settlement Agreement was signed by the Parties as of June 15, 1999.[4]

B. The Circumstances Surrounding the Settlement Approval Orders

9. In reasons for decision dated September 22, 1999, Justice Winkler (as he then was) of the Ontario Superior Court of Justice provisionally approved the settlement, but identified three areas of concern to afford the Parties an opportunity to address those concerns with changes to the settlement.[5]

10. The area of concern relevant to the issues under consideration was the provision at section 12.03(3) of the Settlement Agreement, which mandated that any surplus assets in the Trust revert to the governments following termination of the Settlement Agreement. Justice Winkler concluded that this surplus reversion provision was anomalous in that it is "neither in the best interest of the plaintiff classes nor in the interests of defendants."[6] He explained:

> 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.[7]
>
> **[Emphasis added]**

11. Justice Winkler went on to consider whether it was appropriate for the surplus to revert entirely to the defendants in the context of this particular settlement and one of its key features: that Class Members bore the risk of insufficiency. He concluded it was not appropriate.

> 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

---

3 Affidavit of Asvini Krishnamoorthy sworn January 29, 2016, Exhibit O (Affidavit of J.J. Camp sworn November 23, 1999) paras. 82, 84, 89, 95, 99, 100, 105, 106, 109

4 Peterson Affidavit, para 5

5 *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at paras 129 and 132 (S.C.J.). [***Parsons***]

6 *Parsons*, *ibid.* at para 120

7 *Parsons*, *ibid.* at para 120

> 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.[8]

12. Justice Smith of the British Columbia Supreme Court concurred with Justice Winkler that these modifications were required.[9]

13. The Parties drafted consent orders to address the Courts' concerns, which specifically amended the Settlement Agreement. While Justice Winkler had suggested in his reasons that the administrator should be the one to make recommendations to the Courts as to how the surplus should be applied for the benefit of class members, whether all or a portion be released to the defendants, or whether it should be retained in the Trust,[10] the amendment to the Settlement Agreement that the Parties agreed to in the consent Settlement Approval Order gave the power to request an allocation of any surplus to a "Party" and the Joint Committee (the **"Allocation Provision"**)

14. In particular, the Allocation Provision set out in paragraph 9(b) of the Ontario Settlement Approval Order states in relevant part:

> 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;

---

8 *Parsons*, *ibid.* at para 122

9 *Endean v. Canadian Red Cross Society*, [1999] B.C.J. No. 2180 at para. 8 (S.C.). [***Endean***].

10 *Parsons*, *supra* note 4 at para 124

> (ii) allocated in any manner that may reasonably be expected to benefit Class Members and/or the Family Class Members even though the allocation does not provide for monetary relief to individual Class Members and/or Family Class Members;
>
> (iii) paid, in whole or in part, to the FPT Governments or some or one of them considering the source of the money and other assets which comprise the Trust Fund; and/or
>
> (iv) retained, in whole or in part, within the Trust Fund;
>
> in such manner as the Courts in their unfettered discretion determine is reasonable in all of the circumstances provided that in distribution there shall be no discrimination based upon where the Class Member received Blood or based upon where the Class Member resides;
>
> **[Emphasis added]**

15. The term "Party" is defined in paragraph 2(q) of the Ontario Settlement Approval Order to mean "any one of the FPT Governments or the Class Action Plaintiffs".

16. Justice Winkler approved and signed the consent Settlement Approval Order a month after his decision was released, on October 22, 1999.

17. A substantially similar consent Settlement Approval Order was signed by the British Columbia Supreme Court on October 28, 1999. It sets out the Allocation Provision at paragraph 5(b) and the definition of "Party" at paragraph 1 (mm).

18. A substantially similar Settlement Approval Order was issued by the Quebec Superior Court on November 19, 1999, through the addition of Schedule F Modification Number 1 to its prior approval order dated September 21, 1999. The Allocation Provision states:

> Dans le cadre du libre exercice de leur pouvoir discrétionnaire, ordonner, de temps à autre, **sur demande de toute partie ou du Comité conjoint**, que les fonds et les autres éléments d'actif détenus par le fiduciaire en vertu de la Convention de règlement et qui ne font pas l'objet d'une attribution actuarielle soient en tout ou en partie :
>
> (i) attribués aux membres des recours collectifs et/ou aux membres de la famille;
>
> (ii) attribués de toute manière dont on peut raisonnablement s'attendre qu'elle bénéficie aux membres des recours collectifs et/ou aux membres de la famille, même si l'attribution ne prévoit pas le versement d'une indemnité aux membres des recours collectifs et/ou aux membres de la famille;

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

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

[Emphasis added]

C. The Courts Declare Actuarially Unallocated Assets/Excess Capital

19. After the most recent financial sufficiency review undertaken in accordance with section 10.01(1)(i) of the Settlement Agreement, the actuaries retained by the Joint Committee on behalf of the class members and the actuaries retained by the federal government expressed the opinion that the trust fund is financially sufficient to meet the expected liabilities to class members and family class members as at December 31, 2013, and that, after taking into account sufficient monies to protect the class members from major adverse experience or catastrophe, the assets exceed liabilities in an amount between $236,341,000 and $256,594,000.[11]

20. On consent of the Joint Committee and the federal government, each of the Courts issued orders declaring the assets of the Trust to be financially sufficient as at December 31, 2013 and declaring that the assets exceed liabilities, after taking into account an amount to protect the class members from major adverse experience or catastrophe, by an amount between $236,341,000 and $256,594,000.[12]

D. The Hearing Schedule and Applications to Allocate the Excess Capital

21. Following a case conference with the Joint Committee and the Parties, by letter dated June 24, 2015, the Courts set a schedule for a three day Joint Hearing of the Courts to be held in Toronto approximately one year later, on June 20-22, 2016, in respect of the 2013 Financial Sufficiency Review and Allocation Hearing and the steps leading up to that Joint Hearing.[13]

---

11 Peterson Affidavit, para 9

12 Order of Justice Perell dated July 20, 2015; Order of Chief Justice Hinkson dated July 23, 2015; Order of Justice Corriveau dated July 16, 2015.

13 Letter from Chief Justice Hinkson to Counsel dated June 24, 2015, sent on behalf of his Lordship and Justices Perell and Corriveau

22. On October 15, 2015, the Joint Committee served applications requesting that the Courts allocate approximately $205.4 million of the Excess Capital for the benefit of Class Members and Family Class Members and requesting that the remaining Excess Capital be retained within the Trust Fund, subject to further application by the Joint Committee. The Joint Committee further requested that the Courts declare that the amount of Excess Capital available for allocation is a lesser amount, namely, $206,920,000.

23. On January 29, 2016, the federal government served applications requesting that the Courts allocate all of the Excess Capital to it or, in the alternative, either limiting allocations made in favour of Class Members or requesting that the Excess Capital be retained in the Trust.

E. The Request to be Added as Parties

24. By letter dated March 7, 2016, the Courts directed the proposed intervenors to file written submissions addressing their proposed intervention and any supporting evidence by March 17, 2016.

25. In support of their request to be added as parties, the Steering Committee members served an affidavit of Dr. Jordan Feld sworn March 16, 2016, which appends a 39 page multi-part proposal entitled, "A National Initiative to Transform the Management of Hepatitis C in Canada" (the "**Proposal**").[14] As the title suggests, the Proposal is not specific to Class Members. Rather, it is aimed at eradicating Hepatitis C generally in Canada, which the Proposal describes as an enormous public health problem affecting 1-2% of the Canadian population.[15] The costs of the Proposal total $154,889,848.00.

26. While both the Feld Affidavit and Proposal baldly state that it will provide tangible benefits for Class Members, it is not apparent to the Joint Committee how any aspect of the Proposal will benefit Class Members. For example, the Proposal assumes that Class Members are not receiving optimal management and treatment and the Feld affidavit goes so far as to say that if the Proposal doesn't go forward "many Class Members will be deprived of the potential to access the most innovative, life-saving care and treatment."[16] There is no evidence whatsoever to support that assumption or statement. Indeed, the settlement pays for Class

---

14 Affidavit of Jordan Feld sworn March 16, 2016 (the "**Feld Affidavit**"), Exhibit "B"

15 Feld Affidavit, *ibid*, Exhibit B p. 6 para. 2

16 Feld Affidavit, *ibid.* para 28

Members to receive the latest and greatest costly treatments recommended by their treating physician if there is no other source of public or private (insurance) funding. Similarly, it is not apparent how investing millions of dollars in clinically testing a vaccine to *prevent* HCV infection in Canada and the rest of the world has any benefit to Class Members, who are or were already infected.

27. By email from the Court Monitor dated March 21, 2016, the Courts directed that they would not permit the filing of additional evidence or cross-examinations in response to the materials delivered by the proposed parties and further ordered any responding submissions to be filed within 10 days.[17]

PART III - ISSUES AND LAW

28. The Steering Committee members' requests to be added as party intervenors (in the case of Ontario and Quebec) and parties (in the case of British Columbia) for the purpose of seeking an allocation of the Excess Capital raise the following two issues:

> (a) Do the Courts have the jurisdiction to grant the Steering Committee members' request to be added as parties?
>
> (b) If the Courts do have such jurisdiction, does the Steering Committee members' request satisfy the required tests to be added as parties in all three provinces?

29. The answers to both questions is "no".

A. The Settlement Agreement Does Not Give the Courts the Jurisdiction to Grant the Steering Committee's Request

30. The Steering Committee members style their request as merely being added as a party pursuant to the Rules and Civil Code provisions relating to intervention in Ontario and Quebec and the Rule for adding parties in British Columbia.[18] In reality, they seek a substantive right that the Courts do not have the jurisdiction to grant. The Steering Committee's request requires the Courts to act outside the terms of the Settlement Agreement as amended by the Settlement Approval Orders or, put differently, to grant substantive rights to members of the Steering Committee that the Settlement Agreement does not provide. Neither the Settlement

---

17 Email from Luisa Ritacca dated March 21, 2016

18 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 13.01 [**Ontario *Rules***]; *Supreme Court Rules*, B.C. Reg. 168/2009, r. 6-2(7) [**B.C. *Rules***]; *New Code of Civil Procedure*, c. C-25.01, ss. 184-186. [**Quebec *Rules***]

Agreement, the Settlement Approval Orders, nor the Rules or Civil Code provisions grant the Courts this jurisdiction.

31. The Steering Committee members were not at the table when the Settlement Agreement was negotiated or amended, they did not execute it, nor did they give any consideration. Over fifteen years later, they cannot ask for a seat at the table, let alone be permitted to essentially oppose the allocation requests made by both the Joint Committee and a Party, the federal government, and request that the majority of the Excess Capital not be given to the Parties, but rather be given to them, complete strangers.

i. The Courts Do Not Have the Jurisdiction to Grant the Steering Committee Standing

32. The power of the Courts to allocate the Excess Capital does not derive from the inherent jurisdiction of the Courts nor the various Rules and Civil Code provisions. The Courts' jurisdiction is set out in Settlement Approval Orders, which amended the Settlement Agreement, and were made on consent of the Parties. It is trite law that settlement agreements and consent orders are to be treated as contracts,[19] and are therefore to be interpreted based on the language used by the parties in the context of the whole with regard to the surrounding circumstances.[20] As the Supreme Court has said, the "overriding concern is to determine 'the intent of the parties and the scope of their understanding'.[21] There is nothing in the Settlement Agreement or Settlement Approval Orders that contemplate non-parties to the settlement having the right to claim a share of the Excess Capital.

33. To the contrary, the Settlement Approval Orders expressly state that only a Party or the Joint Committee can request an allocation under the Allocation Provisions.[22] The Courts must reject an interpretation that would render these explicit terms ineffective.[23] The Steering

---

19 *Neinstein v. Marrero*, [2007] O.J. No. 1595 at para. 12 (S.C.J.) [***Neinstein (ONSC)***]; *Monarch Construction Ltd. v. Buildevco Ltd.*, [1998] O.J. No. 332 (C.A.); *McCowan v. McCowan*, [1995] O.J. No. 2245 at paras. 16, 18-19 (C.A.); *Shackleton v. Shackleton*, [1999] B.C.J. No. 2653 at para. 12 (C.A.); *Markus c. Reebok Canada Inc*, 2012 QCCS 3562 at para 21.

20 *Neinstein (ONSC), ibid.* at para. 12; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57 [***Sattva***]

21 *Sattva*, *ibid.* at para 47

22 Ontario Approval Order, para. 9(b); British Columbia Approval Order, para. 5(b); Quebec Approval Order, Annex F, para 1.

23 Geoff R. Hall, *Canadian Contractual Interpretation Law,* 2d ed. (Markham: LexisNexis Canada, 2012) at 15-16.

Committee members are not a "Party", which is a defined term that includes only the FPT Governments and the named plaintiffs to the various actions that were being settled. Paragraph 9(b)(ii) of the Ontario Settlement Approval Order/paragraph 5(b)(ii) of the British Columbia Settlement Approval Order and paragraph 1 p. 1(ii) of Annex F of the amended Quebec Settlement Approval Order do not aid the Steering Committee members,[24] as that provision merely expands the range of possibilities to which the Excess Capital can be put, not the range of persons or organizations that can request an allocation of the Excess Capital for which they provided no consideration. The Settlement Agreement, as amended by the consent Settlement Approval Orders, is a private contract between the Class Members and the FPT Governments. Accordingly, absent clear language to the contrary, there is no basis to conclude that the Parties contemplated allowing non-parties to that contract to make a claim on the settlement funds. Indeed, the factual matrix, including the background and genesis of the consent Settlement Approval Orders fully supports the interpretation that the Parties intended only a binary contest between Class Members and the FPT governments in the event Excess Capital should arise in the future.

34. The Courts' power, as set out at Article 10 of the Settlement Agreement, is to implement and enforce the provisions of the Settlement Agreement, as amended by the Settlement Approval Orders, not change them. Adding parties to the Settlement Agreement or granting strangers the right to seek an allocation of the Excess Capital would be a manifest change. Accordingly, the Courts cannot grant the relief sought by the Steering Committee.

ii. The Steering Committee Members Cannot Acquire Substantive Rights Through Procedural Rules

35. As with the Settlement Agreement and Settlement Approval Orders, there is nothing in the Rules or Civil Code provisions that permits the Courts to grant the Steering Committee members the substantive right to claim into the settlement funds. Only the Parties to the Settlement Agreement have an interest in those funds. The FPT Governments either paid their maximum liability under the contract into the Trust at the outset or had the opportunity to do so at any time thereafter. Class Members gave up their rights to proceed with their claims and seek greater compensation under the tort model and also bore the risk that the Trust would be insufficient to meet their needs and contractual entitlements. Therefore, only the Parties and the Joint Committee were given the right to seek any allocation of Excess Capital, should it arise, in

[24] Factum of the Intervenor, para. 69.

the Settlement Approval Orders they consented to. There is no basis for the Steering Committee to claim this substantive right.

36. The Steering Committee relies on the Ontario Superior Court decision of *Ontario (Attorney General) v. Ballard Estate* for the proposition that an added party intervenor is granted all of the same rights and obligations as the original parties to the proceeding.[25] However, as explained by Justice Cullity in *Del Grande (Litigation guardian of) v. Sebastian*, that proposition applies only to the *procedural* rights of the parties (such as rights to discovery, production of documents or cross-examination), not the parties' substantive rights:

> General statements have been made in the cases that, subject to any restrictions imposed in the order granting intervenor status, such a party has all the rights of the other parties: (see, for example, Attorney General of Ontario v. Estate of Harold Edwin Ballard [1994] O.J. No. 2487). The context in which such statements have been made indicate sufficiently in my opinion that the courts have been referring to procedural rights - such as rights to discovery, production of documents or cross-examination - exclusively. To permit an intervenor, who has no substantive legal rights - whether proprietary, contractual or other - to prevent the original parties from effectively agreeing with respect to the disposal or rearrangement of their own private substantive legal rights would, I believe, require a clear statement or implication in the rules.[26]

37. In *Del Grande*, an intervenor that had been added as a party sought to block a settlement agreement reached between the original parties to the litigation.[27] As a beneficiary of the plaintiff's will, the party intervenor had a contingent interest in the property that was the subject of the settlement.[28] Nonetheless, the Ontario Superior Court refused to block the settlement, holding that being added as a party intervenor did not convey a substantive right on the intervenor.[29] Accordingly, with only a contingent interest, the intervenor did not have a sufficient interest to block the settlement.[30]

---

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

26 [1999] O.J. No. 1879 at para. 15 (S.C.J.)

27 *Ibid.* at paras. 5-6.

28 *Ibid.* at paras. 3-6.

29 *Ibid.* at paras. 12-16.

30 *Ibid.* at paras. 13, 16.

38. Here, the Steering Committee members are in an inferior position. They have *no* substantive right to request a portion of the Excess Capital, and they cannot gain the necessary right by being added as parties.

B. The Steering Committee Does Not Satisfy the Test to be Added as a Party

39. Even if the Courts had jurisdiction to add the Steering Committee members as parties with rights under the Settlement Agreement, as amended by the Settlement Approval Orders, the Steering Committee cannot satisfy the tests to obtain such status in any of the provinces. Indeed, given that the Steering Committee must be granted the right to be added as a party in each of the jurisdictions, its failure to satisfy the test of any one jurisdiction is sufficient to dispose of the Steering Committee members' request.

i. Ontario

40. A party seeking to intervene as an added party in a private dispute has a much heavier burden than where litigation has a constitutional or public interest element.[31] Contrary to the Steering Committee members' suggestion,[32] they are seeking to intervene in what is a completely a private dispute, despite the public origin of the funds. Whatever issues of public interest may have been raised by the original class actions with respect to the screening of blood and blood products in Canada between January 1, 1986 and July 31, 1990, the only issue here is the allocation of the Excess Capital, in which only the FPT Governments and the Class Members have a direct legal interest. This case is nothing like *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* or *1162994 Ontario Inc. v. Bakker*, cited by the Steering Committee. Those cases involved issues of statutory interpretation that could have implications for other cases in the future.[33] In contrast, a decision on the allocation of the Excess Capital is only relevant to the FPT Governments and the Class Members, who have an interest in those funds and how they are allocated, recognized in the Settlement Approval Orders. Accordingly, the Steering Committee members have a heavy burden to satisfy the requirements for intervention.

---

31 *Authorson (Litigation guardian of) v. Canada (Attorney General)*, [2001] O.J. No. 2768 at paras. 8-9 (C.A.).

32 Factum of the Proposed Intervenor, para. 40.

33 *Larfarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, [2008] O.J. No. 1401 at paras. 9-11 (Div. Ct.); *1162994 Ontario Inc. v. Bakker*, [2004] O.J. No. 816 at paras. 2-3, 7 (C.A.). Indeed, the private scope of the Joint Committee's motion is precisely why the Steering Committee is seeking to intervene as an added party rather than as a friend of the court as was the case in the two decisions the Steering Committee relies on.

41. Under Rule 13.01 of the *Rules of Civil Procedure*, to be added as party intervenors, the Steering Committee members must demonstrate that they can claim one of the following:

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

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

(c) that there exists between it and one or more of the parties to the proceeding questions of law or fact in common with one or more of the questions in issue in the proceeding.[34]

42. As acknowledged by the Steering Committee, even where one of the above criteria is satisfied, Ontario Courts will also consider whether the intervention (1) will unduly delay or complicate the proceeding and (2) whether the intervenor has a useful addition or contribution to the resolution of the issues.[35]

43. As discussed below, the Steering Committee does not satisfy any of these requirements.

The Steering Committee Has No Interest in the Subject Matter

44. The Steering Committee's argument that its subject matter interest arises from its interest in the allocation of the Excess Capital is based on a misinterpretation of the meaning of "subject matter". As explained in *Finlayson v. GMAC Leasco Ltd.*, a case relied on by the Steering Committee, an interest in the *subject matter* of a proceeding is to be distinguished from an interest in the *outcome* of a proceeding.[36] The Steering Committee members are complete strangers to the Settlement Agreement, as amended by the Settlement Approval Orders. They therefore have absolutely no interest in the funds held in trust for Class Members or the Excess Capital.

45. Nor do the Steering Committee members have an interest in the *outcome* of the Joint Committee's application and the Federal Government's application. The Steering Committee members seek to bring a third and entirely different application so that they can urge the Courts

---

34 Ontario *Rules*, *supra* note 18 r. 13.01.

35 Factum of the Proposed Intervenor, paras. 36-37. See also, Ontario *Rules, ibid.* r. 13.01(2); *Fairview Donut Inc. v. TDL Group Corp.*, [2008] O.J. No. 4720 at paras. 5, 9-10 (S.C.J.) [***Fairview Donut (ONSC)***]

36 [2007] O.J. No. 597 at para. 27 (S.C.J.).

to award most of the Excess Capital to them instead. This is not an interest that satisfies rule 13.01(1)(a).

The Steering Committee Will Not be Adversely Affected by a Judgment

46. The Steering Committee members cannot be adversely affected by any decision made with respect to the allocation of the Excess Capital because they have no *a priori* interest or legal entitlement to those funds. A person cannot be worse off because they do not receive something that they never had any expectation or legal right to receive in the first place.[37] If the Steering Committee members receive no funding, they are in no different position than any other stranger to the Settlement Agreement who never had a right to the Excess Capital and therefore did not seek intervenor status to obtain those funds. As acknowledged by the Steering Committee, this requirement for intervenor status is not satisfied where the proposed intervenor would be no worse off than the general public.[38]

47. The Steering Committee members' position that the very existence of the Subcommittee depends on receiving funding from the Hepatitis C Settlement[39] is wholly unreasonable – the Steering Committee and its members never had any reason to expect they would receive such funding. Indeed, when the Settlement Agreement was first penned, the Parties expected that there would likely be a shortfall of capital, not an excess. To allow the Steering Committee's argument to prevail would mean that any person could start up an organization upon hearing of a settlement or possible *cy-pres* distribution, and then come to the courts seeking a portion of the money on the basis that without the money the organization would be forced to fold – all without having a legal interest in the money or any support from the parties that actually have a legal interest in that money. Such intermeddling in private disputes by the public cannot be permitted.

48. *Cy-pres* distributions of settlement funds are only considered at the request of the *parties* to the litigation, typically, where direct compensation to class members is not practicable.[40] It is

---

37 *Gould Outdoor Advertising (a Division of Jim Pattison Enterprises Ltd.) v. London (City)*, [1997] O.J. No. 725 at para. 21 (S.C.J.). See also, *Crown Trust Co. v. Rosenberg*, [1986] O.J. No. 2599 at paras. 26-27 (H.C.J.).

38 Factum of the Proposed Intervenor, para. 43. See also, *Andrews v. Ontario (Ministry of Transportation)*, 2012 ONSC 3146 at para. 5.

39 Factum of the Proposed Intervenor, para. 44.

40 *McSheffrey v. Ontario*, 2015 ONSC 4013 at para. 23; *Schimpf v. Samsung Electronics Co. Ltd.*, 2015 BCSC 2154 at para. 46; *Marcotte c. Banque de Montreal*, 2015 QCCS at para. 37.

improper for a potential *cy-pres* recipient to come to the courts seeking funding. As stated in an article, co-authored by Chief Justice Winkler,

> Finally, there is a growing concern about lobbying of counsel, and even courts, by hopeful beneficiaries of cy-pres settlements as this source of funds becomes better known. This must be forbidden.[41]

The Steering Committee Has No Common Question of Law or Fact

49. The Steering Committee's argument that it satisfies the third basis for intervention because it seeks to make submissions on the issue of the allocation of the Excess Capital is specious. As discussed above, the Steering Committee members have no proprietary or legal interest in the Excess Capital – they are complete strangers to the Settlement Agreement. Furthermore, the Steering Committee members do not have a legal relationship with any of the Parties or the Joint Committee. Accordingly, they cannot have any question of law or fact as between them and either the Joint Committee or the Federal Government. To conclude otherwise, would mean that any person with an intellectual interest in the subject matter of a proceeding could intervene *as a party*. This could not have been the intention of the *Rules of Civil Procedure*.

The Steering Committee Will Unduly Delay and Complicate the Proceeding

50. If Steering Committee members are permitted to participate as parties and request that the Courts allocate $155 million of the Excess Capital to fund their proposal, the magnitude of the request is such that Joint Committee (and possibly others) would need to carefully investigate and possibly seek advice on the complex, multi-part proposal, possibly file evidence in reply and likely cross-examine. The Joint Committee has not taken any such steps to date, given the Courts' direction set out in Ms. Ritacca's email dated March 21, 2016. Adding this time-consuming complexity at this stage threatens to derail the Joint Hearing of the Courts in June 2016, which has long been scheduled and long-awaited by Class Members, many of whom are older and some of whom are suffering the effects of liver cancer.

---

41 The Honourable Chief Justice K. Winkler & Sharon D. Matthews, "Caught in a Trap – Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings", online: The Court of Appeal for Ontario < http://www.ontariocourts.ca/coa/en/ps/speeches/caught.htm>

The Steering Committee Will Take the Proceeding Off Course

51. The Steering Committee's intervention would not result in a "useful contribution to the resolution of the motion,"[42] but would instead simply take it off course in a third direction. The *lis* between the Joint Committee and the Federal Government is not broadly the allocation of the Excess Capital, but rather a dispute as between the specific proposals for the use of that Excess Capital put forward by the Joint Committee and the Federal Government. The Steering Committee is not providing a unique perspective on these competing proposals. Instead, it is attempting to expand the *lis* to contemplate a completely new third proposal, in preference to the two presented by the Parties already before the Courts.

52. In essence, the Steering Committee is seeking to bring its own application to be considered with the applications of the Joint Committee and the Federal Government. The Steering Committee will not be making a useful contribution to the resolution of the application before the Courts – it will be complicating that resolution by creating a third application with its own issues and evidence to be considered.

ii. British Columbia

53. In British Columbia, the Steering Committee members have not applied to be intervenors. Instead, they seek to be added as a party pursuant to Rule 6-2(7)(c) of the *Supreme Court Rules,* which provides::

> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> …
>
> (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.[43]
>
> **[Emphasis added]**

---

42 *Fairview Donut (ONSC), supra* note 35 at para. 5.

43 British Columbia *Rules, supra* note 18, r. 6-2(7)(c).

The Steering Committee Does Not Have A Cause of Action

54. The rule is about adding parties in the traditional sense: plaintiffs, defendants, third parties. In order to be added as a party, the person to be added must have a cause of action against the other parties or be the subject of a cause of action asserted by the plaintiff.[44] That is obvious by the very nature of adding parties to an action: they must have or be the subject of a cause of action vis a vis the other parties. It is also obvious by the emphasized portion of Rule 6-2(7) above: it is not enough to have an interest in the subject matter of the proceeding or the relief claimed. That interest must be as between the person to be added and any party to the proceeding.

55. As held by Justice McLachlin (as she was then), in *Robson Bulldozing v. Royal Bank of Canada*, "[u]nless a cause of action is suggested, it cannot be said…that there is an issue between [the person and the parties] which is just and convenient to be tried with the others".[45]

56. The Steering Committee cannot satisfy the rule because it has no cause of action or legal claim to support its demand for the Excess Capital. As discussed above at paragraphs 44 to 49, the Steering Committee has absolutely no direct legal interest in either the underlying class actions or the Settlement Agreement and, critically important for Rule 6-2(7), it has no interest it can assert against the Parties to the Settlement Agreement.

57. The Steering Committee cannot invoke paragraph 5(b)(ii) of the British Columbia approval order to ground its interest in the allocation of the Excess Capital. As discussed above at paragraph 33, the request for an allocation whether pursuant to paragraph 5(b)(ii) or any of the other Allocation Provisions must come from the Parties or the Joint Committee. The Steering Committee cannot pull itself up by its bootstraps by asking to be added as a party pursuant to a provision that requires party status to invoke in the first place.

It is Not Just and Convenient to Add the Steering Committee Members as Parties

58. The existence of a legal claim between the party sought to be added and an existing party is a precondition to the court exercising its discretion to determine if it is just and convenient to add the party.[46]

---

44 *Holmes v. United Furniture Warehouse* 2009 BCSC 1805 at para. 7 and citing *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578; see also *The Owners, Strata Plan LMS 1564 v. Odyssey Tower Properties Ltd.*, 2009 BCSC 1024

45 (1985), 62 B.C.L.R. 267 at paras. 7, 8, 14 (S.C.) ***[Robson Bulldozing]***

59. Since that precondition cannot be met by the Steering Committee, the just and convenient considerations are not relevant. However, it is worth noting that this part of the rule repeats that the question or issue must be just and convenient to be determined "as between the person and the party." The just and convenient test recognizes that the parties to the original litigation, especially long-standing litigation, have an interest in controlling the development and the scope of the case which may be improperly interfered with by newcomers with new issues.

60. In the words of the British Columbia Court of Appeal in *Canada (Attorney General) v. Aluminum Co. of Canada Ltd.* dealing with the just and convenient part of the rule:

> There would have to be very good reason to impose on the back of the existing litigation a massive piece of litigation that will overwhelm the original litigation.[47]

61. The application to add a party was not allowed in that case. Nor was an application to intervene, based on similar considerations, namely that:

> Intervenors should not be permitted to take the litigation away from those directly affected by it. Parties to litigation should be allowed to define the issues and seek resolution of matters they determine appropriate to place in issue. They should not be compelled to deal with issues raised by others.[48]

62. As submitted in detail at paragraph 50 above, the Steering Committee's participation would unduly delay and complicate these proceedings and would unduly widen the issues, effectively hijacking the Joint Committee and Federal Government's right to propose how the Excess Capital should be allocated.[49]

iii. Quebec

63. Under Quebec's *New Code of Civil Procedure*, the Steering Committee members seek an aggressive voluntary intervention.[50] Section 185 provides that in its aggressive form, the third person seeks to be acknowledged as having, against the parties or one of them, a right which is in dispute. As in Ontario and British Columbia, the Steering Committee members lack the

---

46 *Lawrence Construction v. Fong*, 2001 BCSC 813 at paras. 19, 21 and *Robson Bulldozing*, ibid. at para 8.

47 [1987] B.C.J. No. 164 at pp. 7-8.. [***Aluminium Co. of Canada (BCCA)***] See also, *Gladue v. British Columbia (Attorney General)*, 2010 BCSC 788 at paras. 13-14. [***Gladue (BCSC)***].

48 *Aluminum Co. of Canada (BCCA), ibid.* at pp. 12, 13.

49 *Gladue (BCSC), supra* note 47 at paras. 13-14.

50 Quebec *Rules, supra* note 18, ss. 184-186 al. 2; Factum of the Proposed Intervenor, para. 60.

necessary legal interest required for such intervention.[51] In *Michaud c. Videotron*, the Quebec Court of Appeal made clear that for an aggressive intervention such as this one, the proposed intervenor must demonstrate a plausible legal interest that relates to the parties and the object of the dispute.[52] The Steering Committee members cannot meet this threshold as they have no legal interest in the settlement and no legal interest that relates to the Parties to the Settlement Agreement.

64. The Steering Committee effectively acknowledges this limitation, but asks the Quebec Superior Court to apply a different definition of "sufficient interest" on the basis that this case raises issues of public importance.[53] The argument is specious. As discussed above at paragraph 40, to the extent issues of public importance were raised in the underlying class actions, those issues are not present with respect to the allocation of the Excess Capital. Only the Steering Committee members want to import a Canadian public health issue into the Allocation Hearing. As appropriately decided by the Court of Appeal in *McKenzie c. Quebec (Procureur general)*, the courts should not allow such hijack of existing proceedings engaged and advanced between the parties.[54] Moreover, even if there were issues of public importance, such issues cannot give a stranger to a settlement agreement legal rights to claim a portion of the settlement funds.

65. Indeed, the more flexible approach adopted by the Quebec Courts does not apply to an aggressive intervention,[55] which is premised on an individual having a "right" in dispute with one of the parties.[56] The Steering Committee members rely on *Agence du revenu du Québec c Jennis*[57], *Institution royale pour l'avancement des sciences, de gouverneurs de L'Université McGill (Universite McGill) c. Commission de l'équite salariale* and *Soterm c. Terminaux portuaires du Québec*[58], but these

---

51 Quebec *Rules, ibid.* s. 85 of the New Code of Civil Procedure replacing s. 55 of the previous Code of Civil Procedure; *Michaud c. Videotron*, [2003] J.Q. no. 16363 (C.A.). [***Michaud (QCCA)***]

52 *Michaud (QCCA), ibid.* at para. 63. See also, *Association des réalisateurs de Radio-Canada c. Société Radio-Canada*, [2001] J.Q. no. 987 (C.A.).

53 Factum of the Proposed Intervenor, para. 65.

54 [1998] J.Q. no. 1133 at para. 23 (C.A.). [***McKenzie (QCCA)***]

55 *Institution royale pour l'avancement des sciences, de gouverneurs de L'Universite McGill (Universite McGill) c. Commission de l'equite salariale*, [2005] J.Q. no. 2217 at paras. 9-10 (S.C.) [***McGill (QCCS)***], Steering Committee's Brief of Authorities, Tab 20.

56 Quebec *Rules, supra* note 18, s. 184 al. 2.

57 2013 QCCA 1839.

58 [1993] R.D.J. 549 (Que. C.A.)

cases did not contemplate the aggressive type of intervention . In *Jennis,* the Quebec Superior Court decided that the third party did not have a sufficient interest as it lacked a legal interest in the proceedings as engaged and, therefore, dismissed the conservatory intervention.[59] In *McGill,* the court was also addressing an application for conservative, not aggressive intervention.[60] In that case, the Court found that the union had a sufficient interest for a conservatory intervention because of the numerous references by the opposing party in its proceeding to the role played by the union in the program which triggered the investigation by the Equity Commission.[61] In addition, that case raised issues of the interpretation of pay equity statutes. No such issue of statutory interpretation, the constitution, or the *Charter of Rights and Freedoms* is raised here.

66. In *Soterm,* on which the Steering Committee members rely heavily, the Court of Appeal clearly explains that the more recent flexible approach has developed in the cases of conservatory interventions.[62] It also worth noting that in *Procureur général du Québec c Corneau*, cited by the Steering Committee, the court dismissed the aggressive intervention for lack of sufficient interest.[63]

67. Finally, as noted above at paragraphs 50 to 52, the Steering Committee members' participation as parties submitting a complex, multi-part proposal involves consideration of new and additional issues that will serve to complicate and delay the proceedings. In *McKenzie*, the Quebec Court of Appeal noted that even where an individual has a right to intervene, such intervention is supposed to advance the litigation, not raise completely new issues outside the dispute between the parties.[64] Accordingly, the Steering Committee's proposed aggressive intervention is wholly improper and must be denied.

PART IV - ORDER REQUESTED

68. On the basis of the foregoing, the Joint Committee requests that the Courts refuse the Steering Committee members' request to be added as party intervenors/parties.

---

59 *Ibid.* at paras 14-15.

60 *McGill (QCCS)*, *supra* note 55.

61 *Ibid.* at paras 11-13.

62 Paras. 24-27.

63 2008 QCCS 1205 at paras. 37-51.

64 *McKenzie (QCCA), supra* note 54 at paras. 21-22.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of March, 2016.

Kathryn Podrebarac, Joint Committee Member

for Harvey Strosberg, Joint Committee Member

for: J.J. Camp, Joint Committee Member

for: Michel Savonitto, Joint Committee Member

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Andrews v. Ontario (Ministry of Transportation)*, 2012 ONSC 3146
2. *Association des realisateurs de Radio-Canada c. Societe Radio-Canada*, [2001] J.Q. no. 987 (C.A.)
3. *Authorson (Litigation guardian of) v. Canada (Attorney General)*, [2001] O.J. No. 2768 (C.A.)
4. *Canada (Attorney General) v. Aluminum Co. of Canada Ltd.*, [1987] B.C.J. No. 164 (C.A.)
5. *Crown Trust Co. v. Rosenberg*, [1986] O.J. No. 2599 (H.C.J.)
6. *Del Grande (Litigation guardian of) v. Sebastian*, [1999] O.J. No. 1879 (S.C.J.)
7. *Endean v. Canadian Red Cross Society*, 2014 BCSC 621
8. *Gould Outdoor Advertising (a Division of Jim Pattison Enterprises Ltd.) v. London (City)*, [1997] O.J. No. 725 (S.C.J.)
9. *Holmes v. United Furniture Warehouse* 2009 BCSC 1805
10. *Lawrence Construction v. Fong*, 2001 BCSC 813
11. *Marcotte c. Banque de Montreal* 2015 QCCS
12. *Markus c. Reebok Canada Inc*, 2012 QCCS 3562
13. *McCowan v. McCowan*, [1995] O.J. No. 2245 (C.A.)
14. *McKenzie c. Quebec (Procureur general)*, [1998] J.Q. no. 1133 (C.A.)
15. *McSheffrey v. Ontario*, 2015 ONSC 4013
16. *Michaud c. Videotron*, [2003] J.Q. no. 16363 (C.A.)
17. *Monarch Construction Ltd. v. Buildevco Ltd.*, [1998] O.J. No. 332 (C.A.)
18. *Neinstein v. Marrero*, [2007] O.J. No. 1595 (S.C.J.)
19. *Parsons v. Canadian Red Cross Society*, 2013 ONSC 7788
20. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53
21. *Schimpf v. Samsung Electronics Co. Ltd.*, 2015 BCSC 2154
22. *Shackleton v. Shackleton*, [1999] B.C.J. No. 2653 (C.A.)
23. *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578

24. *The Owners, Strata Plan LMS 1564 v. Odyssey Tower Properties Ltd.*, 2009 BCSC 1024

Secondary Sources

25. Hall, Geoff R., *Canadian Contractual Interpretation Law,* 2d ed. (Markham: LexisNexis Canada, 2012)

26. The Honourable Chief Justice K. Winkler & Sharon D. Matthews, "Caught in a Trap – Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings", online: The Court of Appeal for Ontario <http://www.ontariocourts.ca/coa/en/ps/speeches/caught.htm>

SCHEDULE "B"
RELEVANT STATUTES

ONTARIO

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

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.

(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.

BRITISH COLUMBIA

Supreme Court Civil Rules, B.C. Reg. 168/2009

Rule 6-2 — Change of Parties

Change of Party Status or Interest

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

Le nouveau Code de procedure civile, RLRQ, c. C-25.01

"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. 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. 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 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.

187. Le tiers qui entend intervenir à titre amical lors de l'instruction doit être autorisé par le tribunal. Il doit présenter un acte d'intervention exposant le but et les motifs de son intervention et le notifier aux parties au moins cinq jours avant la date fixée pour la présentation de sa demande au tribunal.

Le tribunal peut, après avoir entendu le tiers et les parties, autoriser l'intervention s'il l'estime opportune; il prend en compte l'importance des questions en litige, au regard notamment de l'intérêt public, et l'utilité de l'apport du tiers au débat."

PARSONS et al. KREPPNER et al.	vs. THE CANADIAN RED CROSS SOCIETY et al.	Court File No. 98-CV-141369 CP00 98-CV-146405
Plaintiffs	Defendants	

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT TORONTO

FACTUM/SUBMISSIONS OF THE JOINT COMMITTEE

(Responding to Request to be Added as a Party Intervenor or Party)

Podrebarac Barristers Professional Corporation
701 – 151 Bloor Street West
Toronto, ON M5S 1S4

Kathryn Podrebarac LSUC# 35640P
Tel: 416.348.7502
Fax: 416.348.7505

Sutts, Strosberg LLP
Lawyers
600 Westcourt Place
251 Goyeau Street
Windsor, ON N9A 6V4

Heather Rumble Peterson LSUC#: 24671V

Tel: 1.519.561.6216
Fax: 1.519.561.6203

Lawyers representing the Joint Committee in Ontario