





joint hearing of motions before the courts of British Columbia, Ontario, and Québec. The motions are scheduled to be concurrently heard in Toronto on June 20-23, 2016 with video links to the courtrooms in British Columbia, and Québec. The purpose of the motions is to determine, what if anything is to be done to actuarially unallocated funds held by the Trustee of the 1986-1990 Hepatitis C Settlement Agreement.

[2] The Settlement Agreement was the culmination of class actions commenced in British Columbia, Québec, and Ontario for transfused persons and persons with hemophilia who received blood or blood products between January 1, 1986 and July 1, 1990 and who were infected with Hepatitis C. The actions were brought against the Canadian Red Cross Society and the federal and provincial governments. The provinces not named as defendants became intervenors and parties to the Settlement Agreement. The Settlement Agreement, which was reached on June 15, 1998, was national in scope and was intended to be administered for over 80 years.

[3] The Settlement Agreement required court approval, and the court approvals addressed the matter of the treatment of any surplus, i.e., excess capital from the settlement funds that were to be made available for the benefit of the Class Members.

[4] For example, 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;

(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;

[5] A substantially similar consent Settlement Approval Order with a similar allocation provision was signed by the British Columbia Supreme Court on October 28, 1999. A substantially similar Settlement Approval Order with a similar allocation provision was issued by the Québec Superior Court on November 19, 1999, through the addition of Schedule F Modification Number 1 to its prior approval order dated September 21, 1999.

[6] On July 10, 2015, I ordered that as of December 31, 2013, the assets of the trust, which contains the funds to be used for the benefit of Class Members, exceeded the liabilities by an amount between \$236 million and \$257 million after taking into account funds to protect Class Members from major catastrophic adverse experiences.

[7] The Steering Committee seeks to intervene as an added party in the upcoming motion for the purpose of submitting that some of the actuarially unallocated funds should be allocated to the “National HCV Initiative” of which the Steering Committee is the organizing group or steering committee.

[8] The National HCV Initiative has two goals: (1) to improve diagnosis rates, increase treatment uptake, and optimize delivery of care to all Canadians living with HCV, i.e. not just Class Members but other Canadians, including underserved First Nations populations; and (2) to improve future prevention, care and treatment of Hepatitis C through research to eliminate the deadly disease from Canada. The estimated cost of the various projects to be advanced by the National HCV Initiative is approximately \$155 million. The Steering Committee submits that if it is denied the opportunity to participate in the allocation motion, the National HCV Initiative will not go forward.

[9] It is worth emphasizing that the National HCV Initiative is designed to benefit all those infected by the Hepatitis C virus regardless of the source or date of the infection, while the class action was about providing compensation for a particular group of those infected over a particular period of time because of the alleged wrongdoing of the Defendants.

[10] The Québec Government opposes the participation of the Steering Committee and submits that should a grant be made to the National HCV Initiative that would constitute an amendment to the Settlement Agreement that the court has no jurisdiction to make. The Joint Committee, which represents the Class Members, opposes the participation of the Steering Committee at the allocation motion. On the motion, the Joint Committee is seeking that the funds be used to increase the entitlements of individual Class Members. The Federal Government opposes the participation of the Steering Committee at the allocation motion. On the motion, the Federal Government seeks an order that the excess capital revert to Canada.

[11] The Steering Committee submits that it satisfies the rules for joinder as an intervenor or, with respect to British Columbia, as a party to the litigation. It submits that it has a real interest in the actuarially unallocated funds because its projects will benefit all Class Members, particularly Class Members who may be asymptomatic and unaware that they have been infected by the disease. It submits that the allocation motion is a public interest matter and its joinder is in the public interest and that its addition as a participant will not cause prejudice or delay. The Steering Committee argues that it will not be raising any new legal issue, the only legal issue being the proper allocation of the funds, which is a common issue for all participants to the motion.

[12] The other parties to the litigation and to the Settlement Agreement take no position with respect to the request of the Steering Committee.

[13] As I have already noted above, the Joint Committee, the Government of Québec, and the Federal Government oppose the participation of the Steering Committee. In arguments with which I generally agree, the Joint Committee and the Federal Government submit that the Settlement Agreement does not give the court the jurisdiction to allow the Steering Committee to participate because the Steering Committee is not a party to the contract that is the Settlement Agreement.

[14] The Joint Committee, the Government of Québec, and the Federal Government also argue that the court does not have the jurisdiction to make an allocation to the Steering Committee or to its National HCV Initiative. I do not necessarily agree with that submission, but given my opinion, explained below, that the court does not have the jurisdiction to grant the Steering Committee standing to participate in the allocation motion, it is not necessary to opine on whether an allocation might be made to the National HCV Initiative, apart from noting that such an allocation is not being requested and is being opposed by the genuine parties to the Settlement Agreement. It is also not necessary to opine on whether the Steering Committee satisfies the conventional test and rules of civil procedure about intervention in another's lawsuit. For present purposes, it is sufficient to say, as I shall explain below, that because the Steering Committee is neither a party to the litigation or to the Settlement Agreement, it has no substantive right or interest and the court cannot allow its participation at the motions scheduled for June, 2016.

[15] The Steering Committee is not a party to the contract that is the Settlement Agreement. The Steering Committee is not a party to the litigation, and it is not the appointed counsel for the parties. It is not a class member or a representative plaintiff. Legally speaking, the Steering Committee is a stranger to both the Settlement Agreement and to the litigation that spawned the Settlement Agreement.

[16] In seeking funds to be used for all Canadians infected or possibly infected by Hepatitis C the Steering Committee is actually an opponent and in conflict with the Class Members and with the Defendants who are under no obligation to share the actuarially unallocated funds with strangers to the contract or to the litigation that was settled by a negotiated contract.

[17] It should be noted that under the court approved Settlement Agreement, the request for an allocation of excess capital must come from a "Party" to the Agreement. The Settlement Approval Orders define a "Party" to mean "any one of the FPT Governments or the Class Action Plaintiffs." The Steering Committee is not a Party as defined by the Settlement Agreement; it did not give any consideration for the Settlement Agreement; it did not give up any rights, and it did not contribute any funds. As a matter of contract interpretation and contract law, a non-contracting party does not have the legal status to enforce the contract because of the absence of privity of contract.

[18] At this time, the Steering Committee is not even a potential third party beneficiary to the contract, because no party to the Settlement Agreement has applied on its behalf for an allocation of the excess capital for the benefit of the Steering Committee or its projects. Rather, the parties to the Settlement Agreement either take no position or oppose the participation of the Steering Committee and they oppose any allocation to the National HCV Initiative. There is no support

for the Steering Committee's proposed allocation. Had a request been made by a party on behalf of the Steering Committee, the status of the Steering Committee would have changed from a stranger to the contract to that of a potential third party beneficiary under the contract - but there still would be no basis for the participation of the Steering Committee at the allocation hearing.

[19] However commendable sharing any excess capital with all Canadians who suffer from Hepatitis C may be, the parties to the litigation, the plaintiffs and the defendants to the class actions, negotiated a settlement in their own self-interest and they are under no obligation to be altruistic in enforcing the bargain they reached. The Steering Committee has no substantive right to participate in what amounts to the administration of a contract that has been approved by the court. Its participation would create an opponent to the parties to the contract, and the Steering Committee's participation would delay and potentially disturb the commencement of the long-scheduled hearing of the allocation motion.

[20] For the above reasons, I dismiss the intervention request of the Steering Committee.

[21] If costs are requested, then submissions in writing may be made by those seeking costs within 20 days of the release of these Reasons for Decision followed by the Steering Committee's response within a further 20 days.



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Perell, J.

**CITATION:** Parsons v. The Canadian Red Cross Society, 2016 ONSC 2661  
**COURT FILE NO.:** 98-CV-141369CP  
**COURT FILE NO.:** 98-CV-146405CP  
**DATE:** 20160421

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

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

Plaintiffs

– and –

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

Defendants

– and –

HER MAJESTY THE QUEEN IN THE RIGHT OF THE  
PROVINCE OF ALBERTA, 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

**AND BETWEEN:**

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

Plaintiffs

– and –

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

Defendants

– and –

HER MAJESTY THE QUEEN IN THE RIGHT OF THE  
PROVINCE OF ALBERTA, HER MAJESTY THE QUEEN IN  
THE RIGHT OF THE PROVINCE OF SASKATCHEWAN, HER  
MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE

OF MANITOBA, HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NEW BRUNSWICK, HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF 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

**REASONS FOR DECISION**

**PERELL J.**

Released: April 21, 2016