



No. C965349  
Vancouver Registry

In the Supreme Court of British Columbia

Between

**Anita Endean, as representative plaintiff**

Applicant  
(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**

Respondents  
(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*, RSBC 1996, c 50

**APPLICATION RESPONSE  
(Late Claims Benefit Plan)**

Application response of: Attorney General of Canada, representing Her Majesty the Queen in Right of Canada (the "AGC")

THIS IS A RESPONSE TO the notice of application of the Applicant British Columbia Joint Committee member dated October 13, 2017.

**Part 1: ORDERS CONSENTED TO**

The AGC consents to proposed Late Claim Benefit Plan ("LCBP") and the granting of the orders set out in Part 1 of the notice of application with three exceptions set out below, which are opposed.

**Part 2: ORDERS OPPOSED**

The AGC application respondent opposes the proposed LCBP and the granting of the orders set out in Part 1 of the notice of application to the extent that:

- (i) the LCBP creates a separate termination provision that violates the overriding termination provision governing the settlement;
- (ii) the LCBP contains an amendment provision that fails to account for the procedural rights of the AGC with respect to the administration of the settlement; and
- (iii) the LCBP fails to include any ultimate deadline for initiating late claims.

More specifically, the AGC seeks that the orders set out in Part 1 of the notice of application be amended by:

- a. Removing Articles 2.05 and 9.03 from the LCBP proposed by the Joint Committee;
- b. Declaring that the termination and amendment provisions contained in the Settlement Agreement and Funding Agreement govern the LCBP and the funds dedicated to the LCBP;
- c. Amending the LCBP proposed by the Joint Committee to incorporate a first claims deadline of four years from the date of the Order approving the amended LCBP.

The AGC also seeks such further and other relief as counsel may request and this Honourable Court may direct.

### **Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The AGC application respondent takes no position on the granting of the orders set out in paragraphs

### **Part 4: FACTUAL BASIS**

#### *The 1986-1990 Hepatitis C Settlement*

2. In the fall of 1999, the Superior Courts in Ontario, British Columbia and Quebec ("the Courts") approved the Settlement Agreement reached by the parties in the class actions brought 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.<sup>1</sup>

3. The Settlement Agreement provided for the creation of a trust (the "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. Canada was to pay 8/11<sup>ths</sup> of this amount and the PT governments were to pay 3/11<sup>ths</sup>.<sup>2</sup>
4. Canada satisfied its obligation up-front, by transferring its full share in the amount of \$877,818,181 to the Trust in 1999. The FPT governments also agreed to forego the collection of taxes on the investment income earned by the Trust.<sup>3</sup> On the Federal level, this commitment was incorporated into the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), by Parliament in s. 81(1)(g.3):

There shall not be included in computing the income of a taxpayer for a taxation year...

(g.3) the amount that, but for this paragraph, would be the income of the taxpayer for the year if

(i) the taxpayer is the trust established under

(A) the 1986-1990 Hepatitis C Settlement Agreement entered into by Her Majesty in right of

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<sup>1</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Sup. Ct.); *Parsons v. Canadian Red Cross Society*, Judgment dated October 22, 1999, (entered on December 14, 1999), per Winkler J.; *Endean v. Canadian Red Cross Society*, [1999] B.C.J. No. 2180 (S.C.); *Endean v. Canadian Red Cross Society*, Judgment dated October 28, 1999 (entered on November 12, 1999) per Smith J.; *Honhon c. Canada (Procureur général)*, [1999] J.Q. no. 4370 (C.S.); *Honhon c. Canada (Procureur général)*, 1999 CarswellQue 4293, REJB 1999-15380 (C.S.); *Page c. Canada (Procureur général)*, [1999] J.Q. no. 4415 (CS); *Page c. Canada (Procureur général)*, [1999] J.Q. No. 5325 (CS).

<sup>2</sup> Settlement Agreement: Article 4.01 and Schedule D Funding Agreement, Articles 1.01 and 4.02.

<sup>3</sup> Settlement Agreement: Article 4.01 and Schedule D Funding Agreement, Article 3.02.

Canada and Her Majesty in right of each of the provinces...

and

(ii) the only contributions made to the taxpayer before the end of the year are those provided for under the relevant Agreement described in subparagraph (i)...

5. The Trust Fund, and the tax-free investment income it generates, are used to pay compensation amounts to Class Members and their dependents, in accordance with the Transfused HCV Plan and Hemophiliac HCV Plan (the "Plans") which are incorporated into the Settlement Agreement.<sup>4</sup>

#### *The Allocation Orders*

6. The Settlement Agreement provides that once the Plans have been fully administered and all obligations satisfied, any assets which remain in the Trust are to be the sole property of the FPT governments.<sup>5</sup>
7. In the interim, the Courts perform triennial reviews to determine the sufficiency of the Trust and the existence of any actuarially unallocated assets.<sup>6</sup> In the event of such assets being identified, the plaintiffs, the FPT governments or the Joint Committee may apply to the Courts to have the amount allocated to the Class Members or to the FPT Governments. The clause permitting these allocations ("the Allocation Clause") is contained for British Columbia in the Judgment dated October 28, 1999 per Smith J. at para. 5(b); for Ontario in the Judgment dated

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<sup>4</sup> Settlement Agreement, Schedules A and B.

<sup>5</sup> Settlement Agreement: Article 10.01 (1) (o) and Article 12.03(3); and Schedule D Funding Agreement, Article 10.02(2).

<sup>6</sup> Settlement Agreement, Article 10.01(1)(i).

October 22, 1999, per Winkler J. (as he then was) at para. 9(b); and for Québec in Section 10.01(1) (p.1) of the Settlement Agreement, as set out in the Judgment of Morneau J. dated November 19, 1999 at paragraph 16 and Annexe F.<sup>7</sup>

8. The Courts made orders in July 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”).<sup>8</sup> The Courts revised this amount to \$206,920,000 in August 2016.<sup>9</sup>
9. In August 2016, the Courts denied Canada’s request for payment of the actuarially unallocated assets. The Courts granted the bulk of the Joint Committee’s proposals for allocating the assets for benefits for Class Members. As part of the Joint Committee’s proposal, the Court ordered that a discrete HCV Late Claims Benefit Plan funded from the excess capital in the amount of \$32,450,000 (plus administrative costs of \$51,000 and required capital) be established for the benefit of Class Members who did not apply prior to June 30, 2010. The Courts stipulated that the late claims plan should provide benefits that are not better than or different from the benefits provided to other Class Members.<sup>10</sup>

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<sup>7</sup> *Endean v. Canadian Red Cross Society*, Judgment dated October 28, 1999, per Smith J., at para. 5(b); *Parsons v. Canadian Red Cross Society*, Judgment dated October 22, 1999, per Winkler J., at para.9(b); Settlement Agreement, article 10.01(1) p.1 [for Québec]; and *Honhon v. The Attorney General of Canada*, 1999 CarswellQue 4293, REJB 1999-15380 (CS) at para. 16 and Appendix F, para. 1, subs. P.1.

<sup>8</sup> *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, C.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

<sup>9</sup> *Endean v. Canadian Red Cross Society*, Order dated August 16, 2016, per Hinkson C.J. at para. 1; *Parsons v. Canadian Red Cross Society*, Order dated August 15, 2016, per Perell J. at para. 1. *Honhon c. Canada (Procureur général)*, 2016 QCCS 3884, at para. 31.

<sup>10</sup> *Endean v. Canadian Red Cross Society*, Order dated August 16, 2016, per Hinkson C.J. at para. 5; *Parsons v. Canadian Red Cross Society*, Order dated August 15, 2016, per Perell J. at para. 5. *Honhon c. Canada (Procureur general)*, Order dated February 15, 2017 at para 5.

10. The Courts further ordered that the Joint Committee and Canada discuss any changes that may be required to give effect to this Order. The Joint Committee and Canada consulted over the proposed LCBP in the summer of 2017 but were unable to come to a final agreement because the Joint Committee proposed a LCBP that was a mixture of the terms of the Settlement Agreement, the Transfused HCV Plan and the Hemophiliac HCV Plan. Mainly due to this approach, the parties could not agree on termination clause, the amendment provision and the lack of a final deadline for late claimants.

## **Part 5: LEGAL BASIS**

### **The Termination Provision**

11. The LCBP should not contain a separate termination provision. Rather, it should be governed by the termination provisions agreed to by the parties in the Settlement Agreement and the Funding Agreement.
12. The LCBP proposed by the Joint Committee contains a new termination provision at s. 2.05:

#### **2.05 Termination**

- (1) This HCV Late Claims Benefit Plan will continue in full force and effect until the date on which the Courts have declared this HCV Late Claims Benefit Plan to be terminated.
- (2) The Joint Committee may apply for a declaration pursuant to Section 2.05(1).
- (3) If this HCV Late Claims Benefit Plan is declared terminated by the Courts, the Courts shall allocate any assets remaining in the HCV Late Claims Account as they determine to:

- (a) Approved Late Claim Class Members;
- (b) Approved Transfused/Hemophiliac Plan Class Members;  
and/or
- (c) in such other manner as they direct.

13. This proposed termination provision contradicts the pre-existing termination provision set out in the Settlement Agreement and the Funding Agreement. Section 12.03 of the Settlement Agreement provides:

**12.03 Termination**

- (1) This Agreement will continue in full force and effect until the date on which the Courts have declared this Agreement to be terminated.
- (2) Any of the FPT Governments or the Joint Committee may apply for a declaration pursuant to Section 12.03(1).
- (3) After this agreement is terminated by the Courts, any assets remaining in the Trust will be the sole property of and transferred to the FPT Governments.

14. The Funding Agreement sets up the Trust Fund that holds the Settlement money. It also contains a termination clause at Article 10.02:

**10.02 Termination**

- (1) This Agreement and the Trust will terminate on the date on which the Courts declare the Settlement Agreement to be terminated pursuant to the provisions of the Settlement Agreement.
- (2) As soon as practicable after the termination of the Trust, the Trustee will transfer the assets in the Trust Fund to the FPT Governments in accordance with this provision. The amount to be paid to each FPT Government will be determined as follows...

15. Neither the Transfused HCV Plan nor the Hemophiliac HCV Plan have their own termination provision. They are governed by the main Settlement Agreement.

16. The allocation orders made by the Courts in August 2016 do not remove the LCBP or the funds set aside for the LCBP from the umbrella of the Settlement Agreement. Indeed, the allocation orders were made under the authority of the allocation provision in the Settlement Agreement. The LCBP is a creature of the Settlement Agreement and must conform to its overarching structure.
17. There are also practical reasons for ensuring that the LCBP is kept within the Settlement Agreement. This arrangement saves administrative expenses. More importantly, it allows the LCBP and the funds set aside for the LCBP to enjoy the tax protection covering the Settlement Agreement. By statute, the 1986-1990 Hepatitis C Settlement Agreement does not pay tax on the income of the Trust Fund, thus saving the Trust millions of dollars each year. The LCBP cannot benefit from being part of the Settlement Agreement and, at the same time, remove itself from the Agreement's structure and requirements.
18. The termination provisions in the Settlement Agreement and Funding Agreement were agreed to by the parties. As the Courts have noted on several occasions, the Courts do not have the power to re-write these contractual terms.<sup>11</sup> As Perell J. put it in his reasons on the allocation motions, "the court cannot use the excess capital allocation provision to change the Settlement Agreement's operative provisions."<sup>12</sup>
19. The Joint Committee argues that the new termination clause is required because the Courts allocated the LCBP funds "in favour of Late Claim Class Members and

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<sup>11</sup> *Parson v. Red Cross Society*, 2013 ONSC 7788 at para. 90; *Endean v. Red Cross Society*, 2014 BCSC 621 at para. 12; and *Honhon v. Canada*, 2014 QCCS 2032 at para. 16.

<sup>12</sup> *Parsons v. Canadian Red Cross Society*, 2016 ONSC 4809 at para. 193.



rejected Canada's competing application for those same funds. None of the governments has an interest in or obligation to the HCV Late Claims Benefit Plan or the HCV Late Claims Account."<sup>13</sup> This argument misconstrues the architecture of the Settlement Agreement in general and the role of the LCBP in particular.

20. The Settlement Agreement is the touchstone for the rights of the late claimants. As Hinkson C.J. said about the late claimants, "These individuals are and always were Class Members."<sup>14</sup> The Settlement Agreement is, of course, binding on all Class Members.<sup>15</sup>
21. The Settlement Agreement does not provide individual claimants with ownership of any partition, division or distribution of the Trust's assets. Rather, the Settlement makes those funds available for specific purposes captured in the benefits plans (originally the Transfused HCV Plan and Hemophiliac HCV Plan, and now also the LCBP). This is clear from the terms of the Funding Agreement. Section 5.03 provides that Class Members do not have legal entitlements to the Trust funds:

The legal ownership of the assets of the Trust and the right to conduct the business of the Trust will be, subject to specific limitations contained herein, vested exclusively in the Trustee, and the Class Members and other beneficiaries of the Trust have no right to compel or call for any partition, division or distribution of any of the assets of the Trust except in an action to enforce the provisions of the Settlement Agreement. No Class Member or any other beneficiary of the Trust will have or is deemed to have any right of ownership in any of the assets of the Trust. [Emphasis added.]

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<sup>13</sup> Notice of Motion (HCV Late Claims Benefits Plan, Notice Plan, Late Claims Referees & Administrative Budget) dated Oct. 13, 2017 at page 7, para. 12.

<sup>14</sup> *Endean v. The Canadian Red Cross Society*, 2016 BCSC 1506 at para. 48.

<sup>15</sup> Settlement Agreement, Clause 2.02.

22. Absent a specified head of compensation, no Class Member has a right to the Trust money at large. The Funding Agreement provides that the Trustee will pay out of the Trust disbursements solely to pay for the expenses of the Transfused HCV Plan and Hemophiliac HCV Plan, the Program for HIV Secondarily Infected-Persons, and other related expenses.<sup>16</sup> The LCBP must fit into this architecture. It is another Plan to be funded by the Trust under Article 6 of the Funding Agreement. As such, it creates a system of specific benefits/compensation payments – but it does not create a vested right of ownership. As a result, if the funds allocated to the LCBP are not all exhausted when the Courts terminate the Settlement Agreement, these funds are not the property of the Class members, but remain within the body of the Trust.
23. In the event that unused funds from the LCBP are found by the Courts to be “actuarially unallocated” at some point in the future, then the Courts may use their unfettered discretion under the Allocation Clause to distribute the funds on an interim basis. If the Courts do not do this, then the Settlement’s termination provision would apply.
24. Similarly, the Joint Committee seeks to establish separate accounts within the Trust (in the application for the implementation of the 2016 Allocation Orders). Although these separate accounts may have a role for administrative, monitoring and accounting purposes, they must not be used to circumvent a provision of the Settlement Agreement.

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<sup>16</sup> Funding Agreement, Article 6.

25. This approach ensures that the LCBP does not provide benefits different than the benefits under the original Settlement Agreement and Plans. Under the Settlement Agreement, the Transfused HCV Plan and Hemophiliac HCV Plan, Class Members are entitled only to the benefits set out in the Plans. They do not have any guaranteed right to interim allocations and they have no right to a final residue.<sup>17</sup> The same rules should apply to the LCBP. This is the best way to ensure that the LCBP harmonizes with the contractual intention of the parties in initially forming the Settlement Agreement.

### **The Amendment Provision**

26. The same reasoning applies to the new amendment provision in the proposed LCBP. This new amendment provision is unacceptable because it contradicts the pre-existing amendment provisions in the Settlement Agreement and Funding Agreement that the parties agreed to in 1999.
27. The new amendment provision in the proposed LCBP is at Article 9.03 and provides:

#### **9.03 Amendment of the HCV Late Claims Benefit Plan**

This HCV Late Claims Benefit Plan may be amended by order of the Courts on application of the Joint Committee.

28. This contradicts the amending provision contained in Article 10.01(m) of the Settlement Agreement. Article 10 sets out the supervising role of the Courts, and sub-article 10.01(1)(m) provides that the Courts will:

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<sup>17</sup> *Parsons v. Canadian Red Cross Society*, 2016 ONSC 4809 at para. 183.

(m) approve any amendment or supplement to, or restatement of, this Agreement agreed to in writing by the FPT Governments and the Joint Committee.

29. Article 1.01 clarifies the above provision by defining “the Agreement” to include “its recitals and Schedules [i.e. the Plans], as amended, supplemented or restated from time to time.” This definition now includes the LCBP, which supplements the Agreement and the original benefits Plans.

30. Similarly, Article 10.01 of the Funding Agreement provides:

**10.01 Amendment**

No Amendment of this Agreement will be valid or binding unless set forth in writing and duly executed by the FPT Governments and the Joint Committee and approved by the Courts.

31. The amendment clause in the proposed LCBP excludes the FPT Governments from participating in any negotiations to amend the LCBP. This places the Late Claimants in a better position than the original Class Members.

32. The Joint Committee argues that Canada has no obligations or rights under the LCBP. This misses the point. Under the original Settlement, Canada has no remaining obligations either.<sup>18</sup> And Canada’s “rights” under the original Settlement are of a contingent nature, such as to a right to any residue in the Trust (if there is one) and a right to apply to the Courts for interim allocations of unallocated surplus (without any guarantee of receiving such an allocation). Therefore, it is not Canada’s rights or obligations which determine its role in the Settlement. Rather, Canada’s role is a matter of the contractual intention of the parties.

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<sup>18</sup> Articles 1.10, 4.03 of the Settlement Agreement and Article 3.03 of the Funding Agreement.

33. The LCBP is a creature of the Settlement and must be bound by its contractual terms. Being a part of the Settlement permits the LCBP to benefit from the special tax protections that the Settlement enjoys under the *Income Tax Act*. One of the contractual terms of this overarching Settlement is the requirement that Canada and the Provincial/Territorial Governments approve of any future amendments to the Settlement and its Plans. These Plans now include the LCBP.

#### **A Final Deadline for the LCBP**

34. The LCBP proposed by the Joint Committee fails to set any final deadline for late claimants. The absence of a final deadline creates a benefits scheme which is different from and better than the benefits provided under the original Settlement Agreement. It also denies the Trust Fund a measure of actuarial certainty since it makes it harder to determine the cohort of late claimants. And, the generous notice plan proposed by the Joint Committee has less utility if it does not work in conjunction with a fixed deadline for these late claims.
35. The original Settlement Agreement set out "first claim deadlines" in the Transfused HCV Plan (at Article 3.08) and the Hemophiliac HCV Plan (at Article 3.07). These deadlines provided:

Except as otherwise expressly provided in this Agreement, no person may make a Claim for the first time under this Plan after 30 June 2010 unless:

- (a) the Claim is made within one year of the person attaining his or her age of majority; or
- (b) the Claim is made within the three year period following the date upon which the person first learned of his or her infection with

HCV and the Court having jurisdiction over the person grants leave to the person to apply for compensation.

36. There is no similar provision in the LCBP.
37. On its face, the lack of a deadline provides a procedural benefit to the late claimants that was not enjoyed by the claimants under the original Plans: the late claimants face no time restrictions in applying for compensation.
38. A claims deadline is a normal component of class action settlements, even where there is a cap on the defendant's liability. Deadlines serve to promote the judicial goals of finality and certainty. The British Columbia Supreme Court recently discussed the importance of deadlines in *Richard v. British Columbia* (2015), which was an application by class counsel to extend a deadline in a class action settlement by 5-10 years.<sup>19</sup> In denying this extraordinary request, Fenlon J. noted that perfection is not a workable standard for class actions, even when the class members are vulnerable:

By definition, a claims deadline means that some class members may fall on the exclusionary side of the line. The claimants in this case are extremely vulnerable; those who have suffered a wrong are most deserving of recompense. But that is generally so in a class action involving personal injury. Those infected with Hepatitis or HIV through blood transfusions, or those whose health has been significantly compromised by defective devices are also worthy of recompense. Yet in those cases, as here, all class members are bound by the claims deadline agreed to in a settlement of their class action and some are thereby excluded.<sup>20</sup>

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<sup>19</sup> *Richard v. British Columbia*, 2015 BCSC 265.

<sup>20</sup> *Ibid.* at para. 28 [emphasis added].

39. The Courts in this case were alive to this concern when ordering the allocation of funds for a late claims plan. Perell J. suggested in his reasons dated August 15, 2016 that a late claims plan should include a new claims deadline:

The discrete plan cannot provide better or different benefits than provided other Class Members, and the discrete plan might include a new notice program and a new deadline for making claims for compensation.<sup>21</sup>

40. The failure to provide a deadline in the LCBP will impair the Courts' ability to assess the financial sufficiency of the funds set aside for late claimants (as required by LCBP Article 7.03) and whether the holdback (set out in LCBP Article 7.03A) should be lifted. The true state of the LCBP fund cannot be ascertained while there is still an indefinite number of potential claimants at large for an indefinite period of time.
41. Finally, the lack of a deadline calls into question the necessity of the notice plan recommended by the Joint Committee (\$987,400 plus taxes together with a post-campaign notice program budgeted at \$37,000 plus taxes per year for 2 years). Any notice plan should work in tandem with a deadline in order to motivate class members to take advantage of the LCBP. This is especially true with an aggressive and expensive notice plan like the one proposed by the Joint Committee, which is estimated to reach over 80% of Canadians aged 27+ at least 8 times and which will reach 90% of the targeted class members.<sup>22</sup>

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<sup>21</sup> *Parsons v. Canadian Red Cross Society*, 2016 ONSC 4809 at para. 190.

<sup>22</sup> Motion Record of the Joint Committee for HCV Late Claims Benefit Plan, Notice Plan, Late Claims Referees & Administration Budget, Affidavit of Patrick Gervais affirmed Oct. 11, 2017 at page 268.

42. In her affidavit sworn October 13, 2017, Heather Rumble Peterson states that “While it is hoped that the proposed notice plan will be effective, it is a virtual certainty that there will always be late Class Members if a new deadline is imposed.”<sup>23</sup> However, as Fenlon J. held in *Richard*, by definition, a claims deadline means that some class members may fall on the exclusionary side of the line. Perfection is not an attainable standard. And in this case, the time limits are already liberal: the Settlement is 18 years old and over 7 years have transpired since the first claims deadline ended. Imposing a time limit on the LCBP that will expire several years from now is not unreasonable or ungenerous.
43. Given the three year notice program proposed by the Joint Committee, the Attorney General submits that a deadline of four years following the Court approval of the LCBP serves the judicial requirements of fairness and finality.

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<sup>23</sup> Motion Record of the Joint Committee for HCV Late Claims Benefit Plan, Notice Plan, Late Claims Referees & Administration Budget, Affidavit of Heather Rumble Peterson dated October 13, 2017 at pages 151-152, para. 25.




**Part 6: MATERIAL TO BE RELIED ON**

44. The pleading and other court documents filed herein.

- The application respondent has filed in this proceeding a document that contains the application respondent's address for service.
- The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Dated: November 8, 2017

  
\_\_\_\_\_  
Signature of  
 application respondent  
 lawyer for application respondent

**ATTORNEY GENERAL OF CANADA**

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