

*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

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**NOTICE OF APPLICATION  
(Implementation of 2016 Allocation Orders)**

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**Name of Applicant: British Columbia Joint Committee Member**

TO: The Attorney General of Canada

AND TO: Her Majesty the Queen in Right of the Province of British Columbia

AND TO: Fund Counsel

TAKE NOTICE that an application will be made by the British Columbia Joint Committee Member to the Honourable Chief Justice Hinkson on November 22 and 23, 2017 in Toronto, Ontario at a place and time be provided for the order(s) set out in Part 1 below.

## **PART 1: ORDERS SOUGHT**

1. An order allocating \$7,411,000 of Excess Capital for required capital for the HCV Late Claims Benefit Plan, referenced in paragraph 5 of the 2016 Allocation Orders.
2. An order allocating \$12,199,000 of Excess Capital for required capital for HCV Special Distribution Benefits, referenced in paragraph 6 the 2016 Allocation Orders.
3. An order permitting:
  - (a) Claimant 2213; and
  - (b) all other alive Primarily-Infected Hemophiliacs who are Approved HCV Infected Persons co-infected with HIV and who made an election under Section 4.08(2) of the Hemophiliac HCV Plan, to re-elect and receive all compensation and benefits to which they would be entitled under the Settlement Agreement as amended by the 1999 Approval Orders, the 2016 Allocation Orders and any future orders, as if that election had not made, provided that the amount they received under the election or related Special Distribution Benefit is indexed to the date of their re-election in accordance with Section 7.02 and deducted from the compensation to which they are entitled as a result of their re-election.
4. An order allocating \$4,600,000 of Excess Capital, plus required capital of \$500,000, as at December 31, 2013, to fund re-elections made pursuant to paragraph 3.
5. An order directing the Administrator to pay:
  - (a) Claimant 7438; and
  - (b) all other alive permanently disabled Approved Dependants of a deceased HCV Infected Person, who receive or received compensation for loss of

services in the home, compensation for loss of services for the dependant's lifetime, rather than it ceasing at the actuarially calculated notional life expectancy of the deceased HCV Infected Person.

6. An order allocating \$3,900,000 of Excess Capital, plus required capital of \$400,000, as at December 31, 2013, to fund the continuation of loss of services payments made pursuant to paragraph 5.
7. An order directing the establishment of the following three separate accounts of the Trust Fund, as at December 31, 2013, to be held, invested and administered by the Trustee:
  - (a) the HCV Late Claims Account, for the payment of compensation under the HCV Late Claims Benefit Plan, the administrative costs thereof, and the HCV Late Claims Notice Campaign.
  - (b) the HCV Special Distribution Benefits Account, for the payment of Special Distribution Benefits ordered in:
    - (i) paragraph 6 of the 2016 Allocation Orders and the administrative costs thereof; and
    - (ii) paragraphs 3 to 6 above.
  - (c) the HCV Regular Benefits Account, for the payment of compensation under the Transfused HCV Plan and the Hemophiliac HCV Plan and the administrative costs thereof.
8. An order directing that the value of the HCV Late Claims Account as at December 31, 2016 shall be comprised of Excess Capital in the amount of:
  - (a) \$32,450,000 plus administrative costs of \$51,000, as ordered in paragraph 5 of the 2016 Allocation Orders;
  - (b) the required capital ordered in paragraph 1 above; and

- (c) the amount of interest earned on the sum of 8(a) and 8(b), from January 1, 2014 to December 31, 2016, by applying the annual rate of return for the invested assets of the Trust Fund, net of investment expenses.
9. An order directing that the value of the HCV Special Distribution Benefits Account as at December 31, 2016, shall be comprised of Excess Capital in the amount of:
- (a) \$130,970,000 plus related administrative costs of \$61,000, as ordered in paragraph 6 of the 2016 Allocation Orders;
  - (b) the required capital ordered in paragraph 2 above;
  - (c) the amount of Excess Capital ordered in paragraph 4 above; (allocation for hemophiliac re-election, plus required capital on same);
  - (d) the amount of Excess Capital ordered in paragraph 6 above (allocation for permanently disabled dependants, plus required capital on same); and
  - (e) the amount of interest earned on the sum of 9(a), 9(b), 9(c) and 9(d), from January 1, 2014 to December 31, 2016, by applying the annual rate of return for the invested assets of the Trust Fund, net of investment expenses.
10. An order directing that the value of the HCV Regular Benefits Account as at December 31, 2016 shall be comprised of the total amount of the Trust Fund, minus:
- (a) the value of the HCV Late Claims Account as at December 31, 2016 calculated in paragraph 8 above; and
  - (b) the value of the HCV Special Distribution Benefits Account as at December 31, 2016 calculated in paragraph 9 above.

11. An order directing that from December 31, 2016 onward, the HCV Late Claims Account, the HCV Special Distribution Benefits Account and the Regular Benefits Account shall be updated monthly as follows:
  - (a) the monthly rate of investment return on the total invested assets, net of investment fees, will be calculated; and
  - (b) each account balance will then be reduced by the payments (benefits and expenses) out of the account and interest added at the monthly investment return rate.
12. An order declaring that each of the HCV Late Claims Account, the HCV Special Distribution Benefits Account and the Regular Benefits Account include:
  - (a) any investments in which such assets may from time to time be invested;
  - (b) any proceeds of disposition of any investments; and
  - (c) all income, interest, profit, gains and accretions and additional assets, rights and benefits of any kind or nature whatsoever arising, directly or indirectly, from or in connection with or accruing to any of the foregoing, but excluding any amounts which have been paid or disbursed therefrom.
13. An order declaring that for the purposes of implementing, administering, monitoring and supervising:
  - (a) the payments to be made pursuant to the 2016 Allocation Orders and this Order; and
  - (b) the HCV Late Claims Account, the HCV Special Distribution Benefits Account and the Regular Benefits Account, the Administrator, Trustee, Fund Counsel, Auditors, Joint Committee, Investment Advisors, Referees, Arbitrators, Monitor, Referees and Courts shall perform the role and have the duties and responsibilities provided for in the Settlement Agreement, with all the necessary adaptations, modifications and powers as may be required to do so, and as provided for in this order, the order implementing

the HCV Late Claims Benefit Plan, the HCV Late Claims Benefit Plan and the court approved protocols.

14. An order declaring that the terms of the order shall not be effective unless and until they are approved by the Superior Court of Quebec and the Ontario Superior Court of Justice.
15. Such further and other relief as counsel may request and this Honourable Court may permit.

## **PART 2: FACTUAL BASIS**

### ***Background***

16. In their Orders/Judgment dated August 15, 2016, August 16, 2016 and February 15, 2017 (the “**2016 Allocation Orders**”), the supervising Courts restated the actuarially unallocated assets of the 1986-1990 Hepatitis C Settlement Agreement Trust Fund to be \$206,920,000 as at December 31, 2013 (the “**2013 Excess Capital**”).

Order of Chief Justice Hinkson made August 16, 2016, para 1.

17. The 2016 Allocation Orders approved the establishment of a discrete HCV Late Claims Benefit Plan and the payment of prescribed Special Distribution Benefits. Specific amounts of Excess Capital were allocated for these purposes, together with administrative costs and required capital in amounts to be agreed upon by the Joint Committee and the Attorney General of Canada or directed by the Courts.

Order of Chief Justice Hinkson made August 16, 2016, paras. 5 and 6.

18. In the 2016 Allocation Orders, the Courts also declared that the Joint Committee may apply to the Courts for consideration of special distribution benefits which address the circumstances of Class Members such as Class Members 2213 and 7438.

Order of Chief Justice Hinkson made August 16, 2016, para 10.

19. The Joint Committee has served concurrently motions/applications to approve a proposed HCV Late Claims Benefit Plan and a related HCV Late Claims Notice Campaign.

***Required Capital***

20. In their report dated October 12, 2017, the Joint Committee's actuaries, Eckler, have calculated the required capital for the HCV Late Claims Benefit Plan to be \$7,411,000 and the required capital for Special Distribution Benefits to be \$12,199,000.

Affidavit #7 of Richard Border made October 12, 2017 ("Border #7") at Exhibit "A" para 82.

***Section 4.08(2) Re-Election***

21. Claimant 2213 is a Primarily-Infected Hemophiliac who is an Approved HCV Infected Person co-infected with HIV. As Justice Perell noted at paragraph 148 of his decision, pertaining to excess capital, Claimant 2213 believed he was not going to live very long. He therefore elected under Section 4.08(2) of the Hemophiliac HCV Plan to receive the all-inclusive sum of \$50,000 (1999 dollars).

*Parsons v. Canadian Red Cross Society*, 2016 ONSC 4809 ("Parsons"), at para. 148.

Factum/Submissions/Written Argument of Class Member 2213

22. As noted at paragraph 150 of the Justice Perell's decision, Claimant 2213 is part of small group of Class Members who made this all-inclusive \$50,000 election.

*Parsons* at para. 150.

23. At paragraph 165 of Eckler's October 14, 2015 actuarial report filed on the 2013 Excess Capital Allocations Applications, Eckler estimated that the total liability of permitting the 29 alive individuals who made this election to re-elect is \$6.6 million. After the compensation they received is indexed and deducted from the

compensation payable as a result of the re-election, the net liability is expected to be \$4.6 million as at December 31, 2013.

Affidavit # 5 of Richard Border made October 14, 2015 ("Border #5") at Exhibit "A".

24. At paragraph 72 of Eckler's October 12, 2017 report, Eckler estimates that the required capital for this \$4.6 million liability is \$500,000.

Border #7 at Exhibit "A" para 72-73.

25. Treating similarly situated Class Members similarly is a fundamental aspect of this settlement. At paragraph 21 of his submissions, Claimant 2213 requested that all co-infected hemophiliacs who made this election be permitted to re-elect and that excess capital be allocated for this purpose.

Factum/Submissions/Written Argument of Class Member 2213, para. 21

26. It is just and appropriate that the Courts exercise their unfettered discretion to allocate excess capital to permit other hemophiliacs who made this election to re-elect in the same manner.

***Loss of Services Payments to Permanently Disabled Approved Dependants***

27. Claimant 7438 is a permanently disabled Approved Dependent of his late mother, an HCV Infected Person. The termination of the loss of services payments he received up to the date actuarially calculated as her normal life expectancy caused him hardship.

Factum/Submissions/Written Argument of Class Member 7438

28. In a memorandum dated October 12, 2017, Eckler has estimated that the liability to extend loss of services benefit payments to all alive permanently disabled Approved Dependants for their lifetime, rather than ceasing at the normal life expectancy of the deceased HCV Infected Person, is \$3,900,000 as at December 31, 2013 and that the associated required capital is \$400,000.

Border #7 at Exhibit "B", p.2.



29. It is just and appropriate that the Courts exercise their unfettered discretion to allocate excess capital to treat other alive permanently disabled Approved Dependents similarly by extending loss of services payments for their lifetimes as well.

### ***Three Separate Accounts of the Trust***

30. Based on trust and accounting advice received by the Joint Committee, the following three separate accounts of the Trust Fund should be established as at December 31, 2013, to be held, invested and administered by the Trustee: the HCV Late Claims Account, the HCV Special Distribution Benefits Account and the HCV Regular Benefits Account.

Affidavit of Heather Rumble-Peterson #18 made October 13, 2017  
("Peterson #18") at para 26.

### ***The Values of the Three Accounts***

31. All actuarial analysis in respect of the 2013 Excess Capital and the allocations made in the 2016 Allocation Orders have been based on assets, liabilities and required capital as at December 31, 2013. In order to manage the three accounts of the Trust going forward, it is necessary to adjust the figures to current dollars.

Border #7 at Exhibit "A", paras 27.

32. Special Distribution Benefit payments and payments under the HCV Late Claims Benefit Plan did not occur prior to 2017. Eckler has opined that it is therefore reasonable to roll the value of the HCV Late Claims Account and the HCV Special Distribution Account as at December 31, 2013 to December 31, 2016, by using the annual rate of return for the invested assets of the Trust Fund net of investment expenses. Use of the total rate of return for the invested assets is consistent with a pro-rata allocation of invested assets to the three accounts.

Border #7 at Exhibit "A", paras 30-31

33. The balance in the Regular Benefits Account as at December 31, 2016 would be equal to the total amount of the Trust Fund minus the December 31, 2016 account values for the Special Distribution Benefits Account and the Late Claims

Benefit Plan Account i.e. the Regular Benefits Account is the balance of the fund after setting aside these two calculated amounts.

Border #7 at Exhibit "A", para 32.

34. From December 31, 2016 onward, Eckler has proposed that the three Accounts be updated monthly as follows. The monthly rate of investment return on the total invested assets, net of investment fees, will be calculated. Each account balance will then be reduced by the payments (benefits and expenses) out of the account and interest added at the monthly investment return rate. In any one month, the investment return could be negative.

Border #7 at Exhibit "A", para 33.

35. For the purposes of implementing, administering, monitoring and supervising the payments to be made pursuant to the 2016 Allocation Orders and this order, as well as the three accounts, the Administrator, Trustee, Fund Counsel, Auditors, Joint Committee, Investment Advisors, Referees, Arbitrators, Monitor, Referees and Courts shall perform the role and have the duties and responsibilities provided for in the Settlement Agreement, with all the necessary adaptations, modifications and powers as may be required to do so and as provided for in this order, the order implementing the HCV Late Claims Benefit Plan, and the court approved protocols.

### **PART 3: LEGAL BASIS**

36. The 2016 Allocation Orders and related decisions.
37. The 1999 Settlement Approval Orders.
38. Articles 5 to 10 of the Settlement Agreement.
39. Sections 4.08(2) and Section 7.01 of the Hemophiliac HCV Plan.
40. Sections 3.05 and 4.03 of the Transfused HCV Plan and of the Hemophiliac HCV Plan.

- 41. Section 2.01(2) of the proposed HCV Late Claims Benefit Plan.
- 42. Such further and other grounds as counsel may advise and this Honourable Court may permit.

**PART 4: MATERIAL TO BE RELIED ON**

- 43. Affidavit of Heather Rumble Peterson #18, sworn October 13, 2017
- 44. Affidavit of Richard Border #7, sworn October 12, 2017
- 45. Affidavit of Richard Border #5, sworn October 14, 2015
- 46. Factum/Submissions/Written Argument of Class Member 7438
- 47. Factum/Submissions/Written Argument of Class Member 2213
- 48. Such further and other evidence as counsel may advise and this Honourable Court may permit.

The applicant estimates that the application will take **n/a**.

- ☐ This matter is within the jurisdiction of a master.
- ☒ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: October 13, 2017

  
\_\_\_\_\_  
Signature of the British Columbia  
Joint Committee Member

Sharon Matthews, Q.C.

*To be completed by the court only:*

Order made

- ☐ in the terms requested in paragraphs ..... of Part 1 of this notice of application
- ☐ with the following variations and additional terms:

.....  
.....  
.....

Date: .....

Signature of ☐ Judge ☐ Master

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## APPENDIX

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### THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts