

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

DIANNA LOUISE PARSONS, deceased  
by her Estate Administrator, William John Forsyth,  
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***

**In the Supreme Court of British Columbia**

Between:

**Anita Endean, as representative plaintiff**

Plaintiff

and:

**The Canadian Red Cross Society  
Her Majesty the Queen in Right of the Province of  
British Columbia, and The Attorney General of Canada**

Defendants

and:

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

Third Parties

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

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

NO : 500-06-000016-960

SUPERIOR COURT  
Class action

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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

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CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

NO : 500-06-000068-987

SUPERIOR COURT  
Class action

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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

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**FACTUM/SUBMISSIONS/Written ARGUMENT OF CLASS MEMBER 7438**  
**(JOINT HEARING ALLOCATION APPLICATIONS)**

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## **PART I**

## **OVERVIEW**

1. These submissions are made on behalf of a Family Class Member, claimant number 7438 (the "Class Member") who has been given the privilege to make submissions to the Courts at the Joint Hearing in June 2016.
  
2. The Class Member is an Ontario-based claimant entitled to benefits under the Transfused Plan. The Class Member is the disabled adult child of a Primarily-Infected Person (now deceased due to HCV) who and was fully dependant upon his late parent for support. The provisions of Article Six of the Plan apply to the entitlement.
  
3. The submissions of the Class Member relate to the three issues before the courts:
  - a. the amount of actuarially unallocated assets in the Trust Fund;
  
  - b. the nature and scope of the discretion of the Courts with respect to unallocated assets in the Trust Fund;
  
  - c. the proposals with respect to the allocation of the unallocated assets in the Trust Fund.
  
4. The submissions of the Class Member with respect to these issues are that:
  - a. the amount of the actuarially unallocated assets of the Trust Fund should be determined to be \$206,900,000 for the reasons advanced by the Joint Committee;
  
  - b. the discretion given to the Courts under the Modification to the Settlement Agreement<sup>1</sup> to allocate or pay<sup>2</sup> unallocated assets in the Trust Fund was intended by the Courts and the parties to the Settlement Agreement to be

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<sup>1</sup> Modification in the form of Schedule F/Annexe F is excerpted below in Part III

<sup>2</sup> The term "allocate" and its counterpart in the French language version are plainly intended to include payment.

exercised only when such allocations or payments will benefit Class Members. The terms of the Funding Agreement<sup>3</sup> creates a *private* Trust under the terms of which unallocated assets in the Trust Fund remain in the Trust Fund for the beneficiaries of the Trust. The Courts may allocate these assets for the benefit of the beneficiaries of the Trust, the Class Members, by direct or indirect allocations and payments. No “payment” or “transfer” of these assets may be made out of the Trust Fund to any of the Governments for their own use or benefit until the Trust Fund and the Settlement Agreement is terminated. There is no legal entitlement by the Governments as Settlers of the Trust to receive a payment of any part of the Trust Fund as a “return of capital” or as return of an “over payment” or otherwise prior to termination;

- c. the actuarially allocated assets should be allocated in such a manner to ensure that loss of support benefits to qualified adult children in circumstances such as the Class Member be paid (i) indefinitely for the life of the dependent; or (ii) until the dependent reaches age 65 and is eligible for old age security benefits<sup>4</sup>. Otherwise, the proposal by the Joint Committee is acceptable to the Class Member. Funding is available from the Trust Fund to permit both this specific allocation to Class Members and the allocation proposal to benefit Class Members advanced by the Joint Committee.

## **PART II**

## **ISSUES and SUBMISSIONS**

### **Issue #1: Amount of the unallocated assets**

5. Given that it is only Class Members who bear the risk associated with:

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<sup>3</sup> Funding Agreement provisions are excerpted below in Part III

<sup>4</sup> See the proposal set out in the submissions on Issue # 3 below.

a. overstated unallocated assets in the Trust Fund (also referred to as “Excess Capital” by the parties);

and

b. the request by the Governments for payment of unallocated assets without any benefit to or for Class Members

a conservative approach is appropriate to determine the amount of the unallocated assets.

6. The Class Member notes that prior to the Termination of the Trust Fund, the Governments have expressly forgone any legal entitlements to the assets of the Trust Fund under the Funding Agreement, whether these assets be allocated or unallocated.<sup>5</sup>

7. The Class Member is generally in agreement with the Joint Committee and the factual and legal considerations set out in paragraphs 84 to 93 and 210 to 213 of the factum of the Joint Committee.

### **Issue #2: The nature and scope of the court’s discretion**

8. The Class Member is in general agreement with the position taken by the Joint Committee in its factum and strongly opposes the position taken by the Attorney General for Canada and other Governments.

9. The Class Member respectfully submits that, unless and until the Trust Fund created by the Funding Agreement is terminated and the Settlement Agreement itself is terminated, the Governments have no legal entitlements to the Trust Fund.

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<sup>5</sup> See Article 5.03 on “Legal Entitlements” and the Termination provisions in the Funding Agreement.



10. The Funding Agreement is express about what constitutes the “Trust Fund”, its “Purposes’ and “Legal Entitlements” to the Trust Fund.<sup>6</sup>
11. Article 2.01 of the Funding Agreement contemplates payments out of the Trust Fund only for “the benefit of Class Members and other persons entitled to be paid out of the Trust in accordance with this Agreement and the Settlement Agreement”.
12. None of the Governments are beneficiaries of the Trust Fund under the Funding Agreement or the Settlement Agreement.
13. Indeed, the Governments were the Settlers of the Trust and are divested of the Trust Fund upon payment of the money and assets comprising the Trust Fund.<sup>7</sup>
14. The rights of the Governments to the Trust Fund under the Settlement Agreement and the Funding Agreement only arise upon termination and are expressly limited to the transfer of the assets in the Trust Fund upon termination – not before termination.<sup>8</sup>
15. The nature and scope of the discretionary powers contained in the Modification to the Settlement Agreement and in the orders of the Courts do not make the Governments a beneficiary of the Trust Fund. This discretion must be understood and applied in order to respect the terms of the private Trust. The discretion must also be understood and applied within the context of the shared view of the Courts about the requirement for the Modification to the Settlement Agreement, that is:

*It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of the surplus may be applied to benefit Class Members<sup>9</sup>.*

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<sup>6</sup> See the definition of “Trust Fund”, Article Two “Purposes and Effect of Agreement” and Article Five “Settlement of Trust” in the excerpts from the Funding Agreement in Part III below.

<sup>7</sup> Article 5.01 of the Funding Agreement and definition of “Trust Fund”. This principle applies as a rule of trust law both under the Civil Code (Article 1265) and within “common law” jurisdictions.

<sup>8</sup> See the Termination provisions in the Settlement Agreement and the Funding Agreement.

<sup>9</sup> Parsons v Canadian Red Cross as per Winkler J.

16. The common intention of the parties and the circumstances in which the Modification to the Settlement Agreement came about are such that the surplus is only intended to be applied to benefit Class Members, including Family Class Members.
17. Either the money stays in the Trust Fund to benefit Class Members or it is allocated or paid out in such a way to benefit Class Members.
18. It is respectfully submitted that the discretion to “pay”, in whole or in part, the Trust Fund to Governments as contemplated by the Modification must necessarily be interpreted to mean “paid” to Governments that present the Courts with a proposal that will “benefit Class Members”. Otherwise, the “payment” to a Government would in effect be a “transfer” that would terminate part of the Trust- something that is simply not permitted by the Settlement Agreement, or the Funding Agreement, or in these circumstances, the trust law of any Canadian jurisdiction.
19. The Class Member notes that none of the Governments have proposed a plan to benefit Class Members or any beneficiaries of the Trust Fund.
20. It is simply inconsistent, unreasonable and unfair for the Governments to take the position that Governments “paid too much” and that the unallocated assets of an ongoing private Trust Fund should now be “returned to the public purse”.

**Issue #3: Proposal for Allocation**

21. As noted above, the Class Member is an adult dependent child of a Primarily-Infected person without other means of support.
22. The Class Member’s circumstances, if not unique, are most certainly only shared by very small number of claimants.

23. The Class Member's circumstances are ones which others have suggested are worthy for consideration by the Courts in the exercise of discretion under the Modification to the Settlement Agreement.
24. The factual and legal considerations relevant to this Class Member circumstances are concisely set out in two decisions which are found in the pages that follow these submissions. As such, the Class Member seeks to incorporate by reference into these submissions the following decisions:
- A. the decision of Justice Perell dated December 16, 2013
  - B. the decision of Referee C. Michael Mitchell dated November 14, 2013.
25. The Class Member requests the Courts, in the exercise of their discretion, to allocate funds to address what the learned Justice and Referee appeared to identify as concerns and apparent unfairness in the administration of the fund for Class Members in circumstances similar to the claimant before them.<sup>10</sup>
26. Such an allocation might follow the suggestions of the Referee that the loss of services benefits be paid:
- A. indefinitely for the life of the dependent; or
  - B. until the dependent reaches age 65 and is eligible for old age security benefits.
27. It is respectfully submitted by the Class Member that the particular circumstances and particular facts related to this Class Member (and any others like him) could not have been ignored or intended to be the object of apparent unfairness by the framers of the plan or the parties to the Settlement Agreement.
28. In addition, and insofar as there are benefits to this class member, the class member generally supports the proposal of the joint committee. The class

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<sup>10</sup> See paras 12 and 13 of the decision of Perell J dated December 16, 2013 and paras 15 to 22 of the decision of Mr. Mitchell

member is of the view that the funding available to respond to the class members circumstances and to the proposal of the joint committee is not in issue.

**PART III RELEVANT DOCUMENTS**

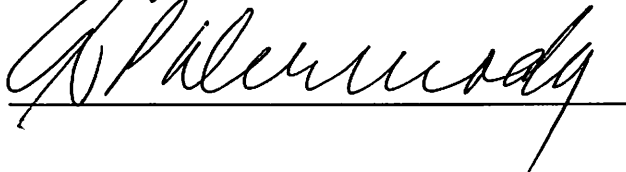
29. See attached immediately following these submissions

**PART IV CONCLUSION**

The Class Member has attempted to state his position in the Overview.

The Class member may be present at the Joint Hearing and will provide information and answers to any questions arising out of these submissions or the Impact Statement.

All of which is respectfully submitted on behalf of the Class Member by his Counsel on this 9<sup>th</sup> day of June 2016.

A handwritten signature in black ink, appearing to read 'W. Dermody', is written over a horizontal line.

William P. Dermody LSUC # 21237F

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**IN THE MATTER OF THE HEPATITIS C  
1986-1990 CLASS ACTION SETTLEMENT AGREEMENT  
(Parsons v. The Canadian Red Cross et al.)  
Court File No. 98-CV-141369)**

**BETWEEN**

**Claimant File 7438**

**- and -**

**The Administrator**

**(On a motion to oppose confirmation of the decision of the Referee, C. Michael Mitchell, released on November 14, 2013)**

**Reasons for Decision**

**PERELL, J:**

**Nature of the Motion**

1. This is a motion to oppose confirmation of the decision of a Referee appointed pursuant to the Settlement Agreement in the Hepatitis C litigation for the class period January 1, 1986 to July 1, 1990. The Claimant challenges the decision of the Administrator to terminate the Loss of Services benefits that he was receiving from the 1986-1990 Hepatitis C Class Action Settlement Fund. The Claimant appealed the termination to a Referee in accordance with the process set out in the Settlement Agreement. The Referee upheld the decision of the Administrator and denied the appeal. The Claimant now opposes confirmation of the Referee’s decision.

**Background**

2. The Settlement Agreement is Pan-Canadian in scope and was approved by this court and also approved by courts in British Columbia and Quebec. See *Parsons v. The Canadian Red Cross Society* (1999), 40 C.P.C. (4<sup>th</sup>) 151 (Ont. Sup. Ct.). Under the Agreement, persons infected with Hepatitis C through a blood or specified blood product transfusion, within the period from January 1, 1986 to July 1, 1990, are entitled to varying degrees of compensation depending primarily on the progression of the Hepatitis C infection. The Settlement Agreement includes, among other things, a number of written court approved protocols (“CAPS”), including the “Loss of Services of the HCV Infected Person CAP”, which is the protocol relevant in this case.

**Facts**

3. The Claimant’s mother was infected with HCV by a blood transfusion she received at Hospital “A” in Ontario during the Class Period. The Claimant’s mother was

approved for and received compensation from the Fund until her death on December 24, 2000. She was 71 at the time of her death.

4. The Claimant contracted Lyme disease in 1987, when he was in his early thirties. As a result of a delay in diagnosing and treating his condition, the Claimant continues to suffer from debilitating medical problems. As a result, the Claimant was determined to be a Dependent of his mother, and he was approved for Loss of Services benefits under the Fund, which he received up until October 1, 2012.

5. On October 1, 2012, the Administrator terminated further payments, on the basis that October 1<sup>st</sup> was the actuarially determined life expectancy for the Claimant’s mother. As is required under the Settlement Agreement, the Administrator used the Canada Life tables current at the time of death to determine the maximum period for which loss of services may be payable. Loss of Services payments are made only for the period of life expectancy as determined by the actuarial tables.

6. The Claimant is opposing the confirmation of the decision of the Referee on the basis that in light of his unique circumstances, he ought to continue to receive Loss of Service benefits, despite the language of the Settlement Agreement.

**Standard of Review**

7. In a prior decision in this class proceeding, the standard of review set out in *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. H.C., aff’d (1990), 39 C.P.C. (2d) 217 (C.A.) was adopted as the appropriate standard to be applied on motions by a rejected Claimant to oppose confirmation of a Referee’s decision. In *Jordan*, Anderson J. stated that the reviewing court “ought not to interfere with the result unless there has been some error in principle demonstrated by the [referee’s] reasons, some absence or excess of jurisdiction, or some patent misapprehension of the evidence.”

**Analysis**

8. The Court Approved Protocol for loss of services of an HCV Infected Person provides ongoing entitlement to benefits for Dependents after the death of the primarily infected family member on the following basis:

16. The Administrator will use the most current Canada Life Tables to calculate a notional life expectancy of the deceased HCV Infected Person without reduction for pre-existing ailments or illness (including HCV) to determine the maximum period loss of services may be payable.

17. Loss of services will be paid to Dependents for the calculated life expectancy of the deceased HCV Infected Person, so long as the Spouse who is Dependent remains alive or there is a Child who is Dependent who continues to qualify for payments. Loss of services payments will cease

upon the death of the Spouse who is a Dependent unless there is a child who continues to qualify for payments as a Dependent.

9. There is no dispute that the Claimant was entitled to benefits as a Dependent of a primarily infected person. The only issue on this motion is whether those benefits should continue beyond the life expectancy date determined by the Administrator.

10. It is clear from the materials provided that the Claimant has had a challenging life and that as a result of his own medical conditions continues to have serious difficulties. It is also clear from the evidence provided that the Claimant will have significant difficulty supporting himself without the Loss of Service benefits he received from the Fund.

11. Unfortunately, there is nothing in the Settlement Agreement or relevant CAPs that gives the Administrator or this court the discretion to extend the period for which the Claimant is entitled to benefits beyond the life expectancy date.

12. I note that in his decision, the Referee, while dismissing the claim, provided suggestions as to how to address this apparent unfairness in the administration of the fund for Dependents in circumstances similar to that of the Claimant here. The Referee suggested that loss of services benefits be paid: (i) indefinitely for the life of the dependent; or (ii) until the dependent reaches age 65 and is eligible for old age security benefits. As a third option the Referee suggested to limit the benefits payable up to age 65 to the difference between the CPP pension in this case (or other income in other cases) and the amount of the full old age security benefit would be if the dependent was age 65.

13. I share the Referee's concerns and echo his suggestion that this matter be brought to the attention of the Joint Committee for future consideration, particularly in the event that the Committee has the opportunity to make submissions to this court as to what should be done with any Fund surplus.

**Result**

14. The Settlement Agreement and relevant court approved protocols establishes limits on the payment of Loss of Services benefits. The Referee correctly interpreted the Agreement and the limits on his discretion in the circumstances.

15. In my view, the Referee committed no errors in principle, with respect to jurisdiction or by misapprehending the evidence before him.

16. Accordingly, the Referee's decision ought to be confirmed.

**Perell, J.**

**THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT**

**IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR  
DATED APRIL 8, 2013**

**DATE OF HEARING: July 24, 2013**

**CLAIMANT REPRESENTATIVE: No. 7438**

**IN ATTENDANCE: Claimant**

**FOR THE ADMINISTRATOR: Belinda Bain  
Carol Miller**

**REFEREE: C. Michael Mitchell**



**DECISION**

1. This is an Ontario-based claimant, claim #7438.
2. My jurisdiction in this matter is as a Referee under the Settlement Agreement. In the unique circumstances of this case, I have taken the liberty of commenting on the matter beyond my strict jurisdiction and I trust I may be excused for doing so.
3. The claimant's mother, a resident of Ontario, was approved for compensation as a result of being infected by a blood transfusion at Mount Sinai Hospital, and she died in the year 2000. She was 71 at that time. The claimant points out that his grandmother had lived until age 96 and that absent the infection received from the tainted blood, his mother could have expected to live an equally long life. The claimant, now aged 59, was approved for loss of services benefits by the fund as a dependent, since he was in fact dependant on his mother.
4. The source of the claimant's dependency appears to have been his infection from Lyme bacteria in 1987 when he was in his early thirties; he states that he nearly died as a result. He was only diagnosed late in the course of the disease and has suffered from it with a host of medical problems, the most debilitating of which is extreme fatigue.
5. The claimant appears as a bright intelligent person who has suffered a series of Job-like personal tribulations and tragedies, including losing his business and home. His sole financial sources of income until October 2012 were a disability pension from the Canada Pension Plan, which is \$606 per month, and the income from lost services under this Agreement, which I understood in 2012 to be \$13,608.27 annually. Thus, the claimant's total annual income barely exceeded \$20,880.27. After the loss of the payments for loss of services, his income was reduced to \$7,272 per annum.
6. The Income from lost services under this agreement terminated on October 1, 2012, as that was the actuarially determined date of his mother's life expectancy as determined by the actuarial life expectancy tables. Under the Settlement Agreement, the Administrator uses the Canada Life tables current at the time of death to determine the maximum period for which loss of services may be payable. Lost services payments are made only for the period of life expectancy as determined by the actuarial tables.
7. The relevant provisions of the Settlement Agreement are attached.
8. These rules limiting the payments to the actuarially determined life expectancy have been challenged at least twice in Ontario and were upheld in two Referee Decisions, numbers 8162 and 15686, the first of these being my own. The claimant, who was not represented by counsel, candidly admitted that he had read the Settlement Agreement and could find no basis for argument that supports his appeal. He is correct in that assessment; the Administrator, and

therefore the Referee, has no discretion to direct a payment beyond the life expectancy date determined by the actuarial tables.

9. What the claimant argues is that it cannot be the case that his circumstances and particular facts would have been ignored by the parties to the Settlement Agreement had they been contemplated at the time. Alternatively, he argues that, upon review now, given the financial state of the fund, it is appropriate to amend the plan or vary it to take account of his circumstances. He argues that there must be discretion, either in the Joint Committee which has responsibility for the plan or perhaps more likely with the courts or with the parties themselves, to vary or amend the Agreement to somehow take account of his circumstances and those of others like him.
10. Another way of putting the claimant's case is that his circumstances are somewhat unique, and had the parties to the original agreement been aware of his circumstances (and those of others in the same circumstances), they would have fashioned the agreement to take such circumstances into account. In this regard, in my view, he is correct - or at least, in my view, account should be taken at this juncture of his rather unique circumstances to see if it is possible and appropriate to redress the situation.
11. In my view, the circumstances of the claimant are likely relatively unique. Unlike a claim for loss of income or support as a result of the death of the primarily infected person where benefits cease on the day the primarily infected person would have turned 65 (presumably because that date is assumed to be the end of the employment period of the primarily infected person), a claim for loss of services is compensated to the deemed date of the life expectancy of the primarily infected person, according to the life expectancy tables, determined without reduction because of a pre-existing ailment or illness.
12. In the case of a child, the loss of services is presumed to continue until age 25, unless the child provides evidence that some other period of loss is appropriate.
13. The claimant's source of support until 2012 comes from this last provision in the Settlement Agreement. He would normally not have been entitled to loss of services compensation as he was a child above age 25. However, because he received services from his mother and was a dependent child of his mother, the loss of services continued until the life expectancy date precisely because he was able to convince the Administrator that a period of loss beyond age 25 was appropriate in his case. Absent such proof, the claim would have been terminated earlier.
14. In my view, the claimant's case is likely quite unique, in that adult dependent children of a primarily infected person are likely as a class to be comparatively rare. Adult dependent children without other means of support or otherwise obtaining services beyond the actuarially determined life expectancy date of their parent are also likely to be comparatively rare.

15. In this Settlement Agreement, the parties clearly contemplated that dependent children would sometimes require continuation of support for lost services well beyond age 25. In my view, if they had turned their mind to the fact that a need for services of a dependent child might continue beyond the actuarially determined life expectancy date, they likely would have made provision for benefits, or some portion of them, to continue at least until our society's social welfare systems provided some additional level of support.
16. The claimant convincingly argues that his mother was willing to sign onto and approve the Settlement Agreement precisely because she believed, as he did, that its provisions meant that her dependent disabled son would be taken care of under the Agreement after her death, if she died as a result of the infection from tainted blood (as she did). In fact, because of the use of the actuarial tables, and the fact that the claimant remains disabled and without income (beyond his small CPP pension) at age 59, there is a gap of at least six years between the life expectancy date of his mother and the date he is eligible for an old age security pension. It seems to me that it is reasonable to think that a gap like that would not have been permitted had the parties explicitly considered the possibility of this occurring.
17. Another way of addressing this question is to ask whether the parties explicitly contemplated that a permanently disabled dependent child of a deceased primarily infected person, who died as a result of the infection, would be left helpless in terms of support for services between the actuarially determined life expectancy date of the primarily infected person, and the time other support becomes available through the old age security pension and guaranteed income supplement available to all Canadians with 10 years of residence at age 65. If they did not so contemplate, or even if they did and the funds are now available in the plan to deal with this matter, it is appropriate that the issue should be addressed.
18. This Settlement Agreement was likely fashioned with a complete understanding of the fabric of Canada's social welfare system where from age 65, the combination of old age security pension (today \$550.99 monthly) and the guaranteed income supplement (\$747.11 monthly) for a single person produces a total income of \$1,298.10 monthly or \$15,577.20 annually. In other words, if the claimant were 65 today he would receive these minimum amounts from the state, as the CPP disability pension ceases at that date.
19. There are at least three obvious ways for the appropriate authority to resolve this matter or for the parties to consider. Unquestionably, there are others options as well. One obvious solution would be to permit the loss of services benefits to be paid indefinitely for the life of the dependent. In tort law, this likely occurs in some settlements and is perhaps appropriate and affordable here if the fund is sufficiently robust at this stage. A second possibility, given that benefits were only payable for the actuarial life expectancy of the primarily infected person, would be that benefits could simply be extended to the date the dependent turns 65 and

becomes eligible for old age security benefits. A third possibility would be to limit the benefits payable up to age 65 to the difference between the CPP pension in this case (or other income in other cases) and the amount of the full old age security benefit would be if the dependent was age 65. This option would be based on the theory that, because this extended benefit is an additional benefit to what was available in the Settlement Agreement, it should be capped at the same level that full old age security provides ( less other sources of income).

- 20. In any event, as I have already said, the number of dependent children who experience this support gap as I have defined it is likely to be very small. Spouses of a primarily infected person are typically much closer in age to the primarily infected person and therefore, as of the life expectancy date, it is highly probable spouses will themselves be at or above age 65 and therefore entitled to old age security (assuming they require a financial substitute for lost services). Consequently, there are likely to be many fewer spouses, if any, in the circumstances of the complainant than there are dependent children in this situation.
- 21. In my view, all of these options should be considered and a solution should be found for the claimant and others like him, if at all possible. His current circumstances with virtually no income are completely inconsistent with the notion that the Settlement and the tortious conduct it purported to remedy addressed his mother's much shortened life and her consequent ability to provide for her dependant son in a reasonable fashion. His vital interests and his mother's are not met by the result I am compelled to render here.
- 22. I would respectfully request that the Administrator's counsel and the Administrator bring this decision to the attention of the Joint Committee.
- 23. The claim is dismissed.

DATED at Toronto this 14<sup>th</sup> day of November, 2013



C. Michael Mitchell  
Referee

**Terms of the Settlement Agreement**

16. The Administrator will use the most current Canada Life Tables to calculate a notional life expectancy of the deceased HCV Infected Person without reduction for pre-existing ailments or illness (including HCV) to determine the maximum period loss of services may be payable.
17. Loss of services will be paid to Dependants for the calculated life expectancy of the deceased HCV infected Person, so long as the Spouse who is Dependant remains alive or there is a Child who is Dependant who continues to qualify for payments. Loss of services payments will cease upon death of the Spouse who is a Dependant unless there is a Child who continues to qualify for payments as a Dependant.
18. Where the Dependant claiming is a Child, the loss of services will be presumed to continue until his/her 25th birthday unless the Child provides evidence satisfactory to the Administrator that some other period of loss is appropriate.

**ARTICLE SIX  
COMPENSATION TO APPROVED DEPENDANTS  
AND APPROVED FAMILY MEMBERS**

**6.01 Compensation to Approved Dependants (top)**

1. If a HCV Infected Person dies and the death was caused by his or her infection with HCV, the Approved Dependants of such HCV Infected Person will be entitled to be compensated for their loss of support. The loss of support is an amount each calendar year equal to 70% of the deceased HCV Infected Person's Annual Loss of Net Income for such year until he or she would have attained the age of 65 years determined in accordance with 4.02(2), provided, however, that the annual amount payable under this provision will be reduced by an amount equal to 30% of the net amount as calculated to allow for the personal living expenses of the HCV Infected Person, and provided further that, for purposes of calculating the annual amount payable under this provision, "Post-claim Net Income" will be computed without reference to clauses (A), (C) and (D) of the definition of "Post-claim Net Income" and that the words "the person" and "on account of illness or disability for the year" in clause (B) and the words "the person" in clause (E) of the definition of "Post-claim Net Income" were replaced with the words "the Dependants as a result of the death of the person".
2. If a HCV Infected Person dies and the death was caused by his or her infection with HCV, the Approved Dependants of such HCV Infected Person living with such HCV Infected Person at the time of his or her death will be entitled to be compensated for the loss of the services of the HCV Infected Person in the home at the rate of \$12 per hour to a maximum of \$240 per week.
3. The amounts payable pursuant to Sections 6.01(1) or (2) will be allocated as the Approved Dependants may agree or, failing any agreement, as the Administrator so determines based on the extent of support received by each of the Dependants prior to the death of the HCV Infected Person. Notwithstanding any of the provisions hereof, the Approved Dependants of a HCV Infected Person whose death was caused by his or her infection with HCV cannot claim compensation for loss of support and compensation for the loss of services in the home for the same period.

**6.02 Compensation to Approved Family Members (top)**

Each Approved Family Member of a HCV Infected Person whose death was caused by his or her infection with HCV will be paid the applicable amount set out below for loss of guidance, care and companionship:

- a. \$25,000 for the Spouse;
- b. \$15,000 for each Child under the age of 21 years at the date of death of the HCV Infected Person;
- c. \$5,000 for each Child 21 years or older at the date of the death of the HCV Infected Person;
- d. \$5,000 for each Parent;
- e. \$5,000 for each Sibling;
- f. \$500 for each Grandparent; and
- g. \$500 for each Grandchild.

The above amounts may be reduced on a proportionate basis pursuant to the provisions of Section 5.01(3) or 5.02(2) if the relevant deceased HCV Infected Person was also a HIV Secondarily-Infected Person.

**6.03 Limitation (top)**

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Dependants and other Family Members of a HCV Infected Person will only be entitled to make Claims pursuant to Sections 6.01 and 6.02 (or, in lieu thereof, under Section 5.01(2)) and they will not be entitled to make any other Claims or to any additional or other compensation. Nothing in this Section will affect the personal Claim of a Spouse or Child who is also a HCV Infected Person.

**FUNDING AGREEMENT**

THIS AGREEMENT is made as of 15 June 1999

BETWEEN:

**THE ATTORNEY GENERAL OF CANADA**  
("Canada"), **HER MAJESTY THE QUEEN**  
**IN RIGHT OF THE PROVINCE OF**  
**BRITISH COLUMBIA** ("British Columbia"),  
**HER MAJESTY THE QUEEN IN RIGHT**  
**OF THE PROVINCE OF ALBERTA**  
("Alberta"), **HER MAJESTY THE QUEEN**  
**IN RIGHT OF THE PROVINCE OF**  
**SASKATCHEWAN** ("Saskatchewan"), **HER**  
**MAJESTY THE QUEEN IN RIGHT OF**  
**THE PROVINCE OF MANITOBA**  
("Manitoba"), **HER MAJESTY THE QUEEN**  
**IN RIGHT OF ONTARIO** ("Ontario"), **LE**  
**GOVERNMENT DU QUÉBEC** ("Québec"),  
**HER MAJESTY THE QUEEN IN RIGHT**  
**OF THE PROVINCE OF NEW**  
**BRUNSWICK** ("New Brunswick"), **HER**  
**MAJESTY THE QUEEN IN RIGHT OF**  
**THE PROVINCE OF NOVA SCOTIA**  
("Nova Scotia"), **HER MAJESTY THE**  
**QUEEN IN RIGHT OF THE PROVINCE**  
**OF PRINCE EDWARD ISLAND** ("PEI"),  
**HER MAJESTY THE QUEEN IN RIGHT**  
**OF THE PROVINCE OF**  
**NEWFOUNDLAND** ("Newfoundland"), **THE**  
**GOVERNMENT OF THE NORTHWEST**  
**TERRITORIES** ("Northwest Territories"),  
**THE GOVERNMENT OF NUNAVUT**  
("Nunavut"), **THE GOVERNMENT OF THE**  
**YUKON TERRITORY** ("Yukon Territory"),  
(collectively, the "FPT Governments"),

-and-

**ANITA ENDEAN**, plaintiff in the British  
Columbia Transfused Class Action (the "British  
Columbia Transfused Plaintiff"), **MARTIN**  
**HENRY GRIFFEN** and **ANNA KARDISH**,



“Trust” means the Trust to be created pursuant to this Agreement.

“Trustee” means the trustee appointed by the Courts from time to time pursuant to the provisions of the Settlement Agreement.

“Trust Fund”, at any time, means each of the following money and other assets that are at such time held by the Trustee pursuant to this Agreement:

- (a) the funds received by the Trustee on trust from time to time from the FPT Governments;
- (b) any investments in which such funds may from time to time be invested;
- (c) any proceeds of disposition of any investments; and
- (d) 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.

“Withheld Amount” means an amount equal to the sum of the Expert Costs plus the Program Disbursements and Costs plus an amount equal to the aggregate of all fees, costs, disbursements and applicable taxes of Class Action Counsel, each as at the Approval Date, which have been paid by the FPT Governments prior to or on the Approval Date.

**1.02 Headings**

The division of this Agreement into Articles and Sections and the insertion of a table of contents and headings are for convenience of reference only and do not affect the construction or interpretation of this Agreement. The terms “herein”, “hereof”, “hereunder” and similar expressions refer to this Agreement and not to any particular Article, Section or other portion hereof. Unless something in the subject matter or context is inconsistent therewith, references herein to Articles, Sections and Appendices are to Articles, Sections and Appendices of this Agreement.

**1.03 Extended Meanings**

In this Agreement words importing the singular number only include the plural and *vice versa*, words importing any gender include all genders and words importing persons include individuals, partnerships, associations, trusts, unincorporated organizations, corporations and governmental authorities. The term “including” means “including without limiting the generality of the foregoing”.

**1.04 No Contra Proferentum**

The Parties acknowledge that their respective legal counsel have reviewed and participated in settling the terms of this Agreement and they agree that any rules of

habitual abode, or, if the person has no habitual abode in any such Province or Territory or an habitual abode in more than one such Province or Territory, in any such Province or Territory where his or her Spouse is ordinarily resident or, if the person has no such Spouse resident in any such Province or Territory or if the Spouse is ordinarily resident in more than one such Province or Territory, in any such Province or Territory where the majority of his or her Dependants are ordinarily resident, or, if the person has no such Dependants or the majority of such Dependants are not ordinarily resident in any one such Province or Territory, in any such Province or Territory in which the person has the closest personal property and social ties.

**1.08 Currency**

All references to currency herein are to lawful money of Canada.

**ARTICLE TWO  
PURPOSES AND EFFECT OF AGREEMENT**

**2.01 Purpose**

The purpose of this Agreement is to (i) provide for the establishment of the Trust for the benefit of Class Members and other persons entitled to be paid out of the Trust in accordance with this Agreement and the Settlement Agreement, (ii) provide for the payment of the Contribution Amount to the Trust, (iii) provide that the Federal Government is severally liable to pay an amount equal to the Proportionate Contribution of the Federal Government to the Trust on or prior to the Approval Date representing 8/11 (i.e., 72.7273%) of the Contribution Amount as at the time of such payment minus the Withheld Amount, (iv) provide that each PT Government is severally liable to pay to the Trust a portion of 3/11 (i.e., 27.2727%) of the Contribution Amount as at the time that the liability is being determined, (v) provide that the several liability of each PT Government is based on the Sharing Proportion of the PT Governments as at the time that the liability is being determined, and (vi) provide for the payment of the Disbursements out of the Trust, in the manner set out in this Agreement.

**2.02 Binding Effect**

On the Approval Date this Agreement will become effective and be binding on and after the Approval Date on all the FPT Governments and all the Class Members including the Class Action Plaintiffs.

**ARTICLE THREE  
SETTLEMENT AMOUNT**

**3.01 Settlement Amount**

The Administrator will be entitled to receive amounts from the Trustee from time to time on behalf of Class Members pursuant to this Agreement, provided that in no event will

(2) The Administrator will notify the Trustee and each of the FPT Governments of the Plan Disbursements to be made in respect of the preceding month within five Business Days after the end of each month. The notice from the Administrator will set out the facts upon which the calculation of such Plan Disbursements is based and the residence information set out in the statutory declaration declared by each claimant.

(3) The Program Administrator will notify the Trustee and each of the FPT Governments of the Program Disbursements to be made in respect of the preceding month within five Business Days after the end of each month. The notice from the Program Administrator will set out the facts upon which the calculation of such Program Disbursements is based and the residence information set out in the application of each claimant.

(4) The Trustee will notify each of the FPT Governments of the amounts to be paid pursuant to paragraphs (b) (c), (d) and (e) of the definition of Other Fees and Disbursements in Section 1.01 in respect of the preceding month within five Business Days after the end of each month.

#### **4.05 No Additional Liability**

For greater certainty, subject to Section 3.02, no FPT Government will be liable to pay any additional amounts pursuant to this Agreement if the Contribution Amount as at any time is insufficient to fund the Disbursements as at such time.

### **ARTICLE FIVE SETTLEMENT OF TRUST**

#### **5.01 Settlement of the Trust**

The FPT Governments will settle on and pay to the Trustee the sum of \$100 for the purpose of creating and settling the Trust. The Trustee will accept such sum on trust to deal with the same, and all other assets at any time forming part of the Trust Fund, upon the trusts and subject to the terms contained in this Agreement.

#### **5.02 Nature of the Trust**

The Trust will be trust established for the following purposes:

- (a) to acquire the funds payable by each of the FPT Governments pursuant to the provisions of Article Four;
- (b) to hold the Trust Fund;
- (c) to make the Disbursements pursuant to the provisions of Article Six;

- (d) to invest cash in investments pursuant to the provisions of Article Seven; and
- (e) to do such other acts and things as are incidental to the foregoing, and to exercise all powers that are necessary or useful to carry on the activities of the Trust or to carry out the provisions of this Agreement.

**5.03 Legal Entitlements**

The legal ownership of the assets of the Trust and the right to conduct the business of the Trust will be, subject to the 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.

**ARTICLE SIX  
DISBURSEMENTS**

**6.01 Monthly Payments for Plans**

(1) Within eight Business Days after the end of each month, the Administrator on behalf of the Class Members will requisition from the Trustee an amount equal to the amount of all Plan Disbursements to be paid by the Administrator pursuant to the Plans in respect of the immediately preceding month as set out in the notice given pursuant to Section 4.04(2).

(2) Within 10 Business Days after the end of each month, the Trustee will transfer an amount equal to the amount requisitioned by the Administrator pursuant to Section 6.01(1) to the Administrator on behalf of the Class Members by electronic fund transfer to an account specified by the Administrator.

**6.02 Monthly Payments for Program**

(1) Within eight Business Days after the end of each month, the Program Administrator on behalf of HIV Secondly-Infected Persons will requisition from the Trustee an amount equal to the amount of all Program Disbursements to be made to HIV Secondly-Infected Persons pursuant to the Program in respect of the immediately preceding month as set out in the notice given pursuant to Section 4.04(3).

(2) Within 10 days after the end of each month, the Trustee will transfer an amount equal to the amount requisitioned by the Program Administrator pursuant to Section 6.02(1) to the Program Administrator on behalf of the HIV Secondly-Infected Persons by electronic fund transfer to an account specified by the Program Administrator, provided that the aggregate amount of such disbursements cannot exceed \$57.6 million.

SCHEDULE "F"

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MODIFICATION NUMBER 1 - NOVEMBER 2, 1999

The Settlement Agreement is hereby modified as follows:

1. By the addition of the following provisions to Section 10.01 of the Settlement Agreement:

"p. 1) In their unfettered discretion, the Courts may order, from time to time, at the request of any Party or of the Joint Committee, that all or any portion of the money and other assets that are held by the Trustee pursuant to the Settlement Agreement and are actuarially unallocated be:

- (i) allocated for the benefit of the Class Members and / or to the Family Class Members in the Class Actions;
- (ii) allocated in any manner that may reasonably be expected to benefit the 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 light of all the circumstances provided that in distribution there shall be no discrimination based upon where the Class Members received Blood or based upon where that Class Member resides;

"p. 2) In exercising their unfettered discretion under paragraph p.1) hereinbefore, the Courts may consider, but are not bound to consider, among other things, the following factors:

- (i) the number of Class Members and Family Class Members;
- (ii) the experience of the Trust Fund;

- (iii) the fact that the compensation provided under the Plans may not reflect, in certain cases, extra-contractual liability models;
  - (iv) article 1036 of the *Code of Civil Procedure of Quebec*;
  - (v) whether the integrity of the Settlement Agreement will be maintained and the benefits particularized in the Plans ensured;
  - (vi) whether the progress of the disease is significantly different from the medical model used in the Eckler actuarial report;
  - (vii) the fact that Class Members and Family Class Members bear the risk of insufficiency of the Trust Fund;
  - (viii) the fact that the contributions of the FPT Governments pursuant to the Settlement Agreement are capped;
  - (ix) the source of the money and other assets which comprise the Trust Fund;
  - (x) any other fact the Courts consider material."
-

LA JUGE NICOLE MORNEAU

\* \* \* \* \*

ANNEXE F MODIFICATION NUMÉRO 1 - 2  
NOVEMBRE 1999

La Convention de règlement est modifiée comme suit :

1. Par l'ajout au paragraphe 10.01 de la Convention de règlement des alinéas suivants :

"p. 1) 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;

p. 2) Dans le cadre du libre exercice de leur pouvoir discrétionnaire qui leur est conféré par l'alinéa p. 1) ci-devant, les tribunaux peuvent prendre en considération, mais sans être liés par aucun d'entre eux, notamment les facteurs suivants :

- (i) le nombre de membres des recours collectifs et de membres de la famille;
- (ii) l'expérience du fonds en fiducie;

- (iii) le fait que les indemnités prévues par les régimes peuvent, dans certains cas, ne pas refléter le régime de responsabilité en matière extra-contractuelle;
  - (iv) l'article 103 6 du Code de procédure civile du Québec;
  - (v) la question de savoir si l'intégrité de la Convention de règlement sera maintenue et si les versements des indemnités prévues dans les régimes seront assurés;
  - (vi) la question de savoir si la progression de la maladie est très différente de celle prévue dans le modèle médical utilisé dans le rapport actuariel Eckler;
  - (vii) le fait que les membres des recours collectifs et les membres de la famille assument le risque d'insuffisance du fonds en fiducie;
  - (viii) le fait que les contributions des gouvernements FPT sont limitées en vertu de la Convention de règlement;
  - (ix) la source des fonds et des autres éléments d'actif que comprend le fonds en fiducie;
  - (x) tout autre fait que les tribunaux estiment important."
-