Citation: Killough et al v. Can. Red Cross et al.
2001 BCSC 1060

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

EDWARD KILLOUGH, PATRICIA NICHOLSON, IRENE FEAD, DAPHNE MARTIN, DEBORAH LUTZ, AND MELANIE CREHAN

PLAINTIFFS

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

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE K. SMITH

Counsel for the Plaintiffs: David A. Klein and David M. Rosenberg

Counsel for the Defendant The Canadian Red Cross Society: Ward K. Branch

Counsel for the Defendant Her Majesty the Queen In Right of the Province of British Columbia: D. Clifton Prowse and Keith L. Johnston

Counsel for the Defendant The Attorney General Of Canada: Paul Vickery and Wendy J.A. Divoky

Counsel for the Public Guardian And Trustee of British Columbia:	Duncan J. Manson
Counsel for the Canadian Hemophilia Society:	Mark G. Underhill
Dates and Place of Hearing:	February 12 and 13, 2001 Vancouver, B.C.

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[1] This hearing concerned, among other things, applications by the plaintiff Deborah Lutz for orders certifying this action against the defendant The Canadian Red Cross Society ("the Red Cross") as a class action pursuant to the provisions of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 (the "***Act***") and approving partial settlements reached with the Red Cross and with Her Majesty the Queen In Right of British Columbia ("the provincial government"). The action will continue against the Attorney General of Canada, who is not a party to the proposed settlements.

[2] As well, the hearing concerned Mr. Manson's application on behalf of the Public Guardian and Trustee for standing to make submissions in relation only to the application for approval of plaintiffs' class-counsel legal fees and disbursements, which will be heard at a date yet to be fixed. Mr. Underhill advised that he appeared on a watching brief for his client, the Canadian Hemophilia Society, and that he anticipated that the issues with which his client is concerned would be worked out by agreement. I assume that they have been.

[3] The action arises out of the now notorious contamination of the Canadian blood supply with Hepatitis C virus in the last three decades of the twentieth century.

[4] By order made November 24, 1998, this action was certified as a class action against the defendants other than the Red Cross, which was exempted from the order because, on July 29, 1998, all proceedings against it were stayed or suspended by order of the Ontario Court (General Division) in a proceeding taken in that Court pursuant to the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, C-36 ("the CCAA proceeding"). As a result of the reorganization of the affairs of the Red Cross in that proceeding, a fund of approximately $63 million was offered for settlement of all claims against the Red Cross made in this action and in parallel actions in Ontario and Quebec arising out of Hepatitis C infections contracted from the Canadian blood supply before January 1, 1986, and between July 1, 1990, and September 28, 1998, which is when the management of the blood supply was transferred from the Red Cross to the Canadian Blood Services and to Hema-Quebec. The offer has been accepted, subject to Court approval in each jurisdiction concerned. The stay of proceedings was lifted by order made in the CCAA proceeding to permit this and the concurrent applications.

[5] As well, an offer by the provincial government to settle all claims against it in this action for approximately $6.5 million has been presented for approval. This proposed

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settlement affects only the plaintiffs in this action and is subject to approval by this Court only.

[6] The class of plaintiffs in this action does not include those who were similarly infected between January 1, 1986, and July 1, 1990, as their claims were settled in separate proceedings: see, for this province, ***Endean v. Canadian Red Cross Society*** (1999), 68 B.C.L.R. (3d) 350 (S.C.).

[7] Hepatitis C is a virus that produces an inflammation of the liver in those infected with it. It can be transmitted through transfusions of blood and blood products, and those infected with it can transmit it to others through sexual contact. As well, it can be transmitted by an infected mother to her fetus. The virus causes no symptoms in some recipients, but its effects on others range from chronic fatigue to death caused by cirrhosis or by heptocellular cancer. There is no known cure for the disease.

[8] Until 1998, control and management of the Canadian blood supply lay with the Red Cross. For several years, including the material periods of time, it was funded by the federal, provincial, and territorial governments, who formed a committee to oversee the administration of the blood supply and to establish policies for the collection and distribution of blood.

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[9] In the 1970's and 1980's, American scientists developed surrogate, or indirect, tests for Hepatitis C virus in the American blood supply. Studies done in the early 1980's concluded that these tests were effective in identifying the presence of the virus in donated blood. As a result, American blood banks began to employ these tests as early as 1982 and, by about August 1, 1986, they were routinely used by the American Association of Blood Banks and the American Red Cross. However, they were never implemented in the Canadian blood system.

[10] In the late 1980's, scientists developed a specific test for Hepatitis C that was put into use in the United States, in conjunction with the surrogate tests, to good effect. However, while the Red Cross implemented the specific test in Canada on July 1, 1990, it continued to ignore the surrogate tests. Finally, with the implementation by the Red Cross of a second, more-sensitive specific test in 1992, the Canadian blood system came into harmony with the testing regime in the United States.

[11] The essence of the plaintiffs' case is that they became infected with the Hepatitis C virus as a result of the failure of the three defendants to implement the surrogate tests and to seasonably introduce the more effective testing regime.

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[12] The purpose of the ***Companies' Creditors Arrangement Act*** is to allow insolvent but viable businesses to avoid the precipitate distribution of their assets amongst their creditors by permitting them time to work out a reorganization that will enable them to continue as going concerns. Faced with an overwhelming number of claims arising out of the contaminated blood system, the Red Cross sought protection in the CCAA proceeding to allow it time to attempt to negotiate settlements of all outstanding claims against it, to facilitate the sale of its blood-collection assets to the Canadian Blood Services and to Hema-Quebec, and to enable it thereafter to continue to carry on its humanitarian activities unrelated to the collection and management of the blood supply.

[13] The Red Cross ultimately filed a plan of compromise and arrangement in the CCAA proceeding that described four classes of creditors, all of whom voted in favour of accepting the plan. On September 14, 2000, Mr. Justice Blair, the judge presiding in the CCAA proceeding, endorsed the plan, describing it as "fair and reasonable" in the context of the ***Companies Creditors Arrangement Act***. He observed that the plan was the culmination of "two years of intense and complex negotiations", and he commended counsel for their efforts in what he characterized as a "difficult and sensitive case."

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[14] The plan provides for a trust fund of approximately $79 million to compensate persons infected with disease as a result of the transfusion of blood or blood products. It is proposed that it be divided as follows:

1. $600,000 for claimants with Creutzfeld-Jacob Disease;

2. $1 million for claimants infected with Hepatitis C from blood collected from prisons in the United States;

3. approximately $63 million (the "HCV Fund") for claimants in this action and the parallel actions in Ontario and Quebec;

4. approximately $13.7 million for those infected with HIV; and

5. $500,000 for transfusion claimants not otherwise provided for.

Mr. Justice Blair's reasons for sanctioning the plan are published in ***Re Canadian Red Cross Society*** (2000), 19 C.B.R. (4th) 158; [2000] O.J. No. 3421 (Q.L.)(O.S.C.J.).

[15] The trust fund is comprised, in part, of $8.975 million contributed by what are described as "Plan Participants", that

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is, certain pharmaceutical companies, hospitals, physicians, and insurers who are exposed to potential liability through claims made against them in litigation by infected claimants. Although the relative merit of their contribution was not apparent, counsel advised that no information was available as to the composition of the contribution or of the reasons motivating the contributors. However, on February 20, 2001, while I had this matter under reserve, Mr. Justice Winkler of the Ontario Superior Court of Justice dismissed the parallel application for settlement approval in Ontario, in ***McCarthy v. Canadian Red Cross Society***, [2001] O.J. No. 567 (Q.L.) (O.S.C.J.), with liberty to renew the application on further evidence of the fairness and reasonableness of the contribution to be made by the Plan Participants. As well, he concluded that the initial proposal to pay nothing to family members and relatives of infected persons – described as "derivative claimants" - was not satisfactory.

[16] As a result, counsel asked me to withhold judgment on this application until those issues should be resolved in Ontario. Further evidence was filed and submissions made in Ontario and, as well, the proposed settlement was amended to provide for modest payments to derivative claimants. Consequently, on June 22, 2001, Winkler J. approved the

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proposed settlement: see ***McCarthy v. Canadian Red Cross Society***, [2001] O.J. No. 2474 (Q.L.) (O.S.C.J.).

[17] Counsel advise that the proposed settlement has also been approved by Tingley J. of the Quebec Superior Court, on July 10, 2001, with reasons to follow.

[18] Recently, counsel filed further materials in this action to address the contribution of the Plan Participants, which included the evidence that was placed before Winkler J. in connection with that issue. They also filed a motion to add the Plan Participants as parties for purposes of this application. Since then, further materials have been filed. After being advised by all counsel that none take any issue with the materials filed, and that none oppose the joinder of the Plan Participants or the approval of the proposed settlement, I have concluded that I can give judgment without a further oral hearing.

[19] The proposed settlement with the provincial government has a different genesis than that with the Red Cross. During the CCAA proceeding it came to the attention of counsel for the representative plaintiffs in this action that the provincial government had asserted a claim of lien for approximately $6.5 million against a building in Vancouver owned by the Red Cross. Plaintiffs' counsel were subsequently

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able to negotiate an agreement with the provincial government for the contribution of that lien claim in full settlement of claims against it in this action. On September 26, 2000, Blair J. approved the proof of claim for the lien and ordered the monitor in the CCAA proceeding to hold the amount of the lien and accrued interest in trust, on the basis that the money would ultimately be paid to the plaintiffs in this action which, he observed, "is consistent with the whole philosophy of the Red Cross Plan." If the settlement with the provincial government is approved, that fund, including accrued interest, will be paid to the credit of plaintiffs in this action. If the settlement is not approved, the money will be paid to the provincial government.

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[20] By virtue of s. 35 of the ***Act***, these two settlements must be approved by this Court to be effective. The proper approach to the applications for approval is now well-settled and is set out in ***Dabbs v. Sun Life Assurance Co. of Canada*** (1998), 40 O.R. (3d) 429 (O.C.(G.D.)), flld. in ***Endean v. Canadian Red Cross***, *supra*, at paras. 13, 14. The Court must be satisfied that the proposed settlement is fair, reasonable, and in the best interests of those affected by it and, in that exercise, must be concerned with the interests of the class as a whole rather than the interests of particular members of the class. The Court should consider such factors as the

likelihood of recovery or success in the action; the amount and nature of discovery evidence obtained; the terms of the proposed settlement; the recommendations and experience of counsel; the cost and likely duration of the litigation if the settlement should not be approved; the recommendations of neutral parties, if any; the number and nature of objections; and the presence of good faith and absence of collusion. In short, the court should weigh the competing positions of the parties in the lawsuit, consider the risks and costs of a trial, and exercise "an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances": ***Dabbs***, para. 15.

[21] I will deal first with the proposed settlement with the Red Cross.

[22] As counsel advise that it is urgent that a decision be made in this matter because the settlement offers will lapse if not accepted by July 31, 2001, I will not take the time to set out in detail the results of my deliberations on the evidence. The proposal is described and analyzed by Mr. Justice Winkler in paragraphs 12 to 14 of his reasons for judgment in ***McCarthy v. Canadian Red Cross Society***, [2001] O.J. No. 2474. After considering the evidence filed and the submissions of counsel, I agree with and adopt his remarks.

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As well, the additional evidence filed in relation to the contribution of the Plan Participants satisfies me, as it satisfied Winkler J. at paragraphs 16-17 of his reasons, that it is fair and reasonable in the circumstances.

[23] I would add that the issue relating to derivative claims does not have the same prominence in British Columbia as it does in Ontario because of statutory provisions of the Ontario ***Family Law Act*** that have no counterpart in this province. The payments to claimants in this category will be modest but the claims, even if successful at trial, would be modest as well, and it is sensible in the circumstances to maximize the settlement benefits to the primary claimants. Such an approach has received judicial approbation in similar circumstances: see ***Knowles v. Wyeth-Ayerst Canada Inc.***, [2001] O.J. No. 1812 (Q.L.) (O.S.C.J.) at para. 20.

[24] It is very likely that the settlement funds offered by the provincial government are all that will be available to the class plaintiffs from that source, short of a successful lawsuit. The settlement plan provides that there will be a single administrator of the HCV Fund for this action and the actions in Ontario and Quebec and it is proposed that it will also administer the $6.5 million on behalf of the claimants in

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this action. The settlement funds contributed by the provincial government will be distributed equally to entitled claimants in this action. Thus, every member of the class in this action who qualifies for payment from the settlement with the Red Cross will receive an additional payment from these funds and the cost of administration of this settlement has been minimized.

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[25] The litigation risks facing the class plaintiffs in this case are daunting, and the chances of a successful outcome against the Red Cross and the province are not high. Although no discoveries have been conducted, the plaintiffs have had the benefit of the results of the Krever Inquiry into the Canadian blood supply, which thoroughly canvassed the events material to this lawsuit. Thus, counsel's recommendation of the settlement has a firm foundation in fact, and is enhanced by the extensive experience of counsel in personal-injury litigation generally and in blood-related litigation and class actions.

[26] Moreover, the costs of litigating this action in a typical case would be out of all proportion to the risk and the reasonably anticipated reward, both in terms of monetary expenditures and in terms of the intangible costs of delay in receipt of payment. On the other hand, the settlement

provides that those class members who wish to pursue their claims individually may opt out of the settlement and do so.

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[27] Further, the representative plaintiff, after consultation with a committee comprised of other members of the class, urges the Court to approve the settlement. As stated by plaintiffs' counsel, their reasons include the high risk of losing at trial; the fact that many class members are ill and dying and are in immediate financial need; the uncertainty of achieving a better settlement and the risk of losing this settlement entirely if it should be rejected at this point; the fact that this is a partial settlement and that there is still the prospect of additional recovery from the Attorney General of Canada; and the fact that some class members are tired of the fight and want to bring it to an end. In my view, these reasons provide cogent support for their desire to accept the settlement offers.

[28] A term of the proposed settlement is that there will be "bar orders" granted to prohibit class members from asserting claims in future against the settling defendants, Plan Participants, or any other person who might claim contribution or indemnity or otherwise claim over against the settling defendants or the Plan Participants. The latter category includes any claims made or to be made against the Attorney

General of Canada that assert vicarious liability for the fault of the Canadian Red Cross. Without such a bar order, the settlement will fail, since the settling parties will not have the security of a cap on their potential liability.

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[29] Jurisdiction to grant a bar order is given by s. 12 and s. 13 of the ***Act***: ***Sawatzky v. Societe Chirurgicale Instrumentarium Inc.*** (1999), 71 B.C.L.R. (3d) 51 (S.C.) at paras. 38-45. The circumstances are such here that a bar order in the terms sought is appropriate.

[30] Several written submissions were received from objectors, some of whom were class members and others of whom were interested in the matter for various reasons. The gist of their objections is that the provincial government is not contributing sufficient compensation. In particular, they object that British Columbia, unlike some other provinces, has not made no-fault benefits available to infected persons as was recommended by the Krever Inquiry. These are extra-judicial, political concerns. My function on this application is to assess the settlement proposal that has been presented. I have no power or jurisdiction to amend it; I may only approve it or reject it.

[31] Considering all of the factors that I am bound to consider, I am satisfied that the proposed settlement with the

Red Cross and with the provincial government is fair and reasonable and in the best interests of the class members, and I approve it.

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[32] Further, I am satisfied that the requirements for certification under s. 4 of the ***Act*** have been met and I certify the action for settlement purposes, as requested and as consented to by all parties.

[33] As well, I am satisfied that the Plan Participants should be added as defendants on their motion for that purpose, and that application is granted.

[34] Finally, I am satisfied that KPMG Inc. is suitable to be the administrator of the settlement plan and I approve its appointment in that capacity.

[35] The application to approve class counsel's legal fees is the subject of a concurrent application to be heard on a date to be fixed. In that regard, Mr. Manson, counsel for the Public Guardian and Trustee filed a motion seeking:

1. an order pursuant to Rule 15 of the ***Rules of Court*** adding his client as a party representing class members who are infants or mentally incapable adults;

2. alternatively, an order pursuant to s. 15 of the ***Act*** permitting his client to participate in this proceeding as a representative of class members who are infants or mentally incapable adults;

3. alternatively, an order that his client be appointed *amicus curiae* or be granted intervener status to represent the interests of class members who are infants or mentally incapable adults.

[36] Mr. Manson made no submission on his application pursuant to Rule 15 of the ***Rules of Court***.

[37] Section 15 of the ***Act*** provides:

> (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.
>
> (2) Participation under subsection (1) must be in the manner and on the terms, including terms as to costs, that the court considers appropriate.

[38] While there may be cases where the Public Guardian and Trustee should be given some sort of formal standing, pursuant to s. 15 or otherwise, on an application for approval of class-counsel fees, there is no evidence of anything unique or

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unusual about this case that would warrant the granting of orders such as those sought by Mr. Manson.

[39] Some comments of Winkler J. in ***McCarthy v. Canadian Red Cross Society***, [2001] O.J. No. 2474, at para. 21, are apt, however, in this context. He said:

> … a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. . . . The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination. This is especially important where the motion is for the approval of settlement agreements, class counsel fees or consent certifications for the purpose of settlement.

[40] Counsel have an inherent conflict of interest on applications for approval of their own fees and disbursements. While those of us who are trained in the workings of the legal system understand that counsel put aside their own self-interest in such matters, as they are ethically bound to do, decisions that take into account the objective, perhaps adversarial, submissions of other interested parties will generally better withstand scrutiny. Accordingly, if the Public Guardian and Trustee wishes to address the Court on behalf of legally incapable persons in the class, it is my view that the Court should hear those submissions.

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[41] Section 12 of the ***Act*** clothes the Court with a very broad discretion. It provides:

> **12** The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

It would assist the Court to have the perspectives of the Public Guardian and Trustee on the proposed class-counsel fees. Therefore, it would be appropriate in this case, in order to ensure the fair and expeditious determination of this issue, to order that counsel for the Public Guardian and Trustee may be heard on the application to approve class-counsel fees. Counsel may speak to terms, if necessary.

[42] There will be orders accordingly. I would add that payment of benefits to claimants should not be delayed simply to permit the approval of class-counsel fees. If necessary, the administrator should hold back a proportionate part of each benefit payment pending resolution of that issue.

"K.J. Smith, J."
The Honourable Mr. Justice K.J. Smith

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