

Amended July 15, 1998  
pursuant to the Order of  
Mr. Justice Smith made June 10, 1998



**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**BETWEEN:**

Edward Killough, Patricia Nicholson, Irene Fead and Daphne Martin,

Plaintiffs

**AND:**

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

Defendants

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

**AMENDED STATEMENT OF CLAIM**

1. The plaintiff, Edward Killough, ("Mr. Killough"), is retired and resides at 1640 Admiral Tryon Boulevard, Parksville, British Columbia.
2. The plaintiff, Patricia Nicholson, ("Mrs. Nicholson"), is on a disability pension and resides at 2855 Coast Meridian Road, Port Coquitlam, British Columbia.
3. The plaintiff, Irene Fead, ("Mrs. Fead"), is retired and resides at 109 – 320 Brandon Avenue, Penticton, British Columbia.
4. The plaintiff, Daphne Martin, ("Mrs. Martin"), is self-employed and resides at 4514 Glenwood Avenue, North Vancouver, British Columbia.

5. The defendant, the Canadian Red Cross Society (the "Red Cross"), is a Society incorporated by special *Act* of Parliament in 1909, and continued by letters patent under the *Canadian Corporations Act* in 1970, with a head office within British Columbia at 4710 Kingsway, Suite 400, Burnaby, British Columbia, V5H 4M2.
6. The defendant, Her Majesty the Queen in Right of the Province of British Columbia, (the "Provincial Crown"), has an address for delivery of legal process care of the Attorney General of British Columbia, 5<sup>th</sup> Floor, Harbour Square, 910 Government Street, Victoria, British Columbia, V8V 1X4.
7. The defendant, the Attorney General of Canada (the "Federal Crown"), has an address for delivery of legal process care of the Deputy Attorney General of Canada, Justice Building, 239 Wellington Street, Ottawa, Ontario, K1A 0H8.

8. Persons who

- (a) received Hepatitis C positive whole blood, packed red cells, platelets, plasma (both fresh frozen and banked) or white blood cells ("blood and blood products") during the period January 1, 1955 through July 31, 1986 (the "Material Time") in British Columbia (the "Transfusion"); and
- (b) were infected with the Hepatitis C virus as a result of the Transfusion and have tested positive for the antibody to the Hepatitis C virus

are referred to as "Primarily Infected Persons".

8.1 Mr. Killough, Mrs. Nicholson, Mrs. Fead, and Mrs. Martin undertake this action on behalf of themselves and all individuals in the following classes:

- (a) persons who are
  - (i) British Columbia residents who are Primarily Infected Persons;
  - (ii) British Columbia residents who have

- (1) been infected with the Hepatitis C virus by a spouse or parent who is included in the definition of **Primarily Infected Persons**; and
  - (2) tested positive for the antibody to the Hepatitis C virus;
  - (iii) the personal representatives of persons described in paragraph 8.1(a)(i) or 8.1(a)(ii) above who have died as a result of being infected with the Hepatitis C virus; and
  - (iv) the executors and administrators of persons described in paragraph 8.1(a)(i) or 8.1(a)(ii) above who have died subsequent to being infected with the Hepatitis C virus; and
- (b) persons who are
- (i) not resident in British Columbia but who are **Primarily Infected Persons**;
  - (ii) not resident in British Columbia but who have
    - (1) been infected with the Hepatitis C virus by a spouse or parent who is included in the definition of **Primarily Infected Persons**; and
    - (2) tested positive for the Hepatitis C virus;
  - (iii) the personal representatives of persons described in sub-sub-paragraph 8.1(b)(i) or 8.1(b)(ii) above who have died as a result of being infected with the Hepatitis C virus; and
  - (iv) the executors and administrators of persons described in paragraph 8.1(b)(i) or 8.1(b)(ii) above who have died subsequent to being infected with the Hepatitis C virus.

8.2 The class plaintiffs described in paragraphs 8.1(a)(i) and 8.1(b)(i) are referred to collectively as the "**Primary Class Members**".

8.3 The class plaintiffs described in paragraphs 8.1(a)(ii) and 8.1(b)(ii) are referred to collectively as the "**Secondarily Infected Class Members**".

8.4 With respect to the *Secondarily Infected Class Members*, the word "spouse" means a person who

- (a) is or was married to another person; or
- (b) lived with another person in a marriage-like relationship for a period of at least 2 years and, for the purposes of the within Action, the marriage-like relationship may be between persons of the same gender.

8.5 With respect to those class plaintiffs described in paragraphs 8.1(a)(iii) and 8.1(b)(iii) the representative plaintiffs plead and rely on the *Family Compensation Act R.S.B.C.* 1996, c.126.

8.6 With respect to those class plaintiffs described in paragraph 8.1(a)(iv) and 8.1(b)(iv) the representative plaintiffs plead and rely on the *Estate Administration Act R.S.B.C.* 1996, c.122.

## Background

### The Blood Program

9. During the Material Time, the Red Cross collected, manufactured, supplied, and distributed all blood and blood products within Canada. The Red Cross' efforts to collect, manufacture, supply, and distribute blood and blood products are hereafter referred to as the "Blood Program."
10. The Blood Program has been publicly funded through various federal government programs since 1958.
11. In 1973, the federal and provincial Health Ministers agreed to continue public funding of the Blood Program. At the same time, the Health Ministers agreed that the federal government, in consultation with the provincial governments, would have authority to

evaluate the budgets and programs that collectively made up, and continue to make up, the Blood Program.

12. The Provincial Crown had a responsibility to ensure the safe collection, manufacture, supply, and distribution of blood and blood products.
13. The Provincial Crown developed policies to regulate the Blood Program, as part of its responsibility as outlined in paragraph 12.
14. The Federal Crown had a responsibility to ensure the safe collection, manufacture, supply, and distribution of blood and blood products.
15. The Federal Crown developed policies to regulate the Blood Program, as part of its responsibility as outlined in paragraph 14.
16. The Red Cross was an agent of the Provincial Crown, and the Provincial Crown is vicariously liable for the actions of the Red Cross.
17. The Red Cross was an agent of the Federal Crown, and the Federal Crown is vicariously liable for the actions of the Red Cross.

#### The Canadian Blood Committee

18. The Federal Crown and the Provincial Crown were members of the Canadian Blood Committee (the "CBC"), along with members from the other nine Canadian provinces, from the CBC's inception in 1982.
19. The mandate of the CBC was to develop and implement policies pertaining to the safe collection, manufacture, supply, and distribution of blood and blood products in Canada. The CBC also had a responsibility, on behalf of the Federal Crown, the

Provincial Crown, and the governments of the other nine Canadian provinces, to supervise and direct the programs run under the policies.

20. From the CBC's inception, it was an agent of the Provincial Crown, and the Provincial Crown is vicariously liable for the actions of the CBC.
21. From the CBC's inception, it was an agent of the Federal Crown, and the Federal Crown is vicariously liable for the actions of the CBC.

### **The Events**

22. On a date during the Material Time, and in the case of Mr. Killough, Mrs. Nicholson, Mrs. Fead and Mrs. Martin, on or about March 1986, June 1986, January 1986 and June 1986, respectively, each of the Primary Class Members received a transfusion or transfusions of blood and blood products collected pursuant to the Blood Program.
23. The blood and blood products received by Mr. Killough, Mrs. Nicholson, Mrs. Fead and Mrs. Martin, and the other Primary Class Members, were contaminated with Hepatitis C, also known as Non-A, Non-B Hepatitis.
24. The defendants knew, or ought to have known, that Hepatitis C is caused by a virus that is transmitted through blood and blood products.
25. The defendants knew, or ought to have known, that Hepatitis C has a long latency period during which an individual infected with it does not have symptoms, but is capable of transmitting it through blood and blood products.
26. The defendants knew, or ought to have known, that there were tests available to detect signs of Hepatitis C in blood and blood products.

**Negligence of the Red Cross**

27. The Red Cross owed a duty of care to the plaintiffs and other class members to exercise all reasonable care, skill, and diligence to ensure that recipients of blood and blood products supplied by the Red Cross did not receive blood and blood products that were contaminated with Hepatitis C.
28. The Red Cross breached its duty of care to the plaintiffs and other class members by:
- a) failing to implement available tests to detect signs of Hepatitis C in donated blood and blood products;
  - b) misrepresenting to the CBC, the Provincial Crown and the Federal Crown, the state of research, opinion and medical literature pertaining to the benefits of testing for signs of Hepatitis C in donated blood and blood products;
  - c) failing to keep abreast of the state of research, opinion, and medical literature pertaining to Hepatitis C and to testing for signs of Hepatitis C in donated blood and blood products; and
  - d) failing to promptly and/or adequately study the need to test for signs of Hepatitis C in donated blood and blood products.

**Negligence of the Provincial Crown**

29. The Provincial Crown owed a duty of care to the plaintiffs and other class members to exercise all reasonable care, skill, and diligence to ensure that recipients of blood and blood products supplied by the Red Cross did not receive blood and blood products which were contaminated with Hepatitis C.

30. Having formulated a policy to regulate the Blood Program and to ensure the safety of the blood supply, the Provincial Crown breached its duty of care to the plaintiffs and other class members by:

- a) failing to require the Red Cross to implement available tests to detect signs of Hepatitis C in donated blood and blood products;
- b) failing to properly exercise its discretion to regulate the Blood Program by delegating the implementation of the Provincial Crown's policies to the CBC, when the Provincial Crown knew or ought to have known that the CBC was incapable of regulating the Blood Program and ensuring the safety of blood and blood products;
- c) implementing a system of review of the Blood Program which was incapable of identifying lapses in the safety of blood and blood products;
- d) implementing a system of review of the Blood Program which did not provide for timely corrective measures to be taken when there were lapses in the safety of blood and blood products; and
- e) failing to keep abreast of the state of research, opinion, and medical literature pertaining to Hepatitis C and to testing for signs of Hepatitis C in donated blood and blood products.

**Negligence of the Federal Crown**

31. The Federal Crown owed a duty of care to the plaintiffs and other class members to exercise all reasonable care, skill, and diligence to ensure that recipients of blood and blood products supplied by the Red Cross did not receive blood and blood products which were contaminated with Hepatitis C.



32. Having formulated a policy to regulate the Blood Program and to ensure the safety of the blood supply, the Federal Crown breached its duty of care to the plaintiffs and other class members by:

- a) failing to require the Red Cross to implement available tests to detect signs of Hepatitis C in donated blood and blood products;
- b) failing to properly exercise its discretion to regulate the Blood Program by delegating the implementation of the Federal Crown's policies to the CBC, when the Federal Crown knew or ought to have known that the CBC was incapable of regulating the Blood Program and ensuring the safety of blood and blood products;
- c) implementing a system of review of the Blood Program which was incapable of identifying lapses in the safety of blood and blood products;
- d) implementing a system of review of the Blood Program which did not provide for timely corrective measures to be taken when there were lapses in the safety of blood and blood products; and
- e) failing to keep abreast of the state of research, opinion, and medical literature pertaining to Hepatitis C and to testing for signs of Hepatitis C in donated blood and blood products.

**Claim in Negligence**

33. As a result of the negligence of the defendants, Mr. Killough, Mrs. Nicholson, Mrs. Fead and Mrs. Martin, and all of the other Primary Class Members and Secondary Infected Class Members, were infected with Hepatitis C through blood and blood products supplied by the Red Cross. As a further result of the negligence of the

defendants, all of the class members have suffered and continue to suffer loss, damage, and expense.

### **Intentional Destruction of Documents**

34. The Provincial Crown and the Federal Crown, through their agent, the CBC, intentionally destroyed documents and evidence which were relevant to litigation pertaining to contaminated blood and blood products. This intentional destruction included the following actions:
- a) On or about May 16, 1989, through May 18, 1989, the CBC developed and implemented a policy to destroy audiotapes and verbatim transcripts of all previous meetings of the CBC. This policy covered all audiotapes and verbatim transcripts that were in the possession of CBC.
  - b) On or about May 16, 1989, through May 18, 1989, the CBC developed and implemented a policy to destroy audiotapes and verbatim transcripts of all future meetings of the CBC.
35. At the time the decision to destroy the audiotapes and verbatim transcripts of all past and future CBC meetings was made, the CBC was part of Health Canada, an institute listed in *Schedule I* to the *Access to Information Act*, R.S.C. 1985, c. A-1. The CBC was also a government institution within the meaning of the *National Archives of Canada Act*, R.S.C. 1985, c. 1 (3<sup>rd</sup> Supp.), and the audiotapes and verbatim transcripts were records within the meaning of that *Act*. The audiotapes and verbatim transcripts were destroyed in contravention of both *Acts*.
36. At the time the decision to destroy the audiotapes and verbatim transcripts was made, the Red Cross had been named in litigation pertaining to contaminated blood and blood products, and the CBC was concerned about liability issues pertaining to contaminated blood and blood products.

37. The decision to destroy the audiotapes and verbatim transcripts of all past and future CBC meetings was made, at least in part, for the purpose of preventing relevant documents and evidence from being produced in the discovery process, and/or being available as trial evidence, in litigation pertaining to contaminated blood and blood products.

38. The relevant documents included:

- a) records of discussions about the Blood Program; and
- b) records of discussions about the liability of the Red Cross, the CBC, the Federal Crown, and the Provincial Crown, in matters pertaining to contaminated blood and blood products that had been used in transfusions.

39. The actions of the CBC, the Provincial Crown, and the Federal Crown, as alleged in paragraph 34, were vexatious, arrogant, high handed, abusive, callous, arbitrary, malicious, reprehensible, outrageous, and deserving of condemnation and punishment.

40. The plaintiffs claim:

- a) An Order certifying this proceeding as a class proceeding and appointing a class member as representative plaintiff;
- b) Judgment against all defendants for negligence, including the following relief:
  - i) damages for pain, suffering, loss of enjoyment of life and loss of life expectancy;

- ii) damages for past and future loss of income;
  - iii) damages for loss of earning capacity and loss of opportunity;
  - iv) special damages;
  - v) damages pursuant to the *Family Compensation Act*, R.S.B.C. 1996, c.126;
  - vi) damages pursuant to the *Estate Administration Act*, R.S.B.C. 1996, c.122;
  - vii) costs pursuant to s. 37(2) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50;
  - viii) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79; and
  - ix) such further and other relief as to this Honourable Court may seem just.
- c) In addition to the damages listed above, punitive damages against the Federal Crown and the Provincial Crown.

PLACE OF TRIAL: Vancouver, British Columbia

Dated at Vancouver, British Columbia, this 12<sup>th</sup> day of November 1997.

  
Solicitor for the Plaintiffs

**THIS AMENDED STATEMENT OF CLAIM** is issued by David A. Klein of the firm of **KLEIN, LYONS**, Barristers and Solicitors, whose place of business and address for service and delivery is at Suite 500, 805 West Broadway, Vancouver, British Columbia, V5Z 1K1, phone 874-7171, fax 874-7180.

No. C976108  
Vancouver Registry

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AMENDED STATEMENT OF CLAIM

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