

**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 British Columbia and the Attorney General of Canada

DEFENDANTS

- and -

The Plan Participants  
(As listed in Schedule 1)

INTERVENORS

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

**ORDER**

BEFORE THE HONOURABLE ) THURSDAY, THE 19<sup>th</sup>  
MR. JUSTICE K. SMITH ) DAY OF JULY, 2001

THIS MOTION, made by the representative plaintiffs, for amendment of the Certification Orders made on November 24, 1998 and May 4, 1999 in this proceeding pursuant to sections 4 and 8(3) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "Act") and for orders pursuant to section 35 of the Act approving settlements of the Class Action was heard on February 12 and 13, 2001 at Vancouver, British Columbia. Further materials were filed and read in July, 2001 and judgment was reserved to this date.

AND UPON READING:

- a. the notices of motion;
- b. the Amended Plan of Compromise and Arrangement, as approved by the order of Mr. Justice Blair of the Ontario Superior Court of Justice dated September 14, 2001;
- c. the affidavit of the affidavit of Darlene Nicolaas sworn July 8, 1998, the affidavit of Arlene King sworn September 4, 1998, the affidavit of Paul Russell Gully sworn September 10, 1998, the affidavit of Lisa Porteous sworn November 9, 1998, the affidavit of Deborah Lutz sworn April 28, 1999, the affidavit of Melanie Crehan sworn April 22, 1999, the affidavits of Gary Smith, Douglas Elliott, and Darlene Nicolaas, all sworn February 7, 2001, the affidavits of Deborah Lutz, and Janet Gordon Pearce, both sworn February 8, 2001, the affidavit of Lorne McCubbin, sworn July 9, 2001, the affidavit of James Sawyers sworn July 9, 2001, and the affidavit of Peter Willcock sworn July 12, 2001, all of which were filed in this action,

AND ON HEARING David A. Klein and David M. Rosenberg, counsel for the representative plaintiffs, Ward K. Branch, counsel for The Canadian Red Cross Society and The Plan Participants, D. Clifton Prowse and Keith L. Johnston, counsel for Her Majesty the Queen In Right of the Province of British Columbia, and Paul Vickery and Wendy Divoky, counsel for The Attorney General Of Canada.

AND WITHOUT ANY ADMISSION OF LIABILITY ON THE PART OF ANY PARTY.

1. THIS COURT ORDERS AND DECLARES that for the purposes of this order, the following definitions apply:

**Blood** means blood or blood derivatives or blood products collected or supplied by the Canadian Red Cross Society (hereinafter the “Red Cross”) prior to September 28, 1998.

**CCAA Plan** means the Amended Plan of Compromise and Arrangement of the Red Cross under the *Companies Creditors Arrangement Act*, as approved by the order of Mr. Justice Blair dated September 14, 2000, which is annexed as Schedule 1 to this order.

**Claimants’ Data** means all data, records, medical, personal and financial information, files, addresses, claims payment history, and all other information of any nature and kind whether in paper, recorded or electronic form or in any other medium including all individual personal identifying and non-personal identifying information and any compilation, selection, co-ordination or arrangement of individual information into an original, derivative or collective work or works capable of being reviewed, perceived, reproduced or otherwise communicated directly or indirectly with the aid of a machine or device or capable of being fixed in any tangible medium of expression now known or later developed or transmitted or displayed even for a transitory period.

**Class Action** means the within action.

**Class Members** means collectively all of the members of the Primary Class and the Derivative Class in the Class Action pursuant to the certification provisions of this order.

**Class Period** means prior to January 1, 1986 and between July 1, 1990 and September 28, 1998 inclusive.

**Court** means the Supreme Court of British Columbia.

**Plan Participants** means those parties designated as Plan Participants pursuant to the Amended Plan of Compromise and Arrangement, annexed hereto as Schedule 1.

**Province** means, individually and collectively,

- a. Her Majesty The Queen In Right Of British Columbia,
- b. The Canadian Blood Agency,
- c. each operator of a hospital or health care facility in British Columbia at which a Primarily-Infected Person received or took blood, care or advice

in any way relating to or arising from the infection of the Primarily-Infected person with HCV,

- d. each health caregiver employed by or acting on behalf of a hospital or health care facility in British Columbia who treated or provided care or advice to a Primarily-Infected Person in British Columbia in any way relating to or arising from the infection of the Primarily-Infected Person with HCV, and
- e. any person employed by or acting on behalf of a hospital or health care facility in British Columbia engaged in the business of collecting, manufacturing, purchasing, processing, supplying or distributing Blood in British Columbia

including their respective past, present, and future parent, subsidiary and affiliated corporations, employees, agents, officers, directors, shareholders, volunteers, representatives, executors, administrators, successors and assigns.

**Spouse** means either of a man and woman who,

- a. are married to each other;
- b. have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right

and in addition includes either of a man and woman who are not married to each other and have cohabited,

- c. continuously for a period of not less than three years, or
- d. in a relationship of some permanence, if they are the natural or adoptive parents of a child;

and in addition includes either of two persons of the same sex who have cohabited,

- e. continuously for a period of not less than three years, or
- f. in a relationship of some permanence, if they are the natural or adoptive parents of a child.

In this order, all other defined terms which are denoted with initial capital letters shall have the meanings ascribed to them in the CCAA Plan.

2. THIS COURT ORDERS AND DECLARES that the Plan Participants are granted leave to intervene in this motion as added parties for the limited purpose of being bound by this order, and that they may receive both the burden and the benefit of this order. The title of proceedings in this order is hereby amended accordingly.

*Certification*

3. THIS COURT ORDERS AND DECLARES that, on consent and for settlement purposes only, the certification Orders of November 24, 1998 and May 4, 1999 are amended as against the Red Cross, the Province and the Plan Participants as set out in this Order. This action shall be certified as a class proceeding against Red Cross, the Province and the Plan Participants, with a resident subclass and a non-resident subclass. Each subclass shall each include a Primary Class and a Derivative Class which are defined as follows:

**Primary Class:**

- a. all Persons who received Blood in British Columbia during the Class Period, which Blood was contaminated with the Hepatitis C Virus (“HCV”) and who were infected for the first time with HCV during the Class Period; and
- b. any Person who was infected with HCV through contact with a Person described in a. above.

**Derivative Class:**

- a. living spouses, children, parents, grandparents, grandchildren and siblings of infected Persons who may claim damages related to the infection with HCV of a member of the Primary Class.

4. THIS COURT ORDERS AND DECLARES that Deborah Lutz is the representative plaintiff for the resident subclass.
5. THIS COURT ORDERS AND DECLARES that Melanie Creehan is the representative plaintiff for the non-resident subclass.
6. THIS COURT ORDERS AND DECLARES that the claims asserted by the Class Members relate to the infection of certain Primary Class members with the Hepatitis C Virus through the administration of Blood during the Class Period, and the subsequent transmission of the Hepatitis C Virus from those Primary Class Members to other Primary Class Members. The Primary Class Members seek damages for pain and suffering, past and future income loss, and past and future medical expenses. The Derivative Class Members seek damages for the loss of care, guidance, companionship and support of the Primary Class Members, and damages for housekeeping and nursing services performed by them.
7. THIS COURT ORDERS AND DECLARES that the following are common issues for both classes:
  - a. The standard of care applicable to blood system operations throughout the Class Period with respect to appropriate methods of reducing the risk of transmitting the Hepatitis C Virus through the therapeutic use of Blood; and
  - b. Whether or not the applicable standard of care was met by the defendants.
8. THIS COURT ORDERS that this certification of the action and the determination of the common issues are not binding on any motion or proceeding within this action for determination of any issues as against the Attorney General of Canada.

*Notification of the Class*

9. THIS COURT ORDERS that Class Members shall be notified of the certification of the Class Action, the settlement of the Class Action and the procedure whereby a Class Member may opt out of the Class Action, in a method to be devised and approved by this court on a motion to be brought by the plaintiffs.

*Opt-Out Provisions*

10. THIS COURT ORDERS AND DECLARES that this order is binding on all Primary Class Members, including minors, unborn Persons and Persons under a legal disability, and all Derivative Class Members, including minors, unborn Persons and Persons under a legal disability, unless a Primary Class Member or a Derivative Class Member opts out of the Class Action by filing a written notice with the Administrator on or before March 31, 2002 or unless a Derivative Class Member is deemed to opt out in accordance with the provisions of this order.
11. THIS COURT ORDERS that any Class Member who can establish to the satisfaction of the Trustee that he or she or the Person from whom his or her derivative claim flows was, on September 14, 2000, unaware of the fact that they had been infected with HCV may opt out of the Class Action by filing a written notice with the Administrator on or before September 30, 2003.
12. THIS COURT ORDERS AND DECLARES that if a Primary Class Member opts out of the Class Action, each Derivative Class Member related to his or her claim is deemed to have opted out of the Class Action in his or her capacity as a Derivative Class Member. However, a Derivative Class member may opt out without affecting the Primary

Claimant or any other Derivative Class members who may also derive their claims from that Primary Claimant.

13. THIS COURT ORDERS that the Administrator shall, on or before September 30, 2003, report to this Court and advise as to the names of those Persons who have opted out of the Class Action. Upon written request, the Administrator shall provide to the Red Cross, the Province or any Plan Participant a list of the names of all Class Members who have received payment pursuant to the CCAA Plan and/or this order.
14. THIS COURT ORDERS that no Person may opt out a Person under a legal disability from the Class Action without the leave of this Court on notice to the Public Guardian and Trustee.

*Settlement Approval*

15. THIS COURT ORDERS AND ADJUDGES that with respect to the Class Members, the CCAA Plan, annexed hereto as Schedule 1, is fair, reasonable, and in the best interests of the Primary Class Members and the Derivative Class Members in the Class Action and this good faith settlement of the Class Action is hereby approved on the terms set out in the CCAA Plan, which forms part of and is incorporated by reference into this order. It is a term of this order that the prohibitive provisions set out in paragraphs 30 and 31 as they relate to any particular Person are subject to compliance by the Red Cross, the Province and Plan Participants with the terms set out in paragraph 33 as they relate to the conduct of any action continued or commenced by Class Members against the Federal, Provincial or Territorial governments or any of them.



16. THIS COURT ORDERS AND ADJUDGES that with respect to the Class Members, the settlement with the Province, annexed hereto as Schedule 4 and as amended by the distribution protocol annexed hereto as Schedule 5, is fair, reasonable, and in the best interests of the Primary Class Members and the Derivative Class Members in the Class Action and this good faith settlement of the Class Action is hereby approved and is incorporated by reference into this order.
17. THIS COURT DECLARES that no subrogation payment of any nature or kind shall be paid, directly or indirectly, under the CCAA Plan or under the settlement with the Province, and without restricting the generality of this provision, that:
- a. no Federal, Provincial, Territorial or Municipal Government and no department of any such Government providing employment insurance, health care, hospital, medical and prescription services, social assistance or welfare will be paid under the CCAA Plan or under the settlement with the Province;
  - b. no Person exercising a right of subrogation will be paid under the CCAA Plan or under the settlement with the Province.

*Opt-In Provisions*

18. A Class Member who is not resident in British Columbia on the date of entry of this Order shall be deemed to have opted into this Class Action if the Class Member applies for compensation from the settlement with the Province or the Red Cross.

*Administration*

19. THIS COURT ORDERS that KPMG Inc., be and are hereby appointed, as the Administrator of the settlements with the Red Cross and the Province until further order

of the Court on the terms and conditions and with the powers, rights, duties and responsibilities set out in this order and the Distribution Protocols, which are attached as Schedules 2 and 5 to this order, and which form part of and are incorporated by reference into this order.

20. THIS COURT ORDERS that Mr. Peter Cory be and is hereby appointed as the Trustee of the Trust until further order of the Courts on the terms and conditions and with the powers, rights, duties and responsibilities set out in this order, and more particularly set out in the Distribution Protocol, and the Trust Agreement, which are attached as Schedules 2 and 3 to this order, and which form part of and are incorporated by reference into this order.
21. THIS COURT DECLARES that all amounts paid to a Class Member pursuant to the CCAA Plan are payments in respect of pain and suffering.
22. THIS COURT DECLARES that all amounts paid to a Class Member pursuant to the settlement with the Province are payments in respect of pain and suffering.
23. THIS COURT ORDERS AND DECLARES that, pursuant to section 33 of the Act, this Court shall supervise the execution of this order and the distribution to Class Members, pursuant to the CCAA Plan and that, without limiting the generality of the foregoing, this Court may issue judgments or orders, in such form as are necessary, to implement and enforce the provisions of the CCAA Plan and this order and may retain any advisor this Court in its discretion considers necessary and the costs of so doing shall be an expense of the Trust.

24. THIS COURT ORDERS AND DECLARES that, pursuant to section 33 of the Act, this Court shall supervise the execution of this order and the distribution to Class Members, pursuant to the settlement with the Province and that, without limiting the generality of the foregoing, this Court may issue judgments or orders, in such form as are necessary, to implement and enforce the provisions of the settlement with the Province and this order and may retain any advisor this Court in its discretion considers necessary and the costs of so doing shall be treated as an expense related to the administration of the settlement.

*Releases and Bar Orders*

25. THIS COURT ORDERS AND DECLARES that each Primary Class Member, unless the Primary Class Member opts out in accordance with the provisions of this order, and each Derivative Class Member unless the Derivative Class Member opts out or is deemed to have opted out in accordance with the provisions of this order, has released each of the Red Cross, the Province and the Plan Participants from any and all actions, causes of action, liabilities, claims and demands whatsoever of every nature or kind for damages, contribution, indemnity, costs, expenses and interest which any such Primary Class Member or Derivative Class Member ever had, now has or may hereafter have in any way relating to or arising from the infection of the Primary Class Member with HCV whether such claims were made or could have been made in any proceeding including the Class Actions, and that any subsisting action or proceeding by or for the benefit of a class member who has not opted out by March 31, 2002 shall be dismissed by the class member on a without costs basis as against Red Cross, the Province and the Plan Participants, failing which it shall be deemed to have been dismissed as against the Red Cross, the Province and any Plan Participant, without costs, in which event such class member shall also be deemed to have consented, by virtue of remaining in the class, to the issuance and filing of any documents or orders that may be necessary to close an

existing court file in respect of such action or proceeding, including but not limited to an order for the dismissal or confirmation of the discontinuance of any such action or proceeding.

26. THIS COURT ORDERS AND DECLARES that the Primary Class Members and the Derivative Class Members, unless the Primary Class Member opts out in accordance with the provisions of this order, or the Derivative Class Member opts out or is deemed to opt out in accordance with the provisions of this order, separately and severally, have fully, finally and forever released each of the Red Cross, the Province and the Plan Participants, separately and severally, and in each and every capacity that such actions, causes of action, liabilities, claims or demands referred to in paragraph 25 of this order may be asserted against any of the Red Cross, the Province or the Plan Participants.
27. THIS COURT ORDERS AND DECLARES that the obligations and liabilities of the Red Cross, the Province and the Plan Participants pursuant to the CCAA Plan, the settlement with the Province and this order constitute the consideration for the releases and other matters referred to in this order and such consideration is in full and final settlement and satisfaction of any and all claims against the Red Cross, the Province and the Plan Participants referred to therein.
28. THIS COURT ORDERS AND DECLARES that, unless the Primary Class Member opts out in accordance with the provisions of this order, or the Derivative Class Member opts out or is deemed to opt out in accordance with the provisions of this order, this order and the CCAA Plan and the settlement with the Province are binding upon all the Primary Class Members and all the Derivative Class Members who are minors, unborn Persons or Persons under a legal disability, and that no additional court approval is necessary relating to any payment made to or for the benefit of any Primary Class Member or

Derivative Class Member who is a minor, an unborn Person or a Person under a legal disability.

29. THIS COURT ORDERS AND DECLARES that, unless the Primary Class Member opts out in accordance with the provisions of this order, or the Derivative Class Member opts out or is deemed to opt out in accordance with the provisions of this order, Class Members shall not make any claim or demand or take any actions or proceedings against the Red Cross, the Province, any Plan Participant or any other Person in which any claim could arise against the Red Cross, the Province or any Plan Participant for damages and/or contribution and/or indemnity and/or other relief over under the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333, as amended, or its counterpart in other jurisdictions, the common law or any other statute of British Columbia or any other jurisdiction or on any other basis in any way relating to or arising from the infection of the Primary Class Member with HCV. Furthermore, no Class Member who has not opted-out shall pursue or assert such a claim against any other Person if by doing so the Person against whom the claim is asserted would, but for the extinguishment of such claims as against the Red Cross, the Province and the Plan Participants as set out above, have a cross-claim, third party claim or other claim for contribution or indemnity against the Red Cross and its present and former officers, governors and employees or the Province or the Plan Participants.
30. THIS COURT ORDERS that no claims for contribution, indemnity, subrogation or other claims over, shall be made by any Person or party against the Red Cross, the Province or any Plan Participant for or in respect of the subject matter of the Class Action or costs associated with the defence of the Class Action, whether direct, derivative, subrogated, asserted or unasserted or asserted in a representative capacity, inclusive of interest, GST and costs, and whether within the Class Action or within any other proceeding, unless

such claim is made with respect to a claim brought by a Class Member who has opted-out.

31. THIS COURT ORDERS AND DECLARES that nothing herein prevents a Class Member from pursuing or asserting a claim against Persons other than the Red Cross, its present and former officers, governors and employees, the Province and the Plan Participants, on a several basis claiming recovery only in accordance with those other Persons' proportions of liability, since pursuing such Persons for their several liability on this basis only will not give rise to a cross-claim, third party claim or other claim for contribution or indemnity against the Red Cross and its present and former officers, governors and employees, the Province and the Plan Participants. For greater certainty, the amount any Class Member who has not opted-out may recover against any Person in a claim contemplated by this paragraph shall not include the proportion, if any, which would have been found to be the liability or responsibility of the Red Cross and its present and former officers, governors and employees, the Province or any Plan Participant if they had been parties to the action. No Person who is sued by a Class Member who has not opted-out and who is pursuing or asserting a claim as contemplated by this paragraph may assert any cross-claim, third party claim or other claim for contribution or indemnity against the Red Cross and its present and former officers, governors and employees, the Province or the Plan Participants.
  
32. THIS COURT ORDERS that unless the Primary Class Member opts out in accordance with the provisions of this order, or the Derivative Class Member opts out or is deemed to opt out in accordance with the provisions of this order, Class Members may not assert claims against any Person or party for vicarious liability related to the actions of the Red Cross, the Province or any of the Plan Participants.

33. THIS COURT ORDERS AND ADJUDGES that notwithstanding any other provision in this order, in any action continued or commenced by class members in this Class Action or the parallel class actions in Québec and Ontario, which could reasonably have resulted in a cross-claim or third party claim against the Red Cross, the Province or any of the Plan Participants, but for the provisions of this order or the CCAA Plan or the settlement with the Province, any Person or party may, on motion to this court, on 10 days notice to present counsel for all affected entities, on the close of pleadings or on receipt of notice of motion seeking certification, whichever is earlier, obtain:
- 1) documentary discovery and a list of documents in accordance with the Rules of Court from each of the Red Cross, the Province and any of the Plan Participants;
  - 2) oral discovery of a representative of each of the Red Cross, the Province and any of the relevant Plan Participants, the transcripts of which may be read in at trial;
  - 3) leave to serve a request to admit on each of the Red Cross, the Province and any of the relevant Plan Participants in respect of factual matters;
  - 4) an undertaking to produce a representative of each of the Red Cross, the Province and any of the relevant Plan Participants to testify at trial, with such representative to be subject to cross-examination by counsel for any Person or party; and
  - 5) an order that this order, including all Schedules hereto, shall be disclosed to the trial judge at the commencement of trial.
34. THIS COURT FURTHER ORDERS that, pursuant to its case management powers under the Act, this court shall maintain a continuing supervisory role in this action and in the event the Red Cross and/or the Province and/or any affected Plan Participant fails to comply with an order of this court made pursuant to paragraph 33(1) – (5) above, the court may, in addressing any such failure, lift the order contemplated by paragraphs 30 and 31 of this order, only as against the entity in non-compliance and in the case of the

Red Cross such non-compliance shall not affect the rights of the insurers under paragraphs 30 and 31.

*Confidentiality*

35. THIS COURT ORDERS AND DECLARES that, subject to the rights of the Red Cross, the Province and the Plan Participants under paragraph 13 of this order, all information in any form whatsoever received, obtained, compiled or created by the Administrator or Trustee, as a result of his, her, their or its involvement with the CCAA Plan, the settlement with the Province, the administration of the CCAA Plan and the settlement with the Province, and the implementation of this order including the Claimants' Data is to be held in confidence and is to be used or disseminated solely for the purposes of administration of the CCAA Plan, the settlement with the Province and the implementation of this order and is not to be used or disseminated for any other purposes whatsoever without an order of the Courts.
36. THIS COURT ORDERS AND DECLARES that the Administrator and the Trustee do not have and shall not obtain any interest of any nature or kind in the Claimants' Data and in any information received, obtained, compiled or created by him, her, them or it in the course of the performance of his, her, their or its duties, in the course of administration of the CCAA Plan, the settlement with the Province and in the implementation of this order.
37. THIS COURT ORDERS AND DECLARES that the Trustee shall hold in trust for the Primary Class Members and Derivative Class Members legal title to the Claimants' Data received, obtained, compiled or created by the Administrator or the Trustee.



38. THIS COURT ORDERS AND DECLARES that the Administrator and the Trustee have no right, authority or ability to pledge the credit of the Trust Fund or in any way to encumber the Trust Fund.
39. THIS COURT ORDERS AND DECLARES that the Administrator and the Trustee have no right, authority or ability to pledge the credit of the settlement fund for the settlement with the Province or in any way to encumber that fund.
40. THIS COURT ORDERS AND DECLARES that no Person may bring any action or take any proceedings against the Administrator, Trustee, or their employees, agents, partners, associates, representatives, successors or assigns for any matter in any way relating to the CCAA Plan, the settlement with the Province, the administration of the CCAA Plan, the administration of the settlement with the Province or the implementation of this order, except with the leave of the Court.
41. THIS COURT ORDERS that execution of this order shall be stayed pending implementation of the CCAA Plan in accordance with its terms and this order shall be automatically set aside in its entirety and shall be of no force and effect if the conditions of Plan Implementation are not fulfilled, satisfied or waived by the last date fixed by the Ontario Superior Court of Justice pursuant to Section 7.04 of the CCAA Plan.

BY THE COURT

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Registrar

Approved as to form by counsel for the parties: see Minutes Attached