

No. C976108  
Vancouver Registry

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

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

Court File No. 98-CV-143334

*ONTARIO*  
SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHAEL MCCARTHY, CHRISTINE MCCARTHY, DEREK MARCHAND

Plaintiffs

- and -

THE CANADIAN RED CROSS SOCIETY, THE ATTORNEY GENERAL OF CANADA

Defendants

Proceeding under the *Class Proceedings Act*, 1992

COURT FILE NUMBER	9903 19153	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
PLAINTIFF(S)	<b>SHIRLEY ADRIAN, DEBBIE ANDERSON, RICHARD EDWARD AUTEN, JAMES EDGAR BAKER, CONSTANCE DOREEN BAKER, JEFF BEESTON, ISABELL BRESSE, JOHN BRESSE, HARRY CHICHAK, BRIAN EDWIN FERGUSON, RON GEORGE, JANICE PATRICIA HAMMOND, DELORES HICKMOTT, GARY HICKMOTT, JAMES MILTON JOBE, BRIAN W. JOHNSON, WENDY LEE RAMEY, MARLENE DOROTHY KEEP, DENNIS KEEP, CAROL DIANNE KNOTT, BYRON KNOTT, LAURA CATHERINE KRISTIANSON, RALPH SAMUEL KRISTIANSON, KIMBERLY ANN LEBEUF, ALEXANDER PATRICK NOWOSAD, ELENA RICIOppo, DALVINO RICIOppo, SHANNON RICKETTS, KEVIN ROE, KATHY ROMANIW, ELLEN SANDERSON, JEAN DARLENE SNIPES, RICHARD JOSEPH LIPSCOMBE, DEBORAH ANNE STABRYLA, ELIZABETH TREAU, GUISEPPE VOLPE, JUNE VOLPE, and JOHN DOEs 1 to 100 and JANE DOEs 1 TO 100</b>	
DEFENDANT(S)	<b>THE ATTORNEY GENERAL OF CANADA AS REPRESENTED BY THE MINISTER OF HEALTH FOR CANADA and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA</b>	

CANADA	(Class Action)
PROVINCE OF QUÉBEC DISTRICT OF MONTRÉAL	SUPERIOR COURT
No. : 500-06-000065-983	_____
	<b>GUY DESJARDINS</b>
	-and-
	<b>JEAN ROCHON</b>
	Plaintiffs
	c.
	<b>LE PROCUREUR GÉNÉRAL DU CANADA</b>
	Defendant
	_____

## NOTICE OF APPLICATION

**Name of Applicant:** Class Counsel for British Columbia.

**To:** The Defendant, Government of Canada and the Attorney General of Canada (“Canada”)

Take Notice that an application will be made by Class Counsel for British Columbia to the Honourable Chief Justice Hinkson at 800 Smithe Street Vancouver, British Columbia on December 15 and 16, 2016 at 8:30 am PDT (10:30 am EDT) linked by audio/videoconference to a hearing proceeding in Toronto, Ontario. The Honourable Chief Justice Hinkson will be attending in Toronto, Ontario at an address to be provided, for the orders set out in Part 1 below.

### **Part 1: ORDERS SOUGHT:**

1. An assessment of the financial sufficiency of the Compensation Fund as required by section 5.07(2) of the Settlement Agreement.
2. A declaration pursuant to section 2.07(3) of the Settlement Agreement that a transfer of monies to the Past Economic Loss and Dependents Fund from the Compensation Fund shall have priority over the payment of a Claims Experience Premium and in priority to the payment of any positive balance in the Dynamic Non-Segregated Family Benefit Fund.
3. If the declaration sought in paragraph 2 is granted, a declaration that future payments out of the Past Economic Loss and Dependents Fund shall be in a manner to be determined by the court at a future hearing.
4. Such further and other relief as the Honourable Courts may deem just.

### **Part 2: FACTS**

5. This action was commenced on November 14, 1997. The nature of the litigation, the negotiations leading to settlement, and the terms of the settlement are set out in detail in the affidavit sworn by Gary Smith on February 15, 2007. The settlement is national in scope and was approved in 2007 by the four provincial courts that have certified class actions related to this litigation: British Columbia, Alberta, Ontario and Quebec.
6. The settlement provides compensation to individuals who contracted Hepatitis C from the receipt of blood products in Canada before January 1, 1986 and after July 1, 1990. These are referred to in the settlement as Primarily Infected Class Members. Compensation is also payable to Secondarily Infected Class Members, who are spouses or children who have contracted Hepatitis C as a result of contact with the Primarily Infected Class Member. Collectively, these persons are HCV Infected Class Members.

7. In addition to compensation payable to HCV Infected Class Members, payments are available under the settlement for the estates, Family Members and Dependents of HCV Infected Class Members.

8. The categories of claimants and the nature of the payments are based on principles of parity with a settlement reached in 1998 for persons who were infected with Hepatitis C from blood products received in Canada between January 1, 1986 and July 1, 1990 (the "86-90 Settlement"). An important difference, however, between the two settlements is that the 86-90 Settlement provides for periodic payments for the lifetime of the class member whereas the Pre/Post Settlement provides for one time lump sum payments. The principle of parity with the 86-90 Settlement was cited by the Courts as a fundamental feature of the Pre/Post Settlement and a reason for approving it:

[18] The settlement is based on the principles of parity with the 1986-1990 settlement, the efficient delivery of the compensation to Class members and the minimization of administrative costs and delays. The settlement includes an extensive Class of individuals who will receive substantial benefits. The principle of parity with regard to the 1986-1990 settlement is very important having regard to the issue of fairness and reasonableness, not only to the present Plaintiffs but to those individuals who formed part of the 1986-1990 settlement, which includes one-time, lump sum payments. This will result in the delivery of the compensation on a much faster and more efficient basis.

[19] Further, the current settlement limits the administrative costs and further delay in the administration of the settlement due to the one-time, lump sum payments as opposed to payments on a progressive basis.

*Adrian v. Canada (Minister of Health)*, 2007 ABQB 376

See also: *Killough v. The Canadian Red Cross Society*, 2007 BCSC 836, para. 11

See also: *Desjardins c. Canada (Procureur général)*, 2007 QCCS 2797, para 23

See also: Settlement Agreement, Recital G

9. Canada paid \$962 million to fund compensation to the class and \$20 million for administration of the settlement. The following are the categories of compensation for class members:

a. Lump sum payments to living HCV Infected Class Members based on the age and disease level of the class member. The likelihood for future disease progression has been actuarially factored into the calculation of the lump sums.

b. Payment for past loss of income or past loss of services for HCV Infected Class Members who are at the higher disease levels.

c. Payments to the estates of HCV Infected Class Members who were deceased at the time of the application for compensation. There are two categories of estate claim. One where the HCV Infected Class Member died before January 1, 1999, and the other where the HCV Infected Class Member died on or after January 1, 1999. The payments

to estates involve a combination of lump sums and payments for past loss of income and past loss of services.

- d. Lump sums for Family Members of the HCV Infected Class Member.
- e. Payments to the Dependents of deceased HCV Infected Class Members for the loss of support (i.e. loss of income and loss of services).

10. \$93.1 million was taken from the \$962 Compensation Fund and was put into a segregated Past Economic Loss and Dependents Fund (the "PELD Fund"). At the time of the settlement, it was anticipated that approximately \$80 million would be required to pay the claims for loss of income and loss of services of HCV Infected Class Members, their estates, and their Dependents. There was a recognition, however, that the total required for these categories was actuarially difficult to predict. The segregated PELD Fund was created to safeguard against the possibility that an over-subscription in these claim categories might deplete the main compensation fund and thereby adversely affect the lump sum payments. The PELD Fund was topped up by about 15% from \$80 million to \$93.1 million to provide a margin against adverse deviations.

11. Other safeguards against adverse deviation were built into the settlement. The anticipated settlement take up was 5,623 HCV Infected Class Members. For the purpose of calculating the total settlement fund, this was increased by 15% to 6,466. The total settlement amount was then grossed up by 2.5%. Loss of income claims were capped at 70% of lost income and the annual gross income amount was capped at \$75,000. Lastly, and importantly, most of the lump sums payable under the settlement were reduced by 10%. The settlement provides that if there are sufficient funds in the Compensation Fund, this 10% reduction can be restored through the payment of a Claims Experience Premium.

12. Regrettably, the goal of parity with the 86-90 Settlement has not been achieved. As of July 8, 2016, claims had been approved for 5,816 HCV Infected Class Members. This is remarkably close to the number that was projected 10 years ago. But, there are more class members in the higher disease levels than predicted. As a result, almost \$200 million more will be paid out for lump sums than was expected. This is an adverse variance of about 29%, which has almost completely eroded the numerous safeguards against adverse deviation. As of July 31, 2016, there was approximately \$27.5 million remaining for payment of claims out of the Compensation Fund. Although the final claim deadline was June 30, 2016, at least half of what remains in the Compensation Fund will likely be required to pay lump sums for the claims that are in process or under appeal. As of August 31, 2016, there was about \$2.2 million remaining for settlement administration.

13. The higher numbers at higher disease levels had a cascading effect on the claims for past loss of income, past loss of services and loss of support. The \$93.1 million PELD Fund is completely exhausted. It ran out of money in February, 2010. Claims made after that date have not been paid. It is estimated that about 500 HCV Infected Class Members, their estates and their Dependents have eligible claims that will not be paid due to the shortfall in the PELD Fund. The total value of those claims is estimated to be between \$60 million to \$70 million.

14. Class Members affected by the PELD Fund shortfall have been writing to their Members of Parliament to ask that the Government of Canada make a voluntary top up payment to the PELD Fund. Some of their letters describing their hardship are attached to the Affidavit sworn September 19, 2016.

15. Within the Compensation Fund there is a non-segregated amount designated as the Dynamic Non-Segregated Family Benefits Fund. It is a notional fund that was created to track the compensation paid to Family Members and achieve, to the extent possible, parity with the amounts payable to Family Members in the 86-90 Settlement. For each HCV Infected Class Member for whom a Family Member claim is approved, a notional amount is allocated to this Fund. However, the actual payouts for Family Members can be higher or lower than the notional amount. If the total notional allocation is higher than the amounts actually paid and there is money remaining in the Compensation Fund at the Termination of the settlement, the excess notional amount is to be paid on a pro rata basis to approved HCV Infected Class Members at disease levels 2 to 6. If the total notional allocation is negative, there is no additional payment. If there is no money remaining in the Compensation Fund at Termination, there is no additional payment.

16. Under the Settlement Agreement, the Courts in all four jurisdictions and the corresponding Class Counsel for each jurisdiction have ongoing roles in the administration of the settlement. One of the responsibilities of Class Counsel, which is set out in section 5.07(2) of the Settlement Agreement, is to apply to the court 120 days or more after each of June 30, 2010, June 30, 2013 and June 30, 2016 to assess the financial sufficiency of the Compensation Fund and may seek directions as the amounts and timing of the payments of the Claims Experience Premium set out in Section 5.07(1).

17. This is the second sufficiency hearing. The first was heard on September 12, 2014 in the British Columbia Supreme Court to determine the solvency of the Compensation Fund. Based on the actuarial evidence provided by the parties, the Court found that the main Compensation Fund was solvent as of November 30, 2012 but that the PELD Fund was insolvent as of that date. The Court also found that at that time, the main Compensation Fund was not in a position to transfer funds into the PELD or to pay the Claims Experience Premium.

18. The main issue regarding fund sufficiency continues to be that the PELD is insufficient to provide compensation to eligible Class Members. Now that the final Claim deadline has passed, the potential liabilities to the Compensation Fund can be more easily calculated. Although there are numerous claims that are currently being processed by the Claims Administrator, no further claims can be submitted. At this time, Class Counsel is seeking a direction from the Court that once the liabilities of the main Compensation Fund have been satisfied, a transfer of the remaining funds to the PELD will be authorized for a distribution to outstanding PELD claims. The manner in which this distribution will occur will be determined at a subsequent hearing before the Courts.

**Part 3: LEGAL BASIS**

19. According to paragraph 25 of the Settlement Approval Order, the Courts retain jurisdiction over the action to implement and enforce the provisions of the Settlement and supervise the ongoing performance of the Settlement.

20. This application is brought pursuant to sections 2.07(3), s. 5.07(2), 8.05(1)(f) of the Settlement Agreement.

21. The two issues in this application are:

- i) Is the Compensation Fund sufficient?
- ii) If there is a surplus in the Compensation Fund, should the Court set a priority for transfer of that surplus to the PELD Fund?

***Is the Compensation Fund sufficient?***

22. Based on the information about the current claims provided by the Claims Administrator, the Compensation Fund remains solvent and has sufficient funds to cover the remaining lump sum payments. The PELD Fund is insolvent and does not have sufficient funds to pay all eligible Class Members.

***Should the Court authorize a transfer of any surplus in the Main Compensation Fund to the PELD Fund?***

23. Section 2.07(3) governs the transfer of funds from the Compensation Fund to the PELD Fund. Class Counsel may apply to the Courts to have monies transferred from the Compensation Fund to the PELD Fund where the latter is insufficient. This transfer is subject only to section 5.07(2) dealing with the sufficiency of the Compensation Fund. Since it appears that the Compensation Fund is sufficient to meet its obligations for lump sum payments under the Settlement Agreement, any balance remaining should be made available for transfer to the PELD Fund.

24. The PELD Fund was limited to \$93.1 million. All but about \$150,000 has been paid out of the PELD Fund. At this time, it is appears that there will be a small surplus remaining in the main Compensation Fund. Although the surplus will not be sufficient to pay the entire outstanding PELD amount, an inequity would occur if Class Members who are eligible for PELD payments receive nothing for those claims.

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

1. Affidavit of Gary Smith sworn on February 15, 2007
2. Affidavit of Peter Gorham sworn on January 26, 2007
- 3.
4. Such further and other evidence as counsel may advise and this Honourable Court may permit.

The Applicant estimates that the application will take 2 days.

- [ ] This matter is within the jurisdiction of a master.  
[x] This matter is not within the jurisdiction of a master.

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

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

Date: September 19, 2016



David A. Klein  
Signature of lawyer for applicant  
Klein Lawyers  
Barristers & Solicitors  
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Vancouver, BC V6H 3V9  
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**To be completed by the court only:**

Order made

in the terms requested in paragraphs ..... of Part 1 of this notice of application

with the following variations and additional terms:

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

Date:

.....  
Signature of  Judge  Master

**Appendix**

**THIS APPLICATION INVOLVES THE FOLLOWING:**

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- Service
- Mediation
- Adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- Experts
- other