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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	N.B.
DEFENDANTS	PHILIP HEEREMA, CALGARY EXHIBITION AND STAMPEDE LIMITED, and CALGARY STAMPEDE FOUNDATION
DOCUMENT	**BRIEF OF ARGUMENT OF THE REPRESENTATIVE PLAINTIFF & THE CERTIFIED CLASS, FOR AN APPLICATION TO APPROVE SETTLEMENT AND COUNSEL FEES**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP** Barristers 800, 304 8th Avenue SW Calgary, Alberta T2P 1C2 Carsten Jensen KC, FCIArb | Gavin Price | Kajal Ervin Phone: 403-571-1526 | 403-571-0747 | 403-571-0745 Email: jensenc@jssbarristers.ca | priceg@jssbarristers.ca | ervink@jssbarristers.ca Fax: 403-571-1528 File: 13652-001

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I. INTRODUCTION

1. This Brief is in support of an application to approve a settlement on damages and for approval of disbursements, other charges and Class Counsel's fees. The Brief adopts the definitions set out in the Settlement Agreement, dated as of April 26, 2024, made between the Representative Plaintiff, N.B., and the Defendants, Calgary Exhibition and Stampede Limited and the Calgary Stampede Foundation (the "**Stampede Defendants**"). A copy of the Settlement Agreement is appended at Exhibit "A" to the Affidavit of N.B. sworn on June 18, 2024.

2. N.B., in his capacity as the Representative Plaintiff on behalf of the certified Class, seeks the following:

    (a) A declaration that the Settlement Agreement is fair, reasonable, and in the best interests of the Class Members;

    (b) Approval of the Settlement Agreement pursuant to section 35 of the *Class Proceedings Act*, SA 2003, C-16.5 ("***CPA***");

    (c) A declaration that the Distribution Protocol attached at Schedule F of the Settlement Agreement is fair and reasonable and that the Settlement Fund shall be distributed in accordance with the terms of the Settlement Agreement, following payment of Class Counsel fees, disbursements, honoraria and administration expenses, subject to the one following revision:

        (i) Should the Claims Administrator determine that a Class Members falls into the most severely impacted category, as described in section 2.3(C)(1) of the Distribution Protocol, they are directed to provide a one-time advance payment of $10,000 to that Class Member to allow the Class Member to access immediate therapy costs. The amount advanced will then be deducted from the total amount awarded to that Class Member;

    (d) An appointment of Epiq Class Actions Services Canada, Inc. as the Claims Administrator;

    (e) Approval of the form and content of the Approval Notice and the Claims Form;

    (f) Approval of Class Counsel Fees, pursuant to section 39 of the *CPA*, in the total amount of $3,258,398.17, being:

        (i) $2,736,832.92 for legal fees;

        (ii) $136,841.65 for applicable taxes on the legal fees;

(iii) $184,723.60 for disbursements (inclusive of tax) incurred as of June 9, 2024;

(iv) $200,000 for anticipated disbursements for claims administration and notice to the Class of settlement; and

(g) Approval of honoraria to the following individuals who provided substantial assistance in litigating and advancing the Action:

(i) N.B. in the amount of $20,000

(ii) M.J. in the amount of $5,000

(iii) R.S. in the amount of $5,000

(iv) S.T. in the amount of $1,000

(v) B.N. in the amount of $1,000

(vi) K.S. in the amount of $1,000

(vii) S.S. in the amount of $1,000

(viii) L.C. in the amount of $1,000

(ix) R.W. in the amount of $1,000

3. If approved, the Settlement Agreement will conclude this Action as against the Stampede Defendants entirely.

II. SUMMARY OF ACTION

A. Summary of the Claim

4. This Action relates to harms caused to Class Members while they were attending the Young Canadians, a school operated at all material times by the Stampede Defendants.

5. The Young Canadians School afforded Class Members an opportunity to develop their singing and dancing talents and to perform before local and international audiences, with the Calgary Stampede Grandstand Show being an annual highlight for many performers.

6. The Defendant, Philip Heerema (**Heerema**), a volunteer with and later employee of the Stampede Defendants, preyed upon adolescent Class Members. Over the course of decades, Heerema repeatedly lured, groomed, sexually abused, sexually assaulted, and/or sexually exploited dozens of students.

7. Complaints regarding Heerema's conduct were first brought to the attention of the Stampede Defendants as early as 1988, with additional complaints being made by others, including faculty members, in 2008.

8. In January 2014, the Representative Plaintiff and other members of the Class brought Heerema's conduct to the attention of the Calgary Police Service. Heerema was subsequently charged and prosecuted, eventually pleading guilty mid-trial to several criminal charges. He was sentenced to a 10-year penitentiary term. Heerema was granted day parole in January 2024.

B. Overview of Agreed Settlements

9. On July 26, 2023, the Stampede Defendants agreed to accept responsibility for all liability in respect of various causes of action pleaded by the Class, including both direct and vicarious liability, and the certified common issues, in exchange for a release of any claims for punitive damages. The Stampede Defendants also agreed to pay 100% of all damages awarded or assessed in favour of the Class. The liability settlement was approved by the Court on September 25, 2023.[1]

10. The Class Members who have suffered losses and damages include those who Heerema assaulted, abused, and exploited, as well as Class Members who participated in the Young Canadians while their friends and peers were being victimized. The impacts of Heerema's predatory conduct are widespread and long-lasting.

11. The Settlement Agreement addresses the harm caused to Class Members, including physical, psychological, and emotional trauma.

12. The Settlement Agreement was reached between the Parties following extensive, arm's length negotiations, including two Judicial Dispute Resolutions.

13. The Settlement Agreement, subject to approval of this Court, provides that an all-inclusive sum of $9,500,000.00[2] will be paid for the benefit of the Class Members, in exchange for a full and final release of the claims asserted in the Action.

III. SETTLEMENT APPROVAL

14. The first issue to be addressed on this motion is whether the Settlement Agreement should be approved.

15. The resolution of complex litigation through compromise and settlement is encouraged by the Courts and favoured by public policy. This principle applies to class action

[1] Affidavit of N.B., filed June 19, 2024 (**NB Affidavit**) at para 22 and Exhibit "C"

[2] As will be detailed herein, in lieu of interest payable on this amount, the Stampede Defendants have agreed to pay an additional $7,500.

litigation, though agreements reached in this context are only binding once they have been approved by the Court.[3]

16. The test for approval of a class action settlement is whether the settlement is fair, reasonable, and in the best interests of the class as a whole.[4]

17. The Settlement Agreement need not be perfect nor the best for every Class Member. Rather, it must fall within a range or zone of reasonableness.[5] The zone of reasonableness has been described as follows:[6]

> […A]ll settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.
>
> Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

18. The zone of reasonableness helps to guide the Court's supervisory role in approval of the settlement:[7]

> It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented, as they are in this case, by reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

19. There is a strong initial presumption of fairness when a proposed class settlement, which is negotiated at arm's length by Class Counsel, is presented for Court approval; the Court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement.[8]

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[3] *CPA*, s. 35; *Rowlands v Durham Region Health*, 2012 ONSC 3948, at para 7

[4] *Macaronies Hair Club and Laser Center Inc v BofA Canada Bank*, 2019 ABQB 181 (***Macaronies***) at para 5; *Northwest v Canada (Attorney General)*, 2006 ABQB 902 (***Northwest***) at para 23

[5] *Northwest*, supra note 2 at para 24

[6] *Dabbs v Sun Life Assurance Co of Canada*, 1998 CanLII 14855 (ONSC) at para 30, aff'd 1998 CanLII 7165 (ONCA) (***Dabbs***)

[7] *Robertson v ProQuest Information and Learning LLC*, 2011 ONSC 2629 (***Robertson***) at para 39

[8] *Macaronies*, supra note 4, at para 5; *Robertson*, supra note 7, at paras 39-40

20. In order to reject the terms of a settlement negotiated at arm's length by experienced counsel, the Court must conclude that the settlement reached falls outside of the "zone of reasonableness".[9]

21. The following non-exhaustive list of factors may inform the settlement approval analysis and the determination of whether the settlement is fair, reasonable and in the best interests of the class:[10]

    (a) the likelihood of recovery or likelihood of success;

    (b) the amount and nature of discovery, evidence or investigation;

    (c) the settlement terms and conditions;

    (d) the recommendation and experience of counsel;

    (e) the future expense and likely duration of litigation and risk;

    (f) the recommendation of neutral parties, if any;

    (g) the number of objectors and nature of objections;

    (h) the presence of good faith, arm's length bargaining and the absence of collusion;

    (i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and

    (j) the information conveying to the Court the dynamics of and the positions taken by the parties during the negotiation.

22. These factors guide, but do not determine, the assessment. In any particular case, some factors will have greater significance than others and weight should be attributed accordingly.[11]

IV. THE SETTLEMENT IS FAIR, REASONABLE AND IN THE BEST INTERESTS OF THE CLASS

23. Based on the relevant factors, addressed in detail below, it is respectfully submitted that the settlement is fair, reasonable, and in the best interests of the Class.

24. A key term of the Settlement Agreement is the Settlement Fund, being an all-inclusive sum of $9,500,000 paid to the benefit of the Class, plus $7,500 in interest.[12] The

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[9] *Robertson*, supra note 7, at paras 38-39; *Macaronies*, supra note 4, at para 5

[10] *Robertson*, supra note 7, at paras 35-36

[11] *Parsons v Canadian Red Cross Society*, [1999] O.J. No. 3572, 1999 CarswellOnt 2932 (ONSCJ) at para 73 (***Parsons***), **Appendix A**

[12] NB Affidavit at para 54 and Exhibit "A"

Settlement Fund was negotiated following two multi-day Judicial Dispute Resolutions (**JDRs**). The first JDR took place on May 11 and 12, 2022, with the Honourable Justice R.E. Nation. The second JDR took place on December 14 and 15, 2023, with the Honourable Justice N. Dilts, after the liability settlement had been negotiated between the Representative Plaintiff and the Stampede Defendants and subsequently approved by the Court.[13]

25. Each JDR involved reviewing voluminous materials submitted by the Parties. A total of four full, intensive days was spent with the Parties discussing, understanding, and challenging their positions. While a resolution was not achieved at either of these JDRs, the guidance provided by Justices Nation and Dilts helped the Parties focus the remaining issues in dispute and identify various zones of potential resolution, which ultimately allowed the Parties to reach this settlement.

A. Likelihood of Success

26. Damages were not initially contemplated as a proposed common issue to be determined through the Class Action. Absent the Settlement Agreement, the next steps in the litigation would have entailed a series of individual damages trials for each Class Member. It is most likely that this would have proceeded over many months or years as a series of test cases involving Class Members with differing experiences and levels of harm.

27. In the context of individual trials, no comparable precedent on damages is exactly on point. However, the Ontario Superior Court of Justice recently suggested a potential range of $150,000 to $450,000 for general and aggravated damages in cases involving repeated sexual offences on a child by a person in a position of trust.[14]

28. The claims of Class Members can essentially be broken down into three damages categories: general damages for Class Members who Heerema directly victimized; special damages for Class Members who have suffered and will continue to suffer economic and/or employability issues and/or physical or mental health issues; and damages for Class Members who were not directly victimized but who live with the guilt of knowing friends who were victims and those who have otherwise had their experience with the Young Canadians tarnished by Heerema's predatory actions and by the failures and breaches of the Stampede Defendants.

29. Determining damages suffered by any individual who has been impacted by sexual misconduct is no easy task. The exercise becomes considerably more difficult when multiple victims are involved. This difficulty is further compounded because the misconduct spans almost 30 years and involves a range of improper acts.

[13] NB Affidavit at paras 27-29
[14] *CO v Williamson*, 2020 ONSC 3874 at para 173

30. In their settlement discussions, the Parties recognized that precision in determining applicable losses and damages would need to give way to a process that recognizes the existence of real and serious impacts but that also emphasizes efficiency in assessing a large number of claims. The ability to design such a process is one of the advantages of a class proceeding.

31. Accordingly, the Settlement Agreement provides for a Distribution Protocol which is designed to maximize compensation to those Class Members who experienced direct harm by Heerema, with a Point System allocating the most points to those Class Members who experienced the most harm.

32. Historically, damages in the Canadian class action context have primarily tied compensation to acts rather than impacts, with ranges between $35,000 and $220,000 for individuals who suffered repeated instances of sexual misconduct.[15]

33. Over time, the focus, and corresponding compensation, has shifted from acts to impacts.

34. Recently, in August 2022, the Supreme Court of Newfoundland and Labrador approved a settlement reached in *Jane Doe (#7)*,[16] where the settlement involved a points system to consider the nature and impact of the abuse. *Jane Doe (#7)* is a class action wherein class members suffered sexual abuse while residing at government-run institutions dating back to between May 1, 1973 and June 28, 1989. The $12.5 million settlement is to be distributed based on a points system allocated to each claim after considering the nature and impact of the abuse. The maximum number of points that can be assigned to a claim is 100 points for a maximum value of $500,000, subject to a *pro rata* reduction in the event of insufficiency.[17] However, the Court specifically noted that the $500,000 limit "significantly exceed[ed]" the maximum payments in similar class actions,[18] and it is unclear whether any class members actually received this level of compensation.

35. In this case, the Parties considered and addressed the fact that the Stampede Defendants are private organizations with finite insurance, as opposed to government-back entities with potentially deeper pockets. However, the Settlement Agreement and Distribution Protocol agreed to between the Parties is similarly intended to compensate the Class Members for the nature and impact of the abuse. Up to 10 points will be allocated to each Class Member directly harmed, depending on the nature of their

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[15] See e.g. *Dolmage v HMQ*, 2013 ONSC 6686 at paras 15-18; *McKillop and Bechard v HMQ*, 2014 ONSC 1282 at paras 11-14; *Weremy v Manitoba*, 2023 MBKB 122 at para 7; *Tidd v New Brunswick*, 2023 NBKB 185 at para 9; *Anderson v Canada (Attorney General)*, 2016 CanLII 76817 (NLSC) at para 11; *Johnston v The Shelia Morrison Schools*, 2013 ONSC 1528 at para 25; *Seed v Ontario*, 2012 ONSC 2681 at para 9; *Adams v Sheane*, 2014 BCSC 733 at para 26; *Doucet v The Royal Winnipeg Ballet*, 2022 ONSC 976 at paras 33-34; *Tiller v Canada*, 2020 FC 321 at para 21

[16] *Jane Doe (#7) v Newfoundland and Labrador*, 2022 NLSC 133 (***Jane Doe (#7)***)

[17] *Jane Doe (#7)*, supra note 12 at para 22

[18] *Jane Doe (#7)*, supra note 12 at paras 59-60

interactions with Heerema, and an additional 1 to 3 points may be allocated depending on the impact that their experiences had on them.

36. The Distribution Protocol is designed to address payment for the following categories of Class Members:[19]

    (a) A single one-time payment of $500 for those Class Members who were in the Senior Male Singer and Dancers and who did not experience direct harm. This is described as the Student Compromised Experience Claim in the Distribution Protocol. If Class Members are able to establish that they were a senior student, they will be eligible for these funds. The purpose of these funds is to provide symbolic compensation for the tarnished experience and the risk of harm that the Senior Male Students faced during the Class Period, as Heerema targeted Senior Male Students, as opposed to the young children who were junior and apprentice students.

    (b) If Class Members were Senior Male Students and who did not experience direct harm by Heerema but observed Heerema with other Class Members or were aware of Heerema's predatory behaviour or who were aware of close friends who were victimized by Heerema and have since suffered mental health impacts as a result, they are eligible for a one-time payment of $1,500. This is described as the Student Compromised Experience Enhanced Impact Claim in the Distribution Protocol.

    (c) The balance of the settlement funds will be distributed among the Class Members who experienced direct harm. The Point System provides up to 10 points to be allocated to each Class Member directly harmed by Heerema, ranging from sexualized interactions without direct physical contact, to penetrative sexual activities. An additional 1 to 3 points may be allocated depending on the impact that their experiences had on them.

37. Based on the Settlement Fund and information received by Class Counsel to date from the Class Members, after deduction of legal fees and disbursements, honoraria and the estimated one-time payments to those Class Members not directly harmed, it is currently estimated that each point will be approximately $15,000 net of requested fees and disbursements. This estimate means those Class Members that fall within the category of most harmed will likely receive compensation of approximately $200,000 net of requested fees and disbursements. Class Counsel believes this amount to be a conservative estimate, as several assumptions were made when calculating the value of each point based on currently known information:

[19] NB Affidavit at paras 44-50

(a) An estimated 156 senior male students that were not directly harmed may submit claims and qualify for the Student Compromised Experience Enhanced Impact Claim of $1,500. Class Counsel believes it is unlikely this many claims will be made, and most Class Members not directly harmed will likely qualify for the $500 Student Compromised Experience Claim rather than the $1,500 available to Class Members who are eligible to receive the Student Compromised Experience Enhanced Impact Claim;

(b) Each Class Member in the directly impacted categories will claim and qualify for the maximum additional 3 points due to impacts. However, it is unlikely that all directly harmed Class Members will qualify for the full 3 points, given the variable degrees of impact; and

(c) A 20% contingency has been added for additional Class Members who have not yet contacted Class Counsel, but may come forward during the Claims Period to submit a claim. Given the multiple notice campaigns to date and communication with the Class Members, Class Counsel believes this contingency to be a conservative amount.

38. The Distribution Protocol also provides compensation to Class Members who would not otherwise have been compensated through individual damages trials:

(a) a single one-time payment of $500 for those Class Members who were in the Senior Male Singer and Dancers and who did not experience direct harm (Student Compromised Experience Claim);

(b) a single one-time payment of $1,500 for those Class Members who did not experience direct harm by Heerema, but observed Heerema with other Class Members or were aware of Heerema's predatory behaviour or who were aware of close friends who were victimized by Heerema and have since suffered mental health impacts as a result (Student Compromised Experience Enhanced Impact Claim); and

(c) 1 point for the Class Members who fall into Category 5, for direct harm related to grooming behaviours perpetrated by Heerema, i.e. those Class Members who experienced some or all of: witness to sexualized activities, witness to sexualized comments, witness to sexualized language, inappropriate personal questions, focused and unwanted attention, voyeurism, sexual advances, invitation to sexual touching.

B. Amount and Nature of Discovery, Evidence or Investigation

39. On an ongoing basis, Class Counsel have been in touch with a total of 110 individuals, and have conducted lengthy telephone and in-person interviews with many Class Members.[20]

40. Of the 110 individuals who have contacted Class Counsel to date, 13 are not on the Stampede Defendants' records as a Class Member, and 24 are not eligible for compensation as they suffered no reported harm or were not a Senior Student. That leaves a total of 73 Class Members who may submit a claim out of the 110 who have contacted Class Counsel.

41. In support of the Certification Application, Application to Amend the Class Definition, Summary Judgment Application, and other filed motions, Affidavits were filed by N.B., Class Members R.S. and M.J.1, and Melissa Klassen, a former instructor with the Young Canadians. Class Counsel also filed the Expert Reports of Dr. Cathy Carter-Snell and James Fayette. In response to the Summary Judgment Application, the Stampede Defendants filed the Affidavit of Sarah Hayes and the Expert Report from Dr. Peter Choate.[21]

42. Prior to the Summary Judgment Application, extensive cross-examinations were undertaken on many elements of this Action. Cross-examination transcripts have been generated and filed with this Court.

43. Voluminous materials were exchanged by the Parties in anticipation of the JDRs, including comprehensive questionnaires prepared with the assistance with experts, and completed by the Class Members in contact with Class Counsel at that point in time.

44. Further expert reports were exchanged on a without prejudice basis regarding the core issue of damages for the JDRs. Dr. Miller, Shawn Hemens and Derek Nordin provided psychological, economic and vocational expert evidence. Both Dr. Miller and Mr. Nordin also met with a number of Class Members who had different experiences with Heerema to provide a wide range of psychological and vocational assessments.[22]

45. At each JDR, the positions of the Parties were further explored and challenged.

C. Tactical Considerations

46. Class Counsel was also mindful of several tactical considerations which favoured acceptance of the Settlement Agreement, including:[23]

[20] NB Affidavit at para 61
[21] NB Affidavit at paras 8-21
[22] NB Affidavit at paras 24-29
[23] NB Affidavit at para 32

(a) *The risk of continued, prolonged, and costly litigation*. There was no straightforward, expedient or obvious path to recovery for the Class as a whole, absent a global resolution. As noted above, damages were not a common issue given their individualized nature, so the Class Members would likely be faced with many individual trials on damages in order to recover a judgment;

(b) *The re-traumatization and resulting harm to Class Members arising from individual damages trials for each Class Member*. Absent settlement, the time horizon for recovery would be undesirably long. There is a Class in need of an expedient resolution, particularly those Class Members most harmed and in need of compensation to start the path of healing;

(c) *The risk that many individual Class Members would be reluctant to participate in individual damages trials due to the adversarial cross-examination process and the personal nature of the issues in this Action.* The Class Members used their strength in numbers to force the Stampede Defendants to engage in serious settlement discussions. However, if settlement had not been achieved, this strength in numbers would become a weakness for the Class, since a large number of smaller claims each requiring individual trials is a difficult, lengthy and personally costly type of action to advance; and

(d) *The range of potential damages available to the Class Members following individual trials.* Many Class Members claims are likely too small to support individual trials on damages.

D. Terms and Conditions of the Settlement Agreement[24]

47. The Settlement Fund is an all-inclusive sum of $9,500,000 paid to the benefit of the Class.

48. The Stampede Defendants have agreed to pay an additional $7,500 to the Settlement Fund, representing the approximate interest that would have accrued in an interest bearing trust account pending approval of the Settlement Agreement.[25]

49. The Settlement Agreement includes a public apology from the Stampede Defendants and an undertaking to carry out Additional Programs to enhance safety measures and provide trauma-informed training to youth program leadership and staff.

50. The Settlement Agreement is a complete and binding document, subject to Court approval, which releases the Stampede Defendants.

[24] NB Affidavit at Exhibit "A"
[25] NB Affidavit at para 54

51. Heerema is not a party to the Settlement Agreement and is not a Releasee under the terms of the Settlement Agreement.

52. The Settlement Agreement includes honoraria to acknowledge the valuable assistance of certain Class Members in prosecuting this claim, including the Representative Plaintiff.

53. The Settlement Agreement provides for a Notice of Settlement Approval and Plan of Notice that will adequately inform the Class of the claims process and the Distribution Protocol.

54. The Settlement Agreement provides a Distribution Protocol whereby the Claims Administrator will fairly and efficiently distribute the Net Settlement Amount. Class Members will receive compensation based on their experiences during the Class Period, the nature of their harm and degree of impacts.

55. The Claims Administrator will invest the Net Settlement Fund in the Account. All interest accrued in the Account will be added to the Net Settlement Fund, for the benefit of the Class.

56. The proposed Approval Order includes a revision to the Settlement Agreement, which has been agreed to by the Stampede Defendants, that should the Claims Administrator determine that a Class Members falls into the most severely impacted category, they will provide a one-time advance payment of $10,000 to that Class Member to allow the Class Member to access immediate therapy costs. The amount advanced will then be deducted from the total amount awarded to that Class Member. The intent of this revision is to assist those Class Members most harmed and in need of immediate funds for therapy or other treatment related costs.

E. Recommendation of Experienced Counsel

57. Class Counsel has extensive experience in class action litigation and general litigation, including claims based on harms arising from sexual misconduct. Class Counsel is involved in numerous complex class actions and have prosecuted to completion a number of complex class actions or representative actions on behalf of plaintiffs.

58. Class Counsel recommends approval of this Settlement Agreement, and believes that this Settlement Agreement is in the best interests of the Class.[26]

F. Future Expenses and Likely Length of Litigation

59. Class Counsel has expended over $3,000,000 in billable time and has incurred $184,714.61 in disbursements to date on behalf of the Class. If the Settlement

[26] NB Affidavit at para 32(e)

Agreement is approved, a further estimated $300,000 in time and disbursements will be incurred by Class Counsel to complete this matter, which will not form part of a separate fee request by them.[27]

60. Absent settlement, the next procedural steps would likely involve individual damages trials for each Class Member. Such trials will involve prolonged and costly litigation, including further discovery and expert evidence.[28]

61. A significant consideration for the settlement was that these individual damages trials will result in further harm and re-traumatization to the Class Members. For many of these Class Members, they have spent years without support and are in need of an expedient resolution to start addressing the harms endured.[29]

62. There is also a significant risk that individual Class Members would be reluctant to participate in individual damages trials due to the adversarial cross-examination process and the highly personal nature of the issues in this Action.

G. Number of Objectors and Nature of Objections

63. The Class was given notice of both their right to object and the objection deadline of June 14, 2024.

64. As of June 14, 2024, Class Counsel received one objection and two statements in support.[30] However, on June 20, 2024, after receiving a copy of the Notice of Application for Settlement Approval and Counsel Fees and the NB Affidavit, which provided the Class with more information regarding the proposed distribution of funds, the single objector withdrew his objection.[31]

H. Presence of Good-Faith Bargaining Between Arm's Length Parties

65. The Stampede Defendants were represented by very experienced litigators from a leading law firm. The Parties attended two JDRs and engaged in extensive arm’s length negotiations.

66. Class Counsel expect that the compensation to individual Class Members in this case will be comparable to the compensation paid in recent class proceedings of the same kind.

67. Further, the Distribution Protocol is intended to address both the nature and impact of the abuse. This was an important aspect of the Settlement Agreement to continue the shift in class actions involving historical sexual assault to focus on the emotional and

[27] NB Affidavit at para 89
[28] NB Affidavit at paras 33-38
[29] NB Affidavit at para 39
[30] NB Affidavit at para 64
[31] Affidavit of Amy Kuang at para 3 and Exhibit “A”.

psychological harm, which can often be more pervasive and permanent in its effect, rather than focusing simply on physical acts and harm.

I. The Degree and Nature of Communications Between Class Counsel and the Representative Plaintiff and Class Members

68. Class Counsel has diligently involved and informed the Representative Plaintiff throughout this matter and provided their advice and sought instructions whenever required.

69. Class Counsel has kept the Representative Plaintiff apprised of the progress of the Action at all times, including written updates. The Representative Plaintiff and other Class Members have been actively engaged in this Action and have sworn several Affidavits in this Action.

70. The Representative Plaintiff also attended both JDRs in person, and was in regular contact with Class Counsel during the extended negotiations. The Representative Plaintiff instructed Class Counsel to approve the Settlement Agreement, and has provided an Affidavit in support of the Approval Application.

71. Since the commencement of the litigation, Class Counsel have kept Class Members informed of the progress of the Action through various means, including via email, telephone discussions and in-person meetings. Class Counsel have also diligently responded to any and all inquiries received from Class Members, and continue to do so.[32]

72. In addition, Class Counsel set up a webpage for Class Members in this Action to view the progress of this Action, at JSS Barristers' webpage at https://jssbarristers.ca/class-actions/philip-heerema-and-calgary-stampede-foundation/ where updates relating to the Action are posted, including the liability settlement, this Settlement Agreement and Notice of Settlement Approval Hearing.

J. Information Conveyed to the Court Regarding the Dynamics of Positions Taken

73. The Parties asserted strong positions in the early stages of negotiations. At each JDR, the Parties tendered expert damages opinions and thoroughly considered relevant case law. Through continued discussions, and with the assistance of experienced Justices, the Parties continued to work towards a negotiated resolution.

74. While the Parties were unable to reach a resolution at the conclusion of the second JDR, the Parties continued negotiations and were ultimately able to agree to the Settlement Fund.

[32] NB Affidavit at paras 57-58

V. CONCLUSION ON SETTLEMENT

75. The Settlement Agreement brings much needed closure to the Class and provides a level of recovery that is fair, reasonable and in the best interests of the Class as a whole.

76. This Action raises complex factual and legal issues and issues that are traumatic and highly distressing to Class Members. Proceeding to individual damages trials would likely not have been feasible for many Class Members, nor would it have been in their best interests given the mental toll it would have taken on them.

77. There is significant value in the certainty and expediency of recovery which is achieved through the Settlement Agreement. The Settlement Agreement was recommended by experienced Class Counsel, after extensive arm's length negotiations, and accepted by the Parties. The Settlement Agreement is a very good result for the Class Members, particularly compared to the expense, delays and risks associated with proceeding with individual damages trials. It is respectfully submitted that the Settlement Agreement falls well within the range or "zone" of reasonableness.

VI. CLASS COUNSEL FEES

78. The Settlement Fund totals $9,507,500. Class Counsel is seeking fees in the amount of $2,736,832.92, plus disbursements and applicable taxes as outlined further below.[33]

79. Class Counsel undertook this Action on a contingency fee basis, including bearing the costs of disbursements and the risk of an adverse costs award, and they did so without obtaining third party funding or third-party indemnities.[34]

80. On January 24, 2018, Class Counsel appeared before Associate Chief Justice J. D. Rooke, as he then was, and obtained preliminary approval of the form of contingency fee agreement between the Plaintiff and Class Counsel (the **Contingency Fee Agreement**). The Contingency Fee Agreement, supporting affidavit and the Contingency Fee Agreement Order were all then sealed pending a further application for approval of Class Counsel Fees.[35]

81. Pursuant to the Contingency Fee Agreement, Class Counsel is entitled to seek recovery of legal fees based on 33% of the amount recovered, plus reimbursement of disbursements and any provincial and federal taxes Class Counsel is required by law to charge on their fees.[36]

[33] NB Affidavit at para 66
[34] NB Affidavit at para 67
[35] NB Affidavit at para 74
[36] NB Affidavit at para 75

82. As at June 17, 2024, Class Counsel has docketed time of $3,080,054.50 (excluding applicable taxes), and had financed disbursements of $184,723.60 (inclusive of applicable taxes).[37]

83. A substantial amount of the disbursements incurred were related to expert fees. Class Counsel financed a total of $133,671.07 in expert fees in order to advance this Action.[38]

84. Despite being entitled to the amounts set out in the Contingency Fee Agreement, in an effort to maximize the amount of money to the Class Members, Class Counsel has committed to reducing their percentage of recovery from 33% to 30%. Accordingly, the requested legal fees by Class Counsel in the amount of $2,736,832.92 prior to GST represents less than the amounts they are contractually entitled to, and less than what they have incurred to date by way of docketed time.[39]

B. Fees in Class Proceedings Generally

85. it is not uncommon, in the context of the *CPA*, for a premium on fees to be awarded, which is recognized as a reward to Class Counsel for taking on meritorious but difficult matters. Courts have recognized that the objectives of the *CPA*, namely, judicial economy, access to justice and behaviour modification, are dependent, in part, upon counsel's willingness to take on class proceedings, which in turn, depends on the incentives available to counsel to assume the risks and burdens of class proceedings.[40]

86. In the present circumstances, Class Counsel is not seeking a premium on fees, and instead is requesting reduced fees to maximize recovery by the Class Members. Class Counsel requests approval of a percentage-based fee totalling 30%.

87. A one third contingency is "presumptively reasonable and acceptable" in the context of a class action. A contingency fee in the range of 20% to 30% is common in class proceedings, and has been approved in a number of actions. Fees of 33% and 36% have also been approved.[41]

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[37] NB Affidavit at paras 77 and 80-81
[38] NB Affidavit at para 81
[39] NB Affidavit at para 83
[40] *Lavier v MyTravel Canada Holidays Inc*, 2013 ONCA 92 (***Lavier***) at paras 27-32, citing *Gagne v Silcorp*, 1998 CanLII 1584 (ONCA) as the leading authority; *Parsons v Canadian Red Cross Society*, 2000 CanLII 22386 (ONSC) ***(Parsons Fees)*** at paras 13 and 56; *Doucet v The Royal Winnipeg Ballet*, 2022 ONSC 976 at paras 46 and 52-56. Note: in *Doucet v The Royal Winnipeg Ballet*, approved fees to class counsel represented a multiplier of 1.27 to their estimated docketed time.
[41] *Baker (Estate) v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 (***Baker***) at para 63; *Robertson v Thomson Canada Limited*, 2009 CanLII 32703 (approved 36%); *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 9 (approved 33%)

88. Ultimately, the Court must determine whether a fee is fair and reasonable by assessing the risks assumed by Class Counsel and the results achieved for the class, and in light of the objectives of class proceedings noted above.[42]

C. Specific Factors to Consider in Assessing Class Counsel Fees

89. As outlined in Section 39 of the *CPA*, any fee awarded must be fair and reasonable in light of the risk undertaken by Class Counsel and the manner in which Class Counsel conducted the proceeding. Factors relevant in assessing the reasonableness of fees are as follows:[43]

(a) The complexity of the issues;

(b) The degree of responsibility assumed by Class Counsel;

(c) The time expended by counsel;

(d) The monetary values at issue;

(e) The importance of the matter to the clients;

(f) The degree of skill and competence demonstrated by counsel;

(g) The result achieved;

(h) The ability of the class to pay;

(i) The risk undertaken by Class Counsel; and

(j) Whether the fees, as a matter of policy, are sufficient to provide economic incentive to counsel.

90. No one factor is determinative and not every factor needs to be considered in every case. The factors are meant to guide the analysis and are not required "check boxes". The goal is to assess if the fees are fair and reasonable in the circumstances of a particular case.[44]

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[42] *Lavier*, supra note 17 at para 27*; Adrian v Canada (Minister of Health)*, 2007 ABQB 377 at paras 11-12
[43] *Northwest*, supra note 2 at para at paras 69-70; *Baker*, supra note 18 at para 70
[44] *Baker*, supra note 18 at para 71

(i) Complexity of the Action and Risks Assumed by Counsel

91. The litigation risk assumed by counsel is materially related to the complexity of the proceedings. A more complex proceeding usually requires that Class Counsel invest more time and resources in pursuing the litigation:[45]

> Moreover, class action litigation introduces additional complications. Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some consideration must also be given to the commitment of resources made by the class counsel and the impact that this will have in the event the litigation is unsuccessful…

92. The relative risk in pursuing a class action must be assessed at the time the action was commenced, and not as it progressed. Risk is not to be assessed with the benefit of hindsight.[46]

93. In addition to the usual risk which underlies all litigation, courts have also considered "certification risk" and "resolution strategy risk" as substantial factors when assessing whether a proposed class counsel fee is fair and reasonable.[47]

94. In deciding to pursue this Action, Class Counsel were cognizant of the following specific risks:[48]

(a) That the Action may not be certified as a class proceeding, or that the claim may be significantly narrowed at or after certification;

(b) That there may only be a few Class Members;

(c) That the Plaintiff might not be able to establish liability against the Stampede Defendants at all, due to potential defences available to the Stampede Defendants;

(d) That certification might be restricted to common liability issues, if any, leaving individual defences and damages issues to be determined in a series of individual trials;

(e) Significant expert evidence would be needed to establish the claims advanced by the Plaintiff;

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[45] *Parsons Fees*, supra note 17 at para 29
[46] *Gagne v Silcorp Ltd,* 1998 CarswellOnt 4045 (ONCA) at para 16, **Appendix B**
[47] *Parsons Fees*, supra note 17 at paras 29 and 37
[48] NB at para 68

(f) That the amount of damages may be assessed at a low number, or potentially, even nil as against the Stampede Defendants; and

(g) That the Stampede Defendants may appeal interlocutory and final decisions in this matter, resulting in significant time, expense and delay.

95. The Action is a complex claim involving historical sexual assault and a broad range of causes of action against Heerema and the Stampede Defendants. This Action included claims arising out of negligence, breach of fiduciary duties, breaches of contract, and vicarious liability. Issues pertaining to liability and damages required expert opinions to assess the strength of the claim and the potential range of damages.[49]

96. When Class Counsel agreed to undertake this matter on a contingency fee basis, there was a general understanding that recovery would be contingent on liability being assessed against the Stampede Defendants. Class Counsel had a general theory of the case at the outset; however, Class Counsel did not have access to sufficient information and records to determine whether they could or would successfully attribute liability to the Stampede Defendants. Further, the amount that any settlement or judgment might be was largely unknown, and Class Counsel took on significant risk by pursuing this claim, and expended significant time and out-of-pocket expenses to move the matter forward.

(ii) Degree of Responsibility Assumed by Class Counsel

97. In undertaking this Action on a contingent fee basis, Class Counsel assumed the risk of the time and expense that would be required to litigate this matter to conclusion, including a certification application and numerous other procedural applications, meetings with Class Members, preparing for and carrying out cross-examinations and Questioning, procuring various expert opinions, a trial on common issues and potential individual trials for each of the Class Members.

98. To maximize recovery for the Class, Class Counsel did not apply to any third-party litigation funder for assistance with disbursements, thereby preserving, for the Class, any fees that might have been associated with this assistance. Rather, Class Counsel funded more than $180,000 in out-of-pocket disbursements and other charges. Class Counsel in this matter also assumed the risk of any adverse costs awards through indemnities provided to the Plaintiff.[50] Both of these factors are relevant when assessing fees.[51]

99. Class Counsel also engaged in extensive arm's length negotiations with the Stampede Defendants, including two JDRs.

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[49] NB Affidavit at Exhibit "B"

[50] NB Affidavit at paras 71-72

[51] *Marcantonio v TVI Pacific Inc*, 2009 CanLII 43191 (ONSC) at para 34

(iii) Time Expended by Class Counsel

100. Class Counsel has recorded over 5,350 hours of billable time between numerous lawyers, paralegals and articling students to date. A significant amount of time has been expended on this Action.[52]

101. Class Counsel has undertaken various steps to date, including:[53]

(a) Conducting multiple interviews and meetings in person, over video and over the telephone with Class Members;

(b) Attending, coordinating and participating in multiple meetings in person, over video and over the phone with the Representative Plaintiff;

(c) Attending, coordinating and participating in multiple meetings in person, over video and over the phone with counsel for the Stampede Defendants;

(d) Reviewing materials and transcripts pertaining to the related criminal proceedings against Heerema;

(e) Attending the criminal trial against Heerema;

(f) Drafting commencement documents and amendments to pleadings;

(g) Conducting extensive legal research and preparing memoranda on various research issues;

(h) Preparing and reviewing extensive Affidavits of Records;

(i) Preparing multiple and extensive application materials, all of which included legal briefs, including the Certification Application, Application to amend the Class Definition, Application to compel responses to the Notices to Admit, and Application for Summary Judgment;

(j) Coordinating and executing numerous notice campaigns;

(k) Attending Court on multiple occasions, including case management hearings;

(l) Preparing and administering websites to provide information and updates to Class Members;

(m) Liaising with experts and coordinating the preparation of numerous expert reports;

[52] NB Affidavit at para 77
[53] NB Affidavit at paras 8-30

(n) Negotiation, drafting and approval of the liability settlement;

(o) Preparing for and attending two JDRs;

(p) Drafting the Settlement Agreement and corresponding Schedules;

(q) Preparing materials for the Approval Application;

(r) Ongoing communications with the Class Members who have contacted Class Counsel to date, including notifying Class Members of the progress of the Action and settlement; and

(s) Responding to numerous inquiries from Class Members and media regarding the Action and settlement.

102. In addition to the time expended thus far by Class Counsel, a great deal of work remains to be done by Class Counsel, including:[54]

(a) Preparing for and attending the Approval Application;

(b) Responding to inquiries from Class Members about the Settlement Agreement, the claims process, the Claims Form, the Distribution Protocol, and other inquiries received from Class Members;

(c) Facilitating the implementation of the Plan of Notice including dissemination of the Short and Long Form Notices;

(d) Working with the Claims Administrator to prepare the website dedicated to the claims distribution process, and issuing notice to the class;

(e) Liaising with the Claims Administrator to ensure the fair and efficient evaluation, administration and distribution of the Net Settlement Amoun, including assisting the Claims Administrator with the evaluation of claims should they require it; and

(f) Overseeing payment of the Claims Administrator Fees.

103. Class Counsel is not seeking to recover, and will not return before this Honourable Court to request payment of the time and disbursements required to see this matter to its conclusion, which is estimated to be at least $300,000.00 in additional fees, disbursements, other charges and taxes (separate from the estimated Claims Administration Fees of $200,000).[55]

[54] NB Affidavit at para 88
[55] NB Affidavit at para 89

(iv) Monetary Value of the Settlement, Importance to the Class and Results Achieved

104. The Settlement Agreement provides for a total Settlement Fund of $9,507,500, before payment of disbursements, Class Counsel Fees and taxes, and honoraria. In light of the risks identified, the Settlement Amount represents a fair and reasonable recovery for the Class.

105. There was significant risk that individual Class Members would be reluctant to commence their own individual claims or participate in individual damages trials due to the information disclosure requirements, adversarial cross-examination process and the highly personal nature of the issues. This Action also relates to a large number of Class Members not directly impacted by the actions of Heerema, many of whom experienced relatively small losses or no damages at all. Without this Action proceeding as a class action, and resolving damages through the Settlement Agreement, it is likely that the majority of Class Members would have never advanced claims and would never have obtained any relief or recovery.

106. The Settlement Agreement and Distribution Protocol is designed to provide the largest compensation to those most significantly harmed, but is also designed to compensate all affected Class Members to some extent. These amounts are important to redress the variable and significant harms suffered by the Class as a result of Heerema's actions and the failure of the Stampede Defendants to protect them.

(v) Skill and Competence of Counsel

107. A presumption of fairness accompanies the recommendation of experienced counsel:[56]

> The recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

108. Class Counsel in this matter have extensive experience in litigating complex matters.

109. Class Counsel conducted the within proceeding in a manner that has resulted in significant savings for the Class, and also achieved a positive result, by (i) deciding to fund all of the disbursements associated with litigating the Action; (ii) not applying for third party funding; (iii) allocating legal work among Class Counsel in a sensible and cost efficient manner; (iv) advancing a Summary Judgment Application which resulted in the liability settlement; (v) engaging in two JDRs; and (vi) devising an efficient and fair Distribution Protocol that will effectively and reasonably distribute the proceeds of the Net Settlement Funds.

[56] *Dabbs*, supra note 4 at para 32

(vi) Ability of the Class to Pay

110. The Class has the ability to pay the requested fees, disbursements and taxes out of the Settlement Fund, with a significant Net Settlement Fund remaining to be distributed to the Class.

(vii) Class Members' Expectation of Fees

111. The Class, through publication of the Notice of Settlement Approval Hearing and the Settlement Agreement, is aware of Class Counsel's intention to request their legal fees in this Action. The Notice of Settlement Approval Hearing states:

> Class Counsel will request that all disbursements incurred in prosecuting this class action be paid from the settlement funds and that the costs of administration of the settlement funds also be paid from the total settlement funds. Class Counsel will seek an honoraria payment to certain Class Members who were instrumental in the prosecution of this Action. Class Counsel will also request that following the payment of disbursements, honoraria, and administration costs, that 30% plus GST of the remaining settlement fund be allocated towards their contingency legal fees, and taxes.

112. Class Members have not filed any objections to the amount sought for legal fees.

113. Further, the Contingency Fee Agreement received preliminary approval in accordance with Sections 38 and 39 of the *CPA*, and numerous Class Member have executed Representation Agreements with Class Counsel which incorporated the Contingency Fee Agreement terms.

(viii) Fee Requested

114. Class Counsel's legal fees and disbursement request can be summarized as follows:[57]

Class Counsel's Legal Fees	$2,736,832.92
GST on Class Counsel's Fees	$136,841.65
Disbursements incurred to date	$175,991.64
GST on Disbursements	$8,731.96
Anticipated Disbursements for Claims Administration and Notice to the Class of Settlement Approval	$200,0000

[57] NB Affidavit at para 84

Total:	$3,258,398.17

115. The Class Counsel Fee request in this matter is fair and reasonable in the circumstances and supported by the Representative Plaintiff in this matter.

VII. HONORARIA

116. Class Counsel is also seeking honoraria to be paid out of the Settlement Fund to certain Class Members who provided substantial assistance in the prosecution of the Action:

(a) N.B. in the amount of $20,000

(b) M.J. in the amount of $5,000

(c) R.S. in the amount of $5,000

(d) S.T. in the amount of $1,000

(e) B.N. in the amount of $1,000

(f) K.S. in the amount of $1,000

(g) S.S. in the amount of $1,000

(h) L.C. in the amount of $1,000

(i) R.W. in the amount of $1,000

117. Honoraria have been awarded in a number of class actions, notwithstanding the fact that the *CPA* is silent on the issue of the allocation of honoraria. The rationale for these payments is to encourage the prosecution of class actions and to reward representative plaintiffs for the time they incurred bringing a matter forward.[58]

118. A court may assess whether the proposed honorarium is in accordance with the expected payments to other class members, because an overly generous honorarium might create the perception of a conflict of interest. In this Action, the modest honoraria proposed is unlikely to create the appearance of a conflict of interest.

119. In *Jane Doe (#7)*, the Court approved a total honorarium of $75,000, which involved payment of $25,000 to each of the three representative plaintiffs.[59]

[58] *Steele v Toyota Canada Inc*, 2015 BCSC 1014, at paras 34 and 36
[59] *Jane Doe (#7)*, supra note 12 at para 39

120. N.B., as the Representative Plaintiff, participated extensively in the Action from the outset. N.B. was also the victim who first reported Heerema to the authorities and finally put an end to his decades-long abuse of the Class Members. His courage in going to the police and commencing this Action is to be commended, as many Class Members would not otherwise have had the ability or means to pursue an individual action.[60]

121. In addition to N.B., the other proposed recipients of honoraria provided valuable assistance in prosecuting this claim, and in so doing, faced the risk of re-traumatization in addressing the harms committed against them. Each of them met with various health care professionals and vocational experts who provided expert reports in the context of various applications which were necessary in this Action.[61]

122. In addition to meeting with these experts, both R.S. and M.J.1 were the subject of cross-examination on their affidavits filed in support of various motions. The contribution by these individuals was an important component in obtaining the settlement.[62]

123. It is respectfully submitted that the proposed honorarium for each of these Class Members for their contributions is appropriate in this case.

VIII. RELIEF REQUESTED

124. An Order:

(h) Abridging the time for service and filing of the Plaintiff's materials, if necessary;

(i) Declaring that the Settlement Agreement reached between the Plaintiff, N.B. in his personal capacity and in his capacity as the Representative Plaintiff on behalf of the certified Class, and the Stampede Defendants, is fair, reasonable, and in the best interests of the Class Members;

(j) Approving the Settlement Agreement pursuant to section 35 of the *CPA*;

(k) Directing that the Settlement Agreement shall be implemented in accordance with its terms;

(l) Declaring that the Settlement Agreement, in its entirety, binds the Stampede Defendants, the Plaintiffs and the Class Members, including those persons or estates that may require litigation representatives, and that the requirements of Rule 2.11 and 2.19 are incorporated into the Order;

(m) Directing that the Distribution Plan attached at Schedule F of the Settlement Agreement is approved as fair and reasonable and that the Settlement Fund shall

[60] NB Affidavit at paras 85-86
[61] NB Affidavit at para 87
[62] NB Affidavit at para 87

be distributed in accordance with the terms of the Settlement Agreement, following payment of Class Counsel fees, disbursements, honoraria and administration expenses, subject to the one following revision:

(i) Should the Claims Administrator determine that a Class Members falls into the most severely impacted category, as described in section 2.3(C)(1) of the Distribution Protocol, they are directed to provide a one-time advance payment of $10,000 to that Class Member to allow the Class Member to access immediate therapy costs. The amount advanced will then be deducted from the total amount awarded to that Class Member;

(n) Appointing Epiq Class Actions Services Canada, Inc. as the Claims Administrator;

(o) Directing that this Court retains an ongoing supervisory role over the implementation, administration, and enforcement of the Settlement Agreement;

(p) Approving the Short and Long Form Notices to Class Members, as attached at Exhibits “G” and “H” to the Affidavit of N.B.;

(q) Approving the Claims Form, as attached at Exhibit “F” of the Affidavit of N.B.;

(r) Directing that the Plaintiff and the Stampede Defendants may, on notice to the Court but without further need for a further order of the Court, agree to reasonable extensions of time to carry out any of the provisions of this Settlement Agreement;

(s) Declaring that the Stampede Defendants are not required to place the Settlement Funds in an interest-bearing account as required by the Settlement Agreement and may instead pay an additional amount of $7,500, as part of the Settlement Funds, representing the interest that would have accrued on the Settlement Funds during the time the Settlement Funds are intended to be held in trust;

(t) Directing that Class Counsel shall seek advice and direction from the Court if further assistance is required for the implementation or administration of the Claims Process or Distribution Protocol;

(u) Directing that Class Counsel shall report to the Court at the conclusion of the administration of the Settlement Agreement, including reporting on notice, claims made and distributions;

(v) Declaring that, as of the Effective Date and set out at Section 7 of the Settlement Agreement, the Releasors will have released and discharged the Releasees from the Released Claims;

(w) Declaring that upon the Effective Date, and without further order, the Action against the Stampede Defendants is dismissed without costs;

(x) Declaring that the Defendant Philip Heerema is not a party to the Settlement Agreement and is not a Releasee under the terms of the Settlement Agreement;

(y) Approving, pursuant to section 39 of the *CPA*, Class Counsel Fees in the total amount of $3,258,398.17, being:

(i) $2,736,832.92 for legal fees;

(ii) $136,841.65 for applicable taxes on the legal fees;

(iii) $184,723.60 for disbursements (inclusive of tax) incurred as of June 9, 2024; and

(iv) $200,000 for anticipated disbursements for claims administration and notice of settlement approval to the Class.

(z) Approving an honorarium to the following individuals who provided substantial assistance in the prosecution of the Action:

(i) N.B. in the amount of $20,000

(ii) M.J. in the amount of $5,000

(iii) R.S. in the amount of $5,000

(iv) S.T. in the amount of $1,000

(v) B.N. in the amount of $1,000

(vi) K.S. in the amount of $1,000

(vii) S.S. in the amount of $1,000

(viii) L.C. in the amount of $1,000

(ix) R.W. in the amount of $1,000

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of June, 2024.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: 

For Carsten Jensen, KC, FCIArb, Kajal Ervin, Gavin Price, Cassandra Sutter and William Katz, Counsel to the Representative Plaintiff and the Class

IX. LIST OF AUTHORITIES

1. *Class Proceedings Act*, SA 2003, C-16.5
2. *Rowlands v Durham Region Health*, 2012 ONSC 3948
3. *Macaronies Hair Club and Laser Center Inc v BofA Canada Bank*, 2019 ABQB 181
4. *Northwest v Canada (Attorney General)*, 2006 ABQB 902
5. *Dabbs v Sun Life Assurance Co of Canada*, 1998 CanLII 14855 (ONSC), aff'd 1998 CanLII 7165 (ONCA)
6. *Robertson v ProQuest Information and Learning LLC*, 2011 ONSC 2629
7. *Parsons v Canadian Red Cross Society*, [1999] O.J. No. 3572, 1999 CarswellOnt 2932 (ONSCJ) [**Appendix A**]
8. *CO v Williamson*, 2020 ONSC 3874
9. *Dolmage v HMQ*, 2013 ONSC 6686
10. *McKillop and Bechard v HMQ*, 2014 ONSC 1282
11. *Weremy v Manitoba*, 2023 MBKB 122
12. *Tidd v New Brunswick*, 2023 NBKB 185
13. *Anderson v Canada (Attorney General)*, 2016 CanLII 76817 (NLSC)
14. *Johnston v The Shelia Morrison Schools*, 2013 ONSC 1528
15. *Seed v Ontario*, 2012 ONSC 2681
16. *Adams v Sheane*, 2014 BCSC 733
17. *Doucet v The Royal Winnipeg Ballet*, 2022 ONSC 976
18. *Tiller v Canada*, 2020 FC 321
19. *Jane Doe (#7) v Newfoundland and Labrador*, 2022 NLSC 133
20. *Lavier v MyTravel Canada Holidays Inc*, 2013 ONCA 92
21. *Gagne v Silcorp*, 1998 CanLII 1584 (ONCA)
22. *Parsons v Canadian Red Cross Society*, 2000 CanLII 22386 (ONSC)

23. *Baker (Estate) v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105

24. *Robertson v Thomson Canada Limited*, 2009 CanLII 32703 (ONSC)

25. *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686

26. *Adrian v Canada (Minister of Health)*, 2007 ABQB 377

27. *Gagne v Silcorp Ltd*, 1998 CarswellOnt 4045 (ONCA) [**Appendix B**]

28. *Marcantonio v TVI Pacific Inc*, 2009 CanLII 43191 (ONSC)

29. *Steele v Toyota Canada Inc*, 2015 BCSC 1014

Appendix A

Indexed as:

Parsons v. Canadian Red Cross Society

PROCEEDING UNDER the Class Proceedings Act, 1992
Between
Dianna Louise Parsons, 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 between
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

[**1999] O.J. No. 3572**

103 O.T.C. 161

40 C.P.C. (4th) 151

91 A.C.W.S. (3d) 351

1999 CarswellOnt 2932

Court File Nos. 98-CV-141369 and 98-CV-146405

Ontario Superior Court of Justice

Winkler J.

Heard: August 19-21, 1999.
Judgment: September 22, 1999.

(133 paras.)

Practice -- Class proceedings -- Settlements -- Court approval.

Motion by various parties for approval of a settlement in two companion class proceedings commenced under the Class Proceedings Act. One plaintiff class was persons who were infected with hepatitis C from blood transfusions between January 1, 1986 and July 1, 1990. The other plaintiff class was persons infected with hepatitis C from the taking of blood or blood products during the same time period. In both proceedings, there was also a family class consisting of family members of persons in the other main classes. The defendants in the two actions were the Canadian Red Cross Society, the Queen in Right of Ontario, and the Attorney General of Canada. The plaintiff classes were national in scope. As such, the other provincial and territorial governments except Quebec and British Columbia also moved to be included in the two actions as defendants, but only if the settlement was approved. The claims in these actions were founded on the decision by the CRCS and its government's overseers not to conduct testing of blood donations to the Canadian blood supply after a test for the hepatitis C virus became available and had been put into widespread use in the U.S. On this motion, the parties presented a comprehensive settlement package to the court. It consisted of a settlement agreement, a funding agreement, and plans for distribution of the settlement funds in the two actions. However, there were over 80 written objections to the settlement proposal from individuals afflicted with hepatitis C. The objections related to a number of issues, specifically, the adequacy of the total value of the settlement amount, the extent of compensation provided through the settlement, the sufficiency of the settlement fund to provide the proposed compensation, the reversion of any surplus, and the costs of administering the plans.

HELD: Motion dismissed. The settlement proposal was within the range of reasonableness having regard to the risks inherent in carrying the matter through to trial. The level of benefits ascribed within the settlement were acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighed any deficiencies which might have existed in the levels of benefits. However, there were two areas which required modification in order for the settlement to receive court approval. The first area related to access to the fund by opt-out claimants, specifically, the benefits provided from the fund for an opt-out claimant could not exceed those available to a similarly injured class member who remained in the class. The second area related to the surplus provisions of the settlement proposal.

Statutes, Regulations and Rules Cited:

Class Proceedings Act 1992, S.O. 1992, c. 6, ss. 5(2), 8(3), 29(2).

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Counsel:

Harvey Strosberg, Q.C., Heather Rumble Peterson and Patricia Speight, for the plaintiffs.
Wendy Matheson and Jane Bailey, for the Canadian Red Cross Society.
Michèle Smith and R.F. Horak, for Her Majesty the Queen in Right of Ontario.
Ivan G. Whitehall, Q.C., Catherine Moore and J.C. Spencer, for the Attorney General of Canada.
Wilson McTavish, Q.C., Linda Waxman and Marian Jacko, for the Office of the Children's Lawyer.
Laurie Redden, for the Office of the Public Guardian and Trustee.
Beth Symes, for the Thalassemia Foundation of Canada, Friend of the Court.
William P. Dermody, for the Intervenors, Hubert Fullarton and Tracey Goegan.
L. Craig Brown, for the Hepatitis C Society of Canada, Friend of the Court.
Pierre R. Lavigne, for Dominique Honhon, Friend of the Court.
Bruce Lemer, for Anita Endean, Friend of the Court.
Elizabeth M. Stewart, for the Provinces and Territories other than British Columbia and Quebec.
Bonnie A. Tough and David Robins, for the plaintiffs.
Janice E. Blackburn and James P. Thomson, for the Canadian Hemophilia Society, Friend of the Court.

WINKLER J.:--

Nature of the Motion

1 This is a motion for approval of a settlement in two companion class proceedings commenced under the Class Proceedings Act 1992, S.O. 1992, c. 6, the "Transfused Action" and the "Hemophiliac Action", brought on behalf of persons infected by Hepatitis-C from the Canadian blood supply. The Transfused Action was certified as a class proceeding by order of this court on June 25, 1998, as later amended on May 11, 1999. On the latter date, an order was also issued certifying the Hemophiliac Action. There are concurrent class proceedings in respect of the same issues before the courts in Quebec and British Columbia. The Ontario proceedings apply to all persons in Canada who are within the class definition with the exception of any person who is included in the proceedings in Quebec and British Columbia. The motion before this court concerns a Pan-Canadian agreement intended to effect a national settlement, thus bringing to an end this aspect to the blood tragedy. Settlement approval motions similar to the instant proceeding have been contemporaneously heard by courts in Quebec and British Columbia with a view to bringing finality to the court proceedings across the country.

The Parties

2 The plaintiff class in the Transfused Action are persons who were infected with Hepatitis C from blood transfusions between January 1, 1986 to July 1, 1990. The plaintiff class in the Hemophiliac Action are persons infected with Hepatitis C from the taking of blood or blood products during the same time period.

3 The defendants in the Ontario actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario, and the Attorney General of Canada. The Ontario classes are national in scope. Therefore, the other Provincial and Territorial Governments of Canada, with the exception of Quebec and British Columbia, have moved to be included in the Ontario actions as defendants but only if the settlement is approved.

4 The court has granted intervenor status to a number of individuals, organizations and public bodies, namely, Hubert Fullarton and Tracy Goegan, the Canadian Hemophilia Society, the Thalassemia Foundation of Canada, the Hepatitis C Society of Canada, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee of Ontario.

5 Pursuant to an order of this court, Pricewaterhouse Coopers received and presented to the court over 80 written objections to the settlement from individuals afflicted with Hepatitis-C. In addition, 11 of the objectors appeared at the hearing of the motion to proffer evidence as to their reasons for objecting to the settlement.

6 The approval of the settlement before the court is supported by class counsel and the Ontario and Federal Crown defendants. In addition to these parties, the Provincial and Territorial governments who seek to be included if the settlement is approved, and the intervenors, the Canadian Hemophilia Society, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee made submissions in support of approval of the settlement. The Canadian Red Cross Society ("CRCS") appeared, but did not participate, all actions against it having been stayed by order of Mr. Justice Blair dated July 28, 1999, pursuant to a proceeding under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36. The other intervenors and individual objectors voiced concerns about the settlement and variously requested that the court either reject the settlement or vary some of its terms in the interest of fairness.

Background

7 Both actions were commenced as a result of the contamination of the Canadian blood supply with infectious viruses during the 1980s. The background facts are set out in the pleadings and the numerous affidavits forming the record on this motion. The following is a brief summary.

8 The national blood supply system in Canada was developed during World War II by the CRCS. Following WWII, the CRCS was asked to carry on with the operation of this national system, and did so as part of its voluntary activities without significant financial support from any government. As a result of its experience and stewardship of system, the CRCS had a virtual monopoly on the collection and distribution of blood and blood products in Canada.

9 Over time the demand for blood grew and Canada turned to a universal health care system. Because of these developments, the CRCS requested financial assistance from the provincial and territorial governments. The governments, in turn, demanded greater oversight over expenditures. This led to the formation of the Canadian Blood Committee which was composed of representatives of the federal, provincial and territorial governments. The CBC became operational in the summer of 1982. Other than this overseer committee, there was no direct governmental regulation of the blood supply in Canada.

10 The 1970s and 80s were characterized medically by a number of viral infection related problems stemming from contaminated blood supplies. These included hepatitis and AIDS. The defined classes in these two class actions, however, are circumscribed by the time period beginning January 1, 1986 and ending July 1, 1990. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The viral infection at the center of these proceedings is now known as Hepatitis C.

11 Hepatitis is an inflammation of the liver that can be caused by various infectious agents, including contaminated blood and blood products. The inflammation consists of certain types of cells that infiltrate the tissue and produce by-products called cytokines or, alternatively, produce antibodies which damage liver cells and ultimately cause them to die.

12 One method of transmission of hepatitis is through blood transfusions. Indeed, it was common to contract hepatitis through blood transfusions. However, due to the limited knowledge of the effects of contracting hepatitis, the risk was considered acceptable in view of the alternative of no transfusion which would be, in many cases, death.

13 As knowledge of the disease evolved, it was discovered that there were different strains of hepatitis. The strains identified as Hepatitis A ("HAV") and Hepatitis B ("HBV") were known to the medical community for some time. HAV is spread through the oral-fecal route and is rarely fatal. HBV is blood-borne and may also be sexually transmitted. It can produce violent illness for a prolonged period in its acute phase and may result in death. However, most people infected with HBV eliminate the virus from their system, although they continue to produce antibodies for the rest of their lives.

14 During the late 1960s, an antigen associated with HBV was identified. This discovery led to the development of a test to identify donated blood contaminated with HBV. In 1972, the CRCS implemented this test to screen blood donations. It soon became apparent that post-transfusion hepatitis continued to occur, although much less frequently. In 1974, the existence of a third form of viral hepatitis, later referred to as Non-A Non-B Hepatitis ("NANBH") was postulated.

15 This third viral form of hepatitis became identified as Hepatitis C ("HCV") in 1988. Its particular features are as follows:

(a) transmission through the blood supply if HCV infected donors are unaware of

their infected condition and if there is no, or no effective, donor screening;
(b) an incubation period of 15 to 150 days;
(c) a long latency period during which a person infected may transmit the virus to others through blood and blood products, or sexually, or from mother to fetus; and
(d) no known cure.

16 The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after a "surrogate" test for HCV became available and had been put into widespread use in the United States.

17 In a surrogate test a donor blood sample is tested for the presence of substances which are associated with the disease. The surrogate test is an indirect method of identifying in a blood sample the likelihood of an infection that cannot be identified directly because no specific test exists. During the class period, there were two surrogate tests capable of being used to identify the blood donors suspected of being infected with HCV, namely, a test to measure the ALT enzyme in a donor's blood and a test to detect the anti-HBc, a marker of HBV, in the blood.

18 The ALT enzyme test was useful because it highlights inflammation of the liver. There is an increased level of ALT enzymes in the blood when a liver is inflamed. The test is not specific for any one liver disease but rather indicates inflammation from any cause. Elevated ALT enzymes are a marker of liver dysfunction which is often associated with HCV.

19 The anti-HBc test detects exposure to HBV and is relevant to the detection of HCV because of the assumption that a person exposed to HBV is more likely than normal to have been exposed to HCV, since both viruses are blood-borne and because the populations with higher rates of seroprevalence were believed to be similar.

20 The surrogate tests were subjected to various studies in the United States. Among other aspects, the studies analyzed the efficacy of each test in preventing NANBH post-transfusion infection and the extent to which the rejection of blood donations would be increased. The early results of the studies did not persuade the agencies responsible for blood banks in the U.S. to implement surrogate testing as a matter of course. However, certain individuals, including Dr. Harvey Alter, a leading U.S. expert on HCV, began a campaign to have the U.S. blood agencies change their policies. In consequence, in April 1986 the largest U.S. blood agency decided that both surrogate tests should be implemented, and further, that the use of the tests would become a requirement of the agency's standard accreditation program in the future. This effectively made surrogate testing the national standard in the U.S. and by August 1, 1986, all or virtually all volunteer blood banks in the U.S. screened blood donors by using the ALT and anti-HBc tests.

21 This course was not followed in Canada. Although there was some debate amongst the doctors involved with the CRCS, surrogate testing was not adopted. Rather, in 1984 a meeting was held at the CRCS during which a multi-centre study was proposed. The purpose of the study was to

determine the incidence of NANBH in Canada. The CRCS blood centres proposed to take part in the study were those in Toronto, Montreal, Ottawa, Edmonton and Vancouver.

22 Prior to the 1984 meeting however, Dr. Victor Feinman of Mount Sinai Hospital had already begun a study to determine the incidence of NANBH in those who had received blood transfusions. This study had a significant limitation in that it did not measure the effectiveness of surrogate testing. Although the limitation was known to the CRCS, the medical directors agreed at their meeting on March 29-30, 1984 to review Dr. Feinman's research to determine whether the proposed CRCS multi-centre study was still required. Ultimately, the CRCS did not conduct the multi-centre study.

23 The CRCS was aware of the American decision to implement surrogate testing in 1986 but opted instead to await a full assessment of the results of the Dr. Feinman study and the impact of testing for the Human-Immunodeficiency Virus ("HIV") and "self-designation" as possible surrogates to screen for NANBH.

24 This decision was criticized by Dr. Alter. In an article published in the Medical Post in February 1988, Dr. Alter was quoted as stating that:

> "while the use of surrogate markers is far from ideal, the lack of any specific test to identify [NANBH], coupled with the serious chronic consequences of the disease, makes the need for these surrogate tests essential."

25 The CRCS never implemented surrogate testing. In late 1988, HCV was isolated. The Chiron Corporation developed a test for anti-HCV for use by blood banks. In March 1990, the CRCS blood centres began implementing the anti-HCV test, and by June 30, 1990, all centres had implemented the test. Hence the class definitions stipulated in the two certification orders before this court, covers the period between January 1, 1986 and July 1, 1990, which corresponds to the interval between the widespread use of surrogate testing in the U.S. and the universal adoption of the Chiron HCV test in Canada. The classes are described fully below.

The Claims

26 It is alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidence of HCV infection from contaminated blood would have been reduced by as much as 75% during the class period. Consequently, they bring the actions on behalf of classes described as the Ontario Transfused Class and the Ontario Hemophiliac Class. The plaintiffs assert claims based in negligence, breach of fiduciary duty and strict liability in tort as against all of the defendants.

The Classes

27 The Ontario Transfused Class is described as:

(a) all persons who received blood collected by the CRCS contaminated with HCV during the Class Period and who are or were infected for the first time with HCV and who are:

(i) presently or formerly resident in Ontario and receive blood in Ontario and who are or were infected with post-transfusion HCV;
(ii) resident in Ontario and received blood in any other Province or Territory of Canada other than Quebec and who are or were infected with post-transfusion HCV;
(iii) resident elsewhere in Canada and received blood in Canada, other than in the Provinces of British Columbia and Quebec, and who are or were infected with post-transfusion HCV;
(iv) resident outside Canada and received blood in any Province or Territory of Canada, other than in the Province of Quebec, and who are or were infected with post-transfusion HCV; and
(v) resident anywhere and received blood in Canada and who are or were infected with post-transfusion HCV and who are not included as class members in the British Columbia Transfused Class Action or the Quebec Transfused Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to in subparagraph (a) or (b) who is or was infected with HCV by such person.

28 The Ontario Hemophiliac Class is described as:

(a) all persons who have or, had a congenital clotting factor defect or deficiency, including a defect or deficiency in Factors V, VII, VIII, IX, XI, XII, XIII or von Willebrand factor, and who received or took Blood (as defined in Section 1.01 of the Hemophiliac HCV Plan) during the Class Period and who are:

(i) presently or formerly a resident in Ontario and received or took Blood in Ontario and who are or were infected with HCV;
(ii) resident in Ontario and received or took Blood in any other Province or Territory of Canada other than Quebec and who are or were infected with HCV;
(iii) resident elsewhere in Canada and received or took Blood in Canada other than in the Provinces of British Columbia and Quebec and who are or were infected with HCV;

(iv) resident outside Canada and received or took Blood in any Province or Territory in Canada, other than in the Province of Quebec, and who are or were infected with HCV; and

(v) resident anywhere and received or took Blood in Canada and who are not included as class members in the British Columbia Hemophiliac Class Action or the Quebec Hemophiliac Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to subparagraph (a) or (b) who is or was infected with HCV by such person.

29 In addition in each of the actions, there is a "Family" class described, in the Ontario Transfused Class, as follows:

(a) the Spouse, child, grandchild, parent, grandparent or sibling of an Ontario Transfused Class Member;
(b) the spouse of a child, grandchild, parent or grandparent of an Ontario Transfused Class Member;
(c) a former Spouse of an Ontario Transfused Class Member;
(d) a child or other lineal descendant of a grandchild of an Ontario Transfused Class Member;
(e) a person of the opposite sex to an Ontario Transfused Class Member who cohabitated for a period of at least one year with that Class Member immediately before his or her death;
(f) a person of the opposite sex to an Ontario Transfused Class Member who was cohabitating with that Class Member at the date of his or her death and to whom that Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and
(g) any other person to whom an Ontario Transfused Class Member was providing support for a period of at least three years immediately prior to his or her death.

There is a similarly described Family Class in the Hemophiliac Action.

The Proposed Settlement

30 The parties have presented a comprehensive package to the court. Not only does it pertain to these actions, but it is also intended to be a Pan-Canadian agreement to settle the simultaneous class proceedings before the courts in Quebec and British Columbia. The settlement will not become final and binding until it is approved by courts in all three provinces. It consists of a Settlement Agreement, a Funding Agreement and Plans for distribution of the settlement funds in the Transfused Action and the Hemophiliac Action.

31 The Settlement Agreement creates the following two Plans:

(1) the Transfused HCV Plan to compensate persons who are or were infected with HCV through a blood transfusion received in Canada in the Class Period, their secondarily-infected Spouses and children and their other family members; and
(2) the Hemophiliac HCV Plan to compensate hemophiliacs who received or took blood or blood products in Canada in the Class Period and who are or were infected with HCV, their secondarily-infected Spouses and children and their other family members.

32 To fund the Agreement, the federal, provincial and territorial governments have promised to pay the settlement amount of $1,118,000,000 plus interest accruing from April 1, 1998. This will total approximately $1,207,000,000 as of September 30, 1999.

33 The Funding Agreement contemplates the creation of a Trust Fund on the following basis:

(i) a payment by the Federal Government to the Trust Fund, on the date when the last judgment or order approving the settlement of the Class Actions becomes final, of 8/11ths of the settlement amount, being the sum of approximately $877,818,181, subject to adjustments plus interest accruing after September 30, 1999 to the date of payment; and
(ii) a promise by each Provincial and Territorial Government to pay a portion of its share of the 3/11ths of the unpaid balance of the settlement amount as may be requested from time to time until the outstanding unpaid balance of the settlement amount together with interest accruing has been paid in full.

34 The Governments have agreed that no income taxes will be payable on the income earned by the Trust, thereby adding, according to the calculations submitted to the court, a present value of about $357,000,000 to the settlement amount.

35 The Agreement provides that the following claims and expenses will be paid from the Trust Fund:

(a) persons who qualify in accordance with the provisions of the Transfused HCV Plan;
(b) persons who qualify in accordance with the provisions of the Hemophiliac HCV Plan;
(c) spouses and children secondarily-infected with HIV to a maximum of 240 who qualify pursuant to the Program established by the Governments (which is not subject to Court approval);
(d) final judgments or Court approved settlements payable by any FPT Government to a Class Member or Family Class Member who opts out of one of the Class Actions or is not bound by the provisions of the Agreement or a person who

claims over or brings a third-party claim in respect of the Class Member's receiving or taking of blood or blood products in Canada in the Class Period and his or her infection with HCV, plus one-third of Court-approved defence costs;

(e) subject to the Courts' approval, the costs of administering the Plans, including the costs of the persons hereafter enumerated to be appointed to perform various functions under the Agreement;

(f) subject to the Courts' approval, the costs of administering the HIV Program, which Program administration costs, in the aggregate, may not exceed $2,000,000; and

(g) subject to Court approval, fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel.

Class Members Surviving as of January 1, 1999

36 Other than the payments to the HIV sufferers, which I will deal with in greater detail below, the plans contemplate that compensation to the class members who were alive as of January 1, 1999, will be paid according to the severity of the medical condition of each class member. All class members who qualify as HCV infected persons are entitled to a fixed payment as compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical condition at the time of qualification under the Plan. However, the class member will be subsequently entitled to additional compensation if and when his or her medical condition deteriorates to a medical condition described at a higher compensation level. This compensation ranges from a single payment of $10,000, for a person who has cleared the disease and only carries the HCV antibody, to payments totaling $225,000 for a person who has decompensation of the liver or a similar medical condition.

37 The compensation ranges are described in the Agreement as "Levels". In addition to the payments for loss of amenities, class members with conditions described as being at compensation Level 3 or a higher compensation Level (4 or above), and whose HCV caused loss of income or inability to perform his or her household duties, will be entitled to compensation for loss of income or loss of services in the home.

38 The levels, and attendant compensation, for class members are described as follows:

(i) Level 1

Qualification	Compensation
A blood test demonstrates that the HCV an-	A lump sum payment of $10,000 plus reimbursement

tibody is present in the blood of a class member.	of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(ii) Level 2

Qualification	Compensation
A polymerase chain reaction test (PCR) demonstrates that HCV is present in the blood of a class member.	Cumulative compensation of $30,000 which comprises the the $10,000 payment at level 1, plus a payment of $15,000 immediately and another $5000 when the court determines that the Fund is sufficient to do so, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iii) Level 3

Qualification	Compensation
If a class member develops non-bridging fibrosis, or receives compensable drug therapy (i.e. Interferon or Ribavirin), or meets a protocol for HCV compensable treatment regardless of whether the treatment is taken, then the class member qualifies for Level 3 benefits.	Option 1 - $60,000 comprised of the level 1 and 2 payments plus an additional $30,000 Option 2 - $30,000 from the Level 1 and 2 benefits, and if the additional $30,000 from Option 1 is waived, compensation for loss of income or loss of income or loss of services in the home, subject to a threshold qualification.

In addition, at this level, the class member is entitled to an additional $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(iv) Level 4

Qualification	Compensation
If a class member develops bridging fibrosis, he or she qualifies as a Level 4 claimant	There is no further fixed payment beyond that of Level 3 at this level. In addition to those previously defined benefits, the claimant is entitled to compensation for loss of income or loss of services in the home, $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(v) Level 5

Qualification	Compensation
A class member who develops (a) cirrhosis; (b) unresponsive porphyria cutanea tarda which is causing significant disfigurement and disability; (c) unresponsive thrombocytopenia (low platelets) which result in certain other conditions; or (d) glomerulonephritis not requiring dialysis, he or she qualifies as a Level 5 claimant.	$125,000 which consists of the prior $60,000, if the claimant elected Option 1 at Level 3, plus an additional $65,0000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(vi) Level 6

Qualification	Compensation
If a class member receives a liver transplant, or develops: (a) decompensation of the liver; (b) hepatocellular cancer; (c) B-cell lymphoma; (d) symptomatic mixed cryoglobullinemia; (e) glomerulonephritis requiring	$225,000 which consists of the $125,000 available at at the prior levels plus an additional $100,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy,

dialysis; or (f) renal failure, he or she qualifies as a Level 6 claimant.	plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses. The claimant is also entitled to reiumbursement for costs of care up to $50,000 per year.

39 There are some significant "holdbacks" of compensation at certain levels. As set out in the table above, a claimant who is entitled to the $20,000 compensation payment at level 2 will initially be paid $15,000 while $5,000 will be held back in the Fund. If satisfied that there is sufficient money in the Fund, the Courts may then declare that the holdback shall be removed in accordance with Section 10.01(1)(i) of the Agreement and Section 7.03 of the Plans. Claimants with monies held back will then receive the holdback amount with interest at the prime rate from the date they first became entitled to the payment at Level 2. In addition, any claimant that qualifies for income replacement at Level 4 or higher will be subjected to a holdback of 30% of the compensation amount. This holdback may be removed, and the compensation restored, on the same terms as the Level 2 payment holdback.

40 There is a further limitation with respect to income, namely, that the maximum amount subject to replacement has been set at $75,000 annually. Again this limitation is subject to the court's review. The court may increase the limit on income, after the holdbacks have been removed, and the held benefits restored, if the Fund contains sufficient assets to do so.

41 Payment of loss of income is made on a net basis after deductions for income tax that would have been payable on earned income and after deduction of all collateral benefits received by the Class Member. Loss of income payments cease upon a Class Member reaching age 65. A claim for the loss of services in the home may be made for the lifetime of the Class Member.

Class Members Dying Before January 1, 1999

42 If a Class Member who died before January 1, 1999, would have qualified as a HCV infected person but for the death, and if his or her death was caused by HCV, compensation will be paid on the following terms:

(a) the estate will be entitled to receive reimbursement for uninsured funeral expenses to a maximum of $5,000 and a fixed payment of $50,000, while approved family members will be entitled to compensation for loss of the deceased's guidance, care and companionship on the scale set out in the chart at paragraph 82 below and approved dependants may be entitled to compensation for their loss of support from the deceased or for the loss of the deceased's services in the home ("Option 1"); or

(b) at the joint election of the estate and the approved family members and dependants of the deceased, the estate will be entitled to reimbursement for uninsured funeral expenses to a maximum of $5,000, and the estate and the approved family members and dependants will be jointly entitled to

compensation of $120,000 in full settlement of all of their claims ("Option 2").

43 Under the Plans when a deceased HCV infected person's death is caused by HCV, the approved dependants may be entitled to claim for loss of support until such time as the deceased would have reached age 65 but for his death.

44 Payments for loss of support are made on a net basis after deduction of 30% for the personal living expenses of the deceased and after deduction of any pension benefits from CPP received by the dependants.

45 The same or similar holdbacks or limits will initially be imposed on the claim by dependants for loss of support under the Plans as are imposed on a loss of income claim. The $75,000 cap on pre-claim gross income will be applied in the calculation of support and only 70% of the annual loss of support will be paid. If the courts determine that the Trust Fund is sufficient and vary or remove the holdbacks or limits, the dependants will receive the holdbacks, or the portion the courts direct, with interest from the time when loss of support was calculated subject to the limit.

46 Failing agreement among the approved dependants on the allocation of loss of support between them, the Administrator will allocate loss of support based on the extent of support received by each of the dependants prior to the death of the HCV infected person.

Class Members Cross-Infected with HIV.

47 Notwithstanding any of the provisions of the Hemophiliac HCV Plan, a primarily infected hemophiliac who is also infected with HIV may elect to be paid $50,000 in full satisfaction of all of his or her claims and those of his or her family members and dependants.

48 Persons infected with HCV and secondarily-infected with HIV who qualify under a Plan (or, where the person is deceased, the estate and his or her approved family members and dependants) may not receive compensation under the Plan until entitlement exceeds the $240,000 entitlement under the Program after which they will be entitled to receive any compensation payable under the Plan in excess of $240,000.

49 Under the Hemophiliac HCV Plan, the estate, family members and dependants of a primarily-infected hemophiliac who was cross-infected with HIV and who died before January 1, 1999 may elect to receive a payment of $72,000 in full satisfaction of their claims.

The Family Class Claimants

50 Each approved family class member of a qualified HCV infected person whose death was caused by HCV is entitled to be paid the amount set out below for loss of the deceased's guidance, care and companionship:

Relationship	Compensation
Spouse	$25,000
Child under 21 at time of death of class member	$15,000
Child over 21 at time of death of class member	$5,000
Parent or sibling	$5,000
Grandparent or Grandchild	$500

51 If a loss of support claim is not payable in respect of the death of a HCV infected person whose death was caused by, his or her infection with HCV, but the approved dependants resided with that person at the time of the death, then these dependants are entitled to be compensated for the loss of any, services that the HCV infected person provided in the home at the rate of $12 per hour to a maximum of 20 hours per week.

52 The Agreement and/or the Plans also provide that:

(a) all compensation payments to claimants who live in Canada will be tax free;
(b) compensation payments will be indexed annually to protect against inflation;
(c) compensation payments other than payments for loss of income will not affect social benefits currently being received by claimants;
(d) life insurance payments received by or on behalf of claimants will not be taken into account for any purposes whatsoever under the Plans; and
(e) no subrogation payments will be paid directly or indirectly.

The Funding Calculations

53 Typically in settlements in personal injury cases, where payments are to be made on a periodic basis over an extended period of time, lump sum amounts are set aside to fund the extended liabilities. The amount set aside is based on a calculation which determines the "present value" of the liability. The present value is the amount needed immediately to produce payments in the agreed value over the agreed time. This calculation requires factoring in the effects of inflation, the return on the investment of the lump sum amount and any income or other taxes which might have to be paid on the award or the income it generates. Dealing with this issue in a single victim case may be relatively straightforward. Making an accurate determination in a class proceeding with a multitude of claimants suffering a broad range of damages is a complex matter.

54 Class counsel retained the actuarial firm of Eckler Partners Ltd. to calculate the present value of the liabilities for the benefits set out in the settlement. The calculations performed by Eckler were based on a natural history model of HCV constructed by the Canadian Association for the Study of the Liver ("CASL") at the request of the parties. As stated in the Eckler report at p. 3, "the results from the [CASL] study form the basis of our assumptions regarding the development of the various medical outcomes." However, the Eckler report also notes that in instances where the study was lacking in information, certain extensions to some of the probabilities were supplied by Dr. Murray Krahn who led the study. In certain other situations, additional or alternative assumptions were provided by class counsel.

55 The class in the Transfused Action is comprised of those persons who received blood transfusions during the class period and are either still surviving or have died from a HCV related cause. The CASL study indicates that the probable number of persons infected with HCV through blood transfusion in the class period, the "cohort" as it is referred to in the study, is 15,707 persons. The study also estimates the rates of survival of each infected person. From these estimates, Eckler projects that the cohort as of January 1, 1999 is 8,104 persons. Of those who have died in the intervening time, 76 are projected to be HCV related deaths and thus eligible for the death benefits under the settlement.

56 In the case of the Hemophiliac class, the added factor of cross-infection with HIV, and the provisions in the plan dealing with this factor, require some additional considerations. Eckler was asked to make the following assumptions based primarily on the evidence of Dr. Irwin Walker:

(a) the Hemophiliac cohort size is approximately 1645 persons
(b) 15 singularly infected and 340 co-infected members of this cohort have died prior to January 1, 1999; the 15 singularly infected and 15 of those co-infected will establish HCV as the cause of death and claim under the regular death provisions (but there is no $120,000 option in this plan); the remaining 325 co-infected will take the $72,000 option.
(c) a further 300 co-infected members are alive at January 1, 1999; of these, 80%, i.e. 240, will take the $50,000 option;
(d) 990 singularly infected hemophiliacs are alive at January 1, 1999

(e) the remaining 60 co-infected and the 990 singularly infected hemophiliacs will claim under the regular provisions and should be modeled in the same way as the transfused persons, i.e. apply the same age and sex profiles, and the same medical, mortality and other assumptions as for the transfused group, except that the 60 coinfected claimants will not have any losses in respect of income.

57 Because of the structure of this agreement, Eckler was not required to consider the impact of income or other taxes on the investment returns available from the Fund. With respect to the rate of growth of the Fund, Eckler states at p. 10 that:

> A precise present value calculation would require a formula incorporating the gross rate of interest and the rate of inflation as separate parameters. However, virtually the same result will flow from a simpler formula where the future payments are discounted at a net rate equal to the excess of the gross rate of interest over the assumed rate of inflation. Eckler calculates the annual rate of growth of the Fund will be 3.4% per year on this basis. This is referred to as the "net discount rate".

58 There is one other calculation that is worthy of particular note. In determining the requirements to fund the income replacement benefits set out in the settlement, Eckler used the average industrial aggregate earnings rate in Canada estimated for 1999. From this figure, income taxes and other ordinary deductions were made to arrive at a "pre-claim net income". Then an assumption is made that the class members claiming income compensation will have other earnings post-claim that will average 40% of the pre-claim amount. The 60% remaining loss, in dollars expressed as $14,500, multiplied by the number of expected claimants, is the amount for which funding is required. Eckler points out candidly at p. 20 that:

> [in regard to the assumed average of Post-claim Net Income] ... we should bring to your attention that without any real choice, the foregoing assumed level of 40% was still based to a large extent on anecdotal input and our intuitive judgement on this matter rather than on rigourous scientific studies which are simply not available at this time. There are other assumptions and estimates which will be dealt with in greater detail below.

59 The Eckler conclusion is that if the settlement benefits, including holdbacks, and the other liabilities were to be paid out of the Fund, there is a present value deficit of $58,533,000. Prior to the payment of holdbacks, the Fund would have a surplus of $34,173,000.

The Thalassemia Victims

60 Prior to analyzing the settlement, I turn to the concerns advanced by The Thalassemia Foundation of Canada. The organization raises the objection that the plan contains a fundamental unfairness as it relates to claims requirements for members of the class who suffer from

Thalassemia.

61 Thalassemia, also known as Mediterranean Anemia or Cooley's Anemia, is an inherited form of anemia in which affected individuals are unable to make normal hemoglobin, the oxygen carrying protein of the red blood cell. Mutations of the hemoglobin genes are inherited. Persons with a thalassemia mutation in one gene are known as carriers or are said to have thalassemia minor. The severe form of thalassemia, thalassemia major, occurs when a child inherits two mutated genes, one from each parent. Children born with thalassemia major usually develop the symptoms of severe anemia within the first year of life. Lacking the ability to produce normal adult hemoglobin, children with thalassemia major are chronically fatigued; they fail to thrive; sexual maturation is delayed and they do not grow normally. Prolonged anemia causes bone deformities and eventually will lead to death, usually by their fifth birthday.

62 The only treatment to combat thalassemia major is regular transfusions of red blood cells. Persons with thalassemia major receive 15 cubic centimeters of washed red blood cells per kilogram of weight every 21 to 42 days for their lifetime. That is, a thalassemia major person weighing 60 kilograms (132 pounds) may receive 900 cubic centimeters of washed red blood cells each and every transfusion. Such a transfusion corresponds to four units of blood. Persons with thalassemia major have not been treated with pooled blood. Therefore, in each transfusion a thalassemia major person would receive blood from four different donors and over the course of a year would receive 70 units of blood from potentially 70 different donors. Over the course of the Class Period, a class member with thalassemia major might have received 315 units of blood from potentially 315 different donors.

63 Over the past three decades, advances in scientific research have allowed persons with thalassemia major in Canada to live relatively normal lives. Life expectancy has been extended beyond the fourth decade of life, often with minimal physical symptoms. In Canada approximately 300 persons live with thalassemia major.

64 Of the 147 transfused dependent thalassemia major patients currently being treated in the Haemoglobinopathy Program at the Hospital for Sick Children and Toronto General Hospital, 48 have tested positive using HCV antibody tests. Fifty-one percent of the population at TGH have tested positive; only 14% of the population of HSC have tested positive. The youngest of these persons was born in 1988; 9 of them are 13 years of age or older but less than 18 years of age; the balance are adults. Nine thalassemia major patients in the Haemoglobinopathy Program have died since HCV testing was available in 1991. Seven of these persons were HCV positive. The Foundation estimates that there are approximately 100 thalassemia major patients across Canada who are HCV positive.

65 The unfairness pointed to by the Thalassemia Foundation is that class members suffering from thalassemia are included in the Transfused Class, and therefore must follow the procedures for that class in establishing entitlement. It is contended that this is fundamentally unfair to thalassemia

victims because of the number of potential donors from whom each would have received blood or blood products. It is said that by analogy to the hemophiliac class, and the lesser burden of proof placed on members of that class, a similar accommodation is justified. I agree.

66 This is a situation where it is appropriate to create a sub-class of thalassemia victims from the Transfused Class. Sub-classes are provided for in s. 5(2) of the CPA and the power to amend the certification order is contained in s. 8(3) of the Act. The settlement should be amended to apply the entitlement provisions in the Hemophiliac Plan mutatis mutandis to the Thalassemia sub-class.

Law and Analysis

67 Section 29(2) of the CPA provides that:

> A settlement of a class proceeding is not binding unless approved by the court.

68 While the approval of the court is required to effect a settlement, there is no explicit provision in the CPA dealing with criteria to be applied by the court on a motion for approval. The test to be applied was, however, stated by Sharpe J. in Dabbs v. Sun Life Assurance, [1998] O.J. No. 1598 (Gen. Div.) (Dabbs No. 1) at para. 9:

> ... the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

69 In the context of a class proceeding, this requires the court to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular member. As this court stated in Ontario New Home Warranty Program v. Chevron Chemical Co., [1999] O.J. No. 2245 (Sup. Ct.) at para. 89:

> The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

70 Sharpe J. stated in Dabbs v. Sun Life Assurance (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd 41 O.R. (3d) 97 (C.A.). leave to appeal to S.C.C. dismissed October 22, 1998, (Dabbs No. 2) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

71 Generally. in determining whether a settlement is "fair, reasonable and in the best interests of the class as a whole", courts in Ontario and British Columbia have reviewed proposed class

proceeding settlements on the basis of the following factors:

1. Likelihood of recovery, or likelihood of success;
2. Amount and nature of discovery evidence;
3. Settlement terms and conditions;
4. Recommendation and experience of counsel;
5. Future expense and likely duration of litigation;
6. Recommendation of neutral parties if any;
7. Number of objectors and nature of objections; and
8. The presence of good faith and the absence of collusion.

See Dabbs No. 1 at para. 13, Haney Iron Works Ltd v. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565 (B.C.S.C.) at 571, See also Conte, Newberg on Class Actions, (3rd ed) (West Publishing) at para. 11.43.

72 In addition to the foregoing, it seems to me that there are two other factors which might be considered in the settlement approval process: i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and ii) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation. These two additional factors go hand-in-glove and provide the court with insight into whether the bargaining was interest-based, that is reflective of the needs of the class members, and whether the parties were bargaining at equal or comparable strength. A reviewing court, in exercising its supervisory jurisdiction is, in this way, assisted in appreciating fully whether the concerns of the class have been adequately addressed by the settlement.

73 However, the settlement approval exercise is not merely a mechanical seriatim application of each of the factors listed above. These factors are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process.

74 Moreover, the court must take care to subject the settlement of a class proceeding to the proper level of scrutiny. As Sharpe J. stated in Dabbs No. 2 at 439-440:

> A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all

parties exactly what they want. Fairness is not a standard of perfection.

75 The preceding admonition is especially apt in the present circumstances. Class counsel described the agreement before the court as "the largest settlement in a personal injury action in Canadian history." The settlement is Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years. It cannot be seriously contended that the tragedy at the core of these actions does not have a present and lasting impact on the class members and their families. While the resolution of the litigation is a noteworthy aim, an improvident settlement would have repercussions well into the future.

76 Consequently, this is a case where the proposed settlement must receive the highest degree of court scrutiny. As stated in the Manual for Complex Litigation, 3rd Ed. (Federal Judicial Centre: West Publishing, 1995) at 238:

> Although settlement is favoured, court review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties - even those with the best intentions - to give insufficient weight to the interests of at least some class members. The court's responsibility is particularly weighty when reviewing a settlement involving a non-opt-out class or future claimants. (Emphasis added.)

77 The court has been assisted in scrutinizing the proposed settlement by the submissions of several intervenors and objectors. I note that some of the submissions, as acknowledged by counsel for the objectors, raised social and political concerns about the settlement. Without in any way detracting from the importance of these objections, it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

78 However, although there may have been social or political undertones to many of the objections, legal issues raised by those objections, either directly or peripherally, are properly considered by the court in reviewing the settlement. Counsel for the objectors described the legal issues raised, in broad terms, as objections to:

(a) the adequacy of the total value of the settlement amount;
(b) the extent of compensation provided through the settlement;
(c) the sufficiency of the settlement Fund to provide the proposed compensation;
(d) the reversion of any surplus;

(e) the costs of administering the Plans; and
(f) the claims process applicable to Thalassemia victims.

I have dealt with the objection regarding the Thalassemia victims above. The balance of these objections will be addressed in the reasons which follow.

79 It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscient wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The CPA mandates that class members retain, for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the, class.

80 This settlement must be reviewed on an objective standard, taking into account the need to provide compensation for all of the class members while at the same time recognizing the inherent difficulty in crafting a universally satisfactory settlement for a disparate group. In other words, the question is does the settlement provide a reasonable alternative for those Class Members who do not wish to proceed to trial?

81 Counsel for the class and the Crown defendants urged this court to consider the question on the basis of each class member's likely recovery in individual personal injury tort litigation. They contend that the benefits provided at each level are similar to the awards class members who are suffering physical manifestations of HCV infection approximating those set out in the different levels of the structure of this settlement would receive in individual litigation. In my view, this approach is flawed in the present case.

82 An award of damages in personal injury tort litigation is idiosyncratic and dependent on the individual plaintiff before the court. Here, although the settlement is structured to account for Class Members with differing medical Conditions by establishing benefits on an ascending classification scheme, no allowances are made for the spectrum of damages which individual class members within each level of the structure may suffer. The settlement provides for compensation on a "one-size fits all" basis to all Class Members who are grouped at each level. However, it is apparent from the evidence before the court on this motion that the damages suffered as a result of HCV infection are not uniform, regardless of the degree of progression.

83 The evidence of Dr. Frank Anderson, a leading practitioner working with HCV patients in Vancouver, describes in detail the uncertain prognosis that accompanies HCV and the often debilitating, but unevenly distributed, symptomology that can occur in connection with infection. He states:

Once infected with HCV, a person will either clear HCV after an acute stage of develop chronic HCV infection. At present, the medical literature establishes that approximately 20-25% of all persons infected clear HCV within approximately one year of infection. Those persons will still test positive for the antibody and will probably do so for the rest of their lives, but will not test positive on a PCR test, nor will they experience any progressive liver disease due to HCV.

Persons who do not clear the virus after the acute stage of the illness have chronic HCV. They may or may not develop progressive liver disease due to HCV, depending on the course HCV takes in their body and whether treatment subsequently achieves a sustained remission. A sustained remission means that the virus is not detectable in the blood 6 months after treatment, the liver enzymes are normal, and that on a liver biopsy, if one were done, there would be no inflammation. Fibrosis in the liver is scar tissue caused by chronic inflammation, and as such is not reversible, and will remain even after therapy. It is also possible to spontaneously clear the virus after the acute phase of the illness but when this happens and why is not well understood. The number of patients spontaneously clearing the virus is small.

HCV causes inflammation of the liver cells. The level of inflammation varies among HCV patients. ... the inflammation may vary in intensity from time to time.

...

Inflammation and necrosis of liver cells results in scarring of liver tissue (fibrosis). Fibrosis also appears in various patterns in HCV patients .... Fibrosis can stay the same or increase over time, but does not decrease, because although the liver can regenerate cells, it cannot reverse scarring. On average it takes approximately 20 years from point of infection with Hepatitis C until cirrhosis develops, and so on a scale of 1 to 4 units the best estimate is that the rate of fibrosis progression is 0. 133 units per year.

...

Once a patient is cirrhotic, they are either a compensated cirrhotic, or a decompensated cirrhotic, depending on their liver function. In other words, the

liver function may, still be normal even though there is fibrosis since there may, be enough viable liver cells remaining to maintain function. These persons would have compensated cirrhosis. If liver function fails the person would then have decompensated cirrhosis. The liver has very many functions and liver failure may involve some or many of these functions. Thus decompensation may present in a number of ways with a number of different signs and symptoms.

A compensated cirrhotic person has generally more than one third of the liver which is still free from fibrosis and whose liver can still function on a daily basis. They may have some of the symptoms discussed below, but they may also be asymptomatic.

Decompensated cirrhosis occurs when approximately 2/3 of the liver is compromised (functioning liver cells destroyed) and the liver is no longer able to perform one or more of its essential functions. It is diagnosed by the presence of one or more conditions which alone or in combination is life threatening without a transplant. This clinical stage of affairs is also referred to as liver failure or end stage liver disease. The manifestations of decompensation are discussed below. Once a person develops decompensation, life expectancy is short and they will generally die within approximately 2-3 years unless he or she receives a liver transplant.

Patients who progress to cirrhosis but not to decompensated cirrhosis may develop hepatocellular cancer ("HCC"). This is a cancer, which originates from liver cells, but the exact mechanism is uncertain. The simple occurrence of cirrhosis may predispose to HCC, but the virus itself may also stimulate the occurrence of liver cell cancer. Life expectancy after this stage is approximately 1-2 years.

...

The symptoms of chronic HCV infection, prior to the disease progressing to cirrhosis or HCC include: fatigue, weight loss, upper right abdominal pain, mood disturbance, and tension and anxiety ...

Of those symptoms, fatigue is the most common, the most subjective and the most difficult to assess .... There is also general consensus that the level of

> fatigue experienced by an individual infected with HCV does not correlate with liver enzyme levels, the viral level in the blood, or the degree of inflammation or fibrosis on biopsy. It is common for the degree of fatigue to fluctuate from time to time.

Dr. Anderson identifies some of the symptoms associated with cirrhosis which can include skin lesions, swelling of the legs, testicular atrophy in men, enlarged spleen and internal hemorrhaging. Decompensated cirrhosis symptomatic effects, he states, can include jaundice, hepatic encephalopathy, protein malnutrition, subacute bacterial peritonitis and circulatory and pulmonary changes. Dr. Anderson also states, in respect of his own patients, that "at least 50% of my HCV infected patients who have not progressed to decompensated cirrhosis or HCC are clinically asymptomatic."

84 It is apparent, in light of Dr. Anderson's evidence, that in the absence of evidence of the individual damages sustained by class members, past precedents of damage awards in personal injury actions cannot be applied to this case to assess the reasonableness of the settlement for the class.

85 This fact alone is not a fatal flaw. There have long been calls for reform of the "once and for all" lump sum awards that are usually provided in personal injury actions. As stated by Dickson J, in Andrews v. Grand & Toy Alberta Ltd, [1978] 2 S.C.R. 229 at 236:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

86 The "once-and-for-all" lump sum award is the common form of compensation for damages in tort litigation. Although the award may be used to purchase annuities to provide a "structured" settlement, the successful claimant receives one sum of money that is determined to be proper

compensation for all past and future losses. Of necessity, there is a great deal of speculation involved in determining the future losses. There is also the danger that the claimant's future losses will prove to be much greater than are contemplated by the award of damages received because of unforeseen problems or an inaccurate calculation of the probability of future contingent events. Thus even though the claimant is successful at trial, in effect he or she bears the risk that there may be long term losses in excess of those anticipated. This risk is especially pronounced when dealing with a disease or medical condition with an uncertain prognosis or where the scientific knowledge is incomplete.

87 The present settlement is imaginative in its provision for periodic subsequent claims should the class member's condition worsen. The underlying philosophy upon which the settlement structure is based is set forth in the factum of the plaintiffs in the Transfused Action. They state at para. 10 that:

> The Agreement departs from the common law requirement of a single, once-and-for-all lump sum assessment and instead establishes a system of periodic payments to Class Members and Family Class Members depending on the evolving severity of their medical condition and their needs.

88 This forward-looking provision addresses the concern expressed by Dickson J. with respect to the uncertainty and unfairness of a once and for all settlement. Indeed, the objectors and intervenors acknowledge this in that they do not take issue with the benefit distribution structure of the settlement as much as they challenge the benefits provided at the levels within the structure.

89 These objections mirror the submissions in support of the settlement, in that they are largely based on an analogy to a tort model compensation scheme. For the reasons already stated, this analogy is not appropriate because the proper application of the tort model of damages compensation would require an examination of each individual case. In the absence of an individualized examination, the reasonableness, or adequacy, of the settlement cannot be determined by a comparison to damages that would be obtained under the tort model. Rather the only basis on which the court can proceed in a review of this settlement is to consider whether the total amount of compensation available represents a reasonable settlement, and further, whether those monies are distributed fairly and reasonably among the class members.

90 The total value of the Pan-Canadian settlement is estimated to be $1.564 billion dollars. This is calculated as payment or obligation to pay by the federal, provincial and territorial governments in the an amount of $1.207 billion on September 30, 1999, plus the tax relief of $357 million over the expected administrative term of the settlement. This amount is intended to settle the class proceedings in Ontario, British Columbia and Quebec. The Ontario proceeding, as stated above, covers all of those class members in Canada other than those included in the actions in British Columbia and Quebec.

91 Counsel for the plaintiffs and for the settling defendants made submissions to the court with

respect the length and intensity of the negotiations leading up to the settlement. There was no challenge by any party as to the availability of any additional compensation. I am satisfied on the evidence that the negotiations achieved the maximum total funding that could be obtained short of trial.

92 In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The CRCS is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.

93 Moving to the remaining factors, although there have been no examinations for discovery, the extensive proceedings before the Krever Commission serve a similar purpose. The settlement is supported by the recommendation of experienced counsel as well as many of the intervenors. There is no suggestion of bad faith or collusion tainting the settlement. The support of the intervenors, particularly the Canadian Hemophilia Society which made submissions regarding the meetings held with class members, is indicative of communication between class counsel and the class members. Although, there were some objectors who raised concerns about the degree of communication with the Transfused Class members, these complaints were not strenuously pursued. Perhaps the most compelling evidence of the adequacy of the communications with the class members regarding the settlement is the relatively low number of objections presented to the court considering the size of the classes. Finally, counsel for all parties made submissions, which I accept, regarding the rigourous negotiations that resulted in the final settlement.

94 In conclusion, I find that the global settlement represents a reasonable settlement when the significant and very real risks of litigation are taken into account.

95 The next step in the analysis is to determine whether the monies available are allocated in such a way as to provide for a fair and reasonable distribution among the class members. In my view, as the settlement agreement is presently constituted, they are not. My concern lies with the provision dealing with opt out claimants. Under the agreement, if opt out claimants are successful in individual litigation, any award such a claimant receives will be satisfied out of the settlement Fund. While this has the potential of depleting the Fund to the detriment of the class members, thus rendering the settlement uncertain, the far greater concern is the risk of inequity that this creates in

the settlement distribution. The Manual for Complex Litigation states at 239 that whether "claimants who are not members of the class are treated significantly differently" than members of the class is a factor that may "be taken into account in the determination of the settlement's fairness, adequacy and reasonableness ...".

96 In principle, there is nothing egregious about the payment of settlement funds to non-class members. Section 26(6) of the CPA provides the court with the discretion to sanction or direct payments to non-class members. In effect, the opt out provision reflects the intention of the defendants to settle all present and future litigation. This objective is not contrary to the scheme of the CPA per se. See, for example, the reasons of Brenner J. in Sawatzky v. Societe Chirurgiale Instrumentarium Inc. [1999] B.C.J. No. 1814 (S.C.), adopted by this court in Bisignano v. La Corporation Instrumentarium Inc. (September 1, 1999, Court File No. 22404/96, unreported.)

97 However, given that the settlement must be "fair, reasonable and in the best interests of the class", the court cannot sanction a provision which gives opt out claimants the potential for preferential treatment in respect of access to the Fund. The opt out provision as presently written has this potential effect where an opt out claimant either receives an award or settlement in excess of the benefits that he or she would have received had they not opted out and which must be satisfied out of the Fund. Alternatively, the preferential treatment could also occur where the opt out claimant receives an award similar to their entitlement under the settlement in quantum but without regard for the time phased payment structure of the settlement.

98 In my view, where a defendant wishes to settle a class proceeding by providing a single Fund to deal with both the claims of the class members and the claims of individuals opting out of the settlement, the payments out of the Fund must be made on an equitable basis amongst all of the claimants. Fairness does not require that each claimant receive equal amounts but what cannot be countenanced is a situation where an opt out claimant who is similarly situated to a class member receives a preferential payment.

99 The federal government argues that fairness ensues, even in the face of the different treatment, because the opt out claimant assumes the risk of individual litigation. I disagree. Because the defendants intend that all claims shall be satisfied from a single fund, individual litigation by a claimant opting out of the class pits that claimant against the members of the class. The opt out claimant stands to benefit from success because he or she may achieve an award in excess of the benefits provided under the settlement. This works to the detriment of the class members by the reducing the total amount of the settlement. More importantly however, the benefits to the class members will not increase as a result of unsuccessful opt out claimants.

100 In the instant case, fairness requires a modification to the opt out claimant provision of the settlement. The present opt out provision must be deleted and replaced with a provision that in the event of successful litigation by an opt out claimant, the defendants are entitled to indemnification from the Fund only to the extent that the claimant would have been entitled to claim from the Fund

had he or she remained in the class. This must of necessity include the time phasing factor. Such a provision ensures fairness in that there is no prospect of preferential distribution from the Fund, nor will the class suffer any detrimental effect as a result of the outcome of the individual litigation. The change also provides a complete answer to the complaint that the current opt out provision renders the settlement uncertain. Similarly, the modification renders the provision for defence costs to be paid out of the Fund unnecessary and thus it must be deleted.

101 Accordingly, the opt out provision of the settlement would not bean impediment to court approval with the modifications set out above.

102 In my view, the remainder of distribution scheme is fair and reasonable with this alteration to the opt out provision. It is beyond dispute that the compensation at any level will not be perfect, nor will it be tailored to individual cases but perfection is not the standard to be applied. The benefit levels are fair. More pointedly, fairness permeates the settlement structure in that each and every class member is provided an opportunity to make subsequent claims if his or her condition deteriorates. An added advantage is that there is a pre-determined, objective qualifying scheme so that class members will be able to readily assess their eligibility for additional benefits. Thus, while a claimant may not be perfectly compensated at any particular level, the edge to be gained by a scheme which terminates the litigation while avoiding the pitfalls of an imperfect, one-time-only lump sum settlement is compelling.

103 In any, event, the settlement structure also provides a reasonable basis for the distribution of the funds available. Class counsel described the distribution method as a "need not greed" system, where compensation is meant, within limits, to parallel the extent of the damages. There were few concerns raised about the compensation provided at the upper levels of the scheme. Rather, the majority of the objections centred on the benefits provided at Levels 1, 2 and 3. The damages suffered by those whose conditions fall within these Levels are clearly the most difficult to assess. This is particularly true in respect of those considered to be at Level 2. However, in order to provide for the subsequent claims, compromises must be made and in this case, I am of the view that the one chosen is reasonable.

104 Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory, benefits assigned to claimants at different levels were largely influenced by the total of the monies available for allocation. As stated in the CASL study at p. 3:

> At the request of the Federal government of Canada, provincial governments, and Hepatitis C claimants, i.e. individuals infected with hepatitis C virus during the period of 1986 to 1990, an impartial group, the Canadian Association for the Study of the Liver (CASL) was asked to construct a natural history model of Hepatitis C. The intent of this effort was to generate a model that would be used by all parties, as guide to disbursing funds set aside to compensate patients

infected with hepatitis C virus through blood transfusion.

105 Of necessity, the settlement cannot, within each broad category, deal with individual differences between victims. Rather it must be general in nature. In my view, the allocation of the monies available under the settlement is "fair, reasonable and in the best interests of the class as a whole."

106 In making this determination, I have not ignored the submissions made by certain objectors and intervenors regarding the sufficiency of the Fund. They asserted that the apparent main advantage of this settlement, the ability to "claim time and time again" is largely illusory because the Fund may well be depleted by the time that the youngest members of the class make claims against it.

107 I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $334,173,000. Admittedly, Eckler currently projects a deficit of $58,533,000 if the holdbacks are released.

108 However, the Eckler report contains numerous caveats regarding the various assumptions that have been made as a matter of necessity, including the following, which is stated in section 12.2:

> A considerable number of assumptions have been made in order to calculate the liabilities in this report. Where we have made the assumptions, we used our best efforts based on our understanding of the plan benefits; in general, where we have made simplifying assumptions or approximations, we have tried to err on the conservative side, i.e. increasing costs and liabilities. In many instances we have relied on counsel for the assumptions and understand that they, have used their best efforts in making these. Nevertheless, the medical outcomes are very unclear - e.g. the CASL report indicates very wide ranges in its confidence intervals for the various probabilities it developed. There is substantial room for variation in the results. The differences will emerge in the ensuing years as more experience is obtained on the actual cohort size and characteristics of the infected claimants. These differences and the related actuarial assumptions will be re-examined at each periodic assessment of the Fund.

109 Unfortunately, but not unexpectedly, the limitations of the underlying medical studies upon which Eckler has based its report require the use of assumptions. For example. the report prepared by Dr. Remis, dated July 6, 1999, states at p. 642:

> There are important limitations to the analyses presented here and, in particular, with the precision of the estimates of the number of HCV-infected recipients who are likely to qualify for benefits under the Class Action Settlement ...

> The proportion of transfusion recipients who will ultimately be diagnosed is particularly important in this regard and has substantial impact on the final estimate. We used an estimate of 70% as the best case estimate for this proportion based on the BC experience but the actual proportion could be substantially different from this, depending on the type, extent and success of targeted notification activities that will be undertaken, especially, in Ontario and Quebec. This could alter the ultimate number who eventually qualify for benefits by as much as 1,500 in either direction.

110 The report of the CASL study states at. 22:

> Our attempt to project the natural history of the 1986-1990 post transfusion HCV infected cohort has limitations. Perhaps foremost among these is our lack of understanding of the long-term prognosis of the disease. For periods beyond 25 years, projections remain particularly uncertain. The wide confidence intervals surrounding long-term projections highlight this uncertainty.
>
> Other key, limitations are lack of applicability of these projections to children and special groups.

111 The size of the cohort and the percentage of the cohort which will make claims against the Fund are critical assumptions. Significant errors in either assumption will have a dramatic impact on the sufficiency of the Fund. Recognizing this, Eckler has chosen to use the most conservative estimates from the information available. The cohort size has been estimated from the CASL study rather than other studies which estimate approximately 20% less surviving members. Furthermore, Eckler has calculated liabilities on the basis that 100% of the estimated cohort will make claims against the Fund.

112 Class counsel urged the court to consider the empirical evidence of the "take-up rate" demonstrated in the completed class proceeding, Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 25 O.R. (3d) 331 (Gen. Div.), leave to appeal dismissed (1995), 129 D.L.R. (4th) 110 (Ont. Div. Ct.), to support a conclusion that the Fund is sufficient. In Nantais, all of the class members were known and accordingly received actual notice of the settlement. Seventy-two percent of the class chose to make claims, or "take-up" the settlement. It was contended that this amounted to strong evidence that less than one hundred per cent of the classes in these proceedings would take up this settlement. I cannot accept the analogy. While I agree that it is unlikely that the entire estimated cohort will take up the settlement, it is apparent from the caveats expressed in the reports provided to the court that the estimate of the cohort size may be understated by a significant number. Accordingly, for practical purposes, a less than one hundred per cent take up rate could well be counter-balanced by a concurrent miscalculation of the cohort size.

113 Although I cannot accept the Nantais experience as applicable on this particular point, the Eckler report stands alone as the only and best evidence before the court from which to determine the sufficiency of the Fund. Eckler has recognized the deficiencies inherent in the information available by using the most conservative estimates throughout. This provides the court with a measure of added comfort. Not to be overlooked as well, the distribution of the Fund will be monitored by this court and the courts in Quebec and British Columbia, guided by periodically, revised actuarial projections. In my view, the risk that the Fund will be completely depleted for latter claimants is minimal.

114 Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000.000 considered in the context of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus, in this respect, the settlement is reasonable.

115 I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the defendants. The Society contends that this provision simpliciter is repugnant to the basis on which this settlement is constructed. It argues that the benefit levels were established on the basis of the total monies available, rather than a negotiation of benefit levels per se. Thus, it states there is a risk that the Fund will not be sufficient to provide the stated benefits and further, that this risk lies entirely with the class members because the defendants have no obligation to supplement the Fund if it proves to be deficient for the intended purpose. Moreover, the Society argues that the use of conservative estimates in defining the benefit levels, although an attempt at ensuring sufficiency, has the ancillary negative effect of minimizing the benefits payable to each class member under the settlement. Therefore, the Society contends that a surplus, if any develops in the ongoing administration of the Fund, should be used to augment the benefits for the class members.

116 The issue here is whether a reversion clause is appropriate in a settlement agreement in this class proceeding, and by extension, whether the inclusion of this clause is such that it would render the overall settlement unacceptable.

117 It is important to frame the submission of the Society in the proper context. This is not a case where the question of entitlement to an existing surplus is presented. Indeed, given the deficit projected by the Eckler report, it is conjectural at this stage whether the Fund will ever generate a surplus. If the Fund accumulates assets over and above the current Eckler projections, they must first be directed toward eliminating the deficit so that the holdbacks may be released.

118 The plan also provides that after the release of the holdbacks, the administrator may make an application to raise the $75,000 annual cap on income replacement if the Fund has sufficient assets to do so. It is only after these two areas of concern have been fully addressed that a surplus could be

deemed to exist.

119 The clause in issue does not, according to the interpretation given to the court by class counsel, permit the withdrawal by the defendants of any actuarial surplus that may be identified in the ongoing administration of the Fund. Rather, they state that it is intended that the remainder of the Fund, if any, revert to the defendants only after the Plans have been fully administered in the year 2080.

120 Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefitting neither party during the entire 80 year term of the settlement.

121 Quite apart from the question of tying up the surplus for this unreasonable period of time, there is the underlying question of whether in the context of this settlement, it is appropriate for the surplus to revert in its entirety to the defendants.

122 The court is asked to approve the settlement even though the benefits are subject to fluctuation and regardless that the defendants are not required to make up any shortfall should the Fund prove deficient. This is so notwithstanding that the benefit levels are not perfect. It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

123 This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. This is in keeping with the CPA which provides in s. 26(4) that surplus funds may "be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members ...". On the other hand, in the proper circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.

124 To attempt to determine the range of reasonable solutions at present, when the prospect of a surplus is uncertain at best, would be to pile speculation upon speculation. In the circumstances therefore, the only appropriate course, in my opinion, is to leave the question of the proper application of any surplus to the administrator of the Fund. The administrator may recommend to

the court from time to time, based on facts, experience with the Fund and future considerations, that all or a portion of the surplus be applied for the benefit of the class members or that all or a portion be released to the defendants. In the alternative, the surplus may be retained within the Fund if the administrator determines that this is appropriate. Any option recommended by the administrator would, of course, be subject to requisite court approval. This approach is in the best interests of the class and creates no conflicts between class members. Moreover, it resolves the anomaly created by freezing any surplus for the duration of the administration of the settlement. If the present surplus reversion clause is altered to conform with the foregoing reasons, it would meet with the court's approval.

125 There was an expressed concern as to the potential for depletion of the Fund through excessive administrative costs. The court shares this concern. However, the need for efficient access to the plan benefits for the class members and the associated costs that this entails must also be recognized. This requires an ongoing balancing so as to keep administrative costs in line while at the same time providing a user friendly claims administration. The courts, in their supervisory role, will be vigilant in ensuring that the best interests of the class will be the predominant criterion.

Disposition

126 In ordinary circumstances, the court must either approve or reject a settlement in its entirety. As stated by Sharpe J. in Dabbs No. 1 at para. 10:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; Poulin v. Nadon, [1950] O.R. 219 (C.A.) at 222-3.

127 These proceedings, emanating from the blood tragedy, are novel and unusually complex. The parties have adverted to this in the settlement agreement which contemplates the necessity for changes of a non-material nature in Clause 12.01:

> This Agreement will not be effective unless and until it is approved by the Court in each of the Class Actions, and if such approvals are not granted without any material differences therein, this Agreement will be thereupon terminated and none of the Parties will be liable to any other Parties hereunder. (Emphasis added.)

128 The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial. Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.

129 I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. Thirdly, in the interests of fairness, a sub-class must be created for the thalassemia victims to take into account their special circumstances.

130 The defendants have expressed their intention to be bound by the settlement if it receives court approval absent any material change. As stated, this reflects their acknowledgment of the complexity of the case, the scientific uncertainty surrounding the infections and the fact this settlement is crafted with a degree of improvisation.

131 The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by counsel for the defendants, the variation indicated is de minimis in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. The creation of the sub-class of thalassemia victims, in the context of the cohort size is equally de minimis. I am prepared to approve the settlement with these changes.

132 However, should the parties to the agreement not share the view that these changes are not material in nature, they may consider the proposed changes as an indication of "areas of concern" within the meaning the words of Sharpe J. in Dabbs No. 1 at para. 10:

> As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement ...

133 The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement,

with the required modifications, is in the best interests of the class as a whole.

133a I am obliged to counsel, the parties and the intervenors and especially to the individual objectors who took the time to either file a written objection or appear in person at the hearings. [The Court did not number this paragraph. QL has assigned the number 133a.] WINKLER J.

Appendix B

1998 CarswellOnt 4045
Ontario Court of Appeal

Gagne v. Silcorp Ltd.

1998 CarswellOnt 4045, [1998] J.Q. No. 4182, [1998] O.J. No. 4182, 113 O.A.C. 299, 167 D.L.R. (4th) 325, 27 C.P.C. (4th) 114, 39 C.C.E.L. (2d) 253, 41 O.R. (3d) 417, 66 O.T.C. 400, 83 A.C.W.S. (3d) 125

Sherrie B. Gagne, Plaintiff and Silcorp Limited, Defendant

Charron, Rosenberg and Goudge JJ.A.

Heard: May 27, 1998
Judgment: October 21, 1998
Docket: CA C28348

Proceedings: reversing in part (1997), 14 C.P.C. (4th) 269 (Ont. Gen. Div.)

Counsel: *Paul S.A. Lamek, Q.C.*, for the appellant solicitors.
McGowan & Associates and Jeff Burtt, advocate.

Subject: Civil Practice and Procedure

APPEAL from judgment reported at (1997), 14 C.P.C. (4th) 269, 35 O.R. (3d) 501, 42 O.T.C. 62 (Ont. Gen. Div.), denying consortium's request to increase base fee by multiple of three.

The judgment of the court was delivered by *Goudge J.A.*:

1 The *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "Act") permits a solicitor to take a class action on a contingency basis. If the action is successful the Act permits the solicitor to seek the court's approval to increase his or her base fee by applying a multiple to that fee. This appeal concerns the appropriate considerations that should inform the court's decision on such a motion.

2 The appellants are solicitors who acted on behalf of the plaintiff Sherrie Gagne in a class action against the defendant Silcorp Limited. The action was concluded successfully and the appellants, having taken the case on a contingency basis, moved to increase their base fee by a multiple of three. Southey J. denied this request, allowing the solicitors only their base fee, namely the product of their usual hourly rates and their hours worked on the matter. This is an appeal from that disposition.

The Factual Background

3 Beginning in late 1996, the defendant Silcorp proceeded to merge the operations of the Becker's and Mac's convenience store chains which it owned. As a consequence of the merger, a number of its employees were no longer needed and were dismissed. Initially Silcorp offered those terminated only an amount that was less than the minimum termination and severance pay to which they were entitled under the *Employment Standards Act*, R.S.O. 1990, c. E.14.

4 On March 24, 1997 the appellant solicitors commenced a class action for wrongful dismissal on behalf of those former employees who had been terminated. Sherrie Gagne was the representative plaintiff.

5 Immediately after commencing the action, the appellants brought a motion before Southey J. seeking an injunction to compel Silcorp to comply with the *Employment Standards Act*. This motion was adjourned from April 3, 1997 to April 17, 1997 on the undertaking of Silcorp to immediately comply with the requirements of that Act.

6 The parties then engaged in intensive negotiations which culminated in minutes of settlement dated April 14, 1997. On April 17, 1997, that settlement was approved by Southey J. as required by s. 29 of the Act. The settlement order was very complex but its essential elements were the following:

- The action was certified as a class proceeding for the purposes of the Act.
- Sherrie Gagne was appointed the representative plaintiff on behalf of the class of former employees who had been terminated by the defendant Silcorp.
- The appellant solicitors were appointed as counsel for the class.
- The defendant was adjudged liable for compensatory damages and *Employment Standards Act* entitlements.
- The claims for punitive and exemplary damages were dismissed.
- Pursuant to s. 25 of the Act, a reference was directed to determine the quantum of damages for each class member.
- The terms of the reference created a mini-hearing process with a mediation stage and an arbitration stage.
- The class members were each permitted to be represented in the mini-hearing process by a personal lawyer rather than the appellant solicitors.

7 Between the date of the settlement and August 26, 1997, when the appellant solicitors prepared the material seeking to triple their base fee, thirty-five individual claims were finally resolved through the mini-hearing process. This court was further advised that by the time of this appeal, all sixty-five class members had resolved their individual claims for a total gross recovery of $1,945,723.

8 As required by the Act, the appellant solicitors executed a written agreement with the representative plaintiff respecting their fees and disbursements. It provided that the payment of any legal fees was contingent on the class action being concluded successfully as defined by the Act. It also provided that the base fee would be the product of the hours worked by the solicitors and their usual hourly rates. In addition, it set out that the solicitors could seek court approval for a multiplier to be applied to that base fee. Finally, the agreement described two examples of how this might work:

> 7. The Consortium and the Client acknowledge it is difficult to estimate what the expected fee will be. However, the following are estimates:
>
> (a) If the class action results in a quick settlement for the class, within 3 months after the date of this retainer, and at that time the Base Fee is $50,000 and if the court sets the Multiplier at 3.0, then the fee will be $50,000 × 3.0 = $150,000.
>
> (b) If the trial of the common issues occurs within 2 or 3 years and is decided in favour of the class and no appeals are taken, and at the time the Base Fee is $250,000 and if the court sets the Multiplier at 2.0, then the fee will be $250,000 × 2.0 = $500,000.

> These estimates do not include work for any mini-hearings or other proceedings which may be necessary to deal with individual damage claims.

9 The motion brought by the appellants sought a multiplier of 3. In denying this request Southey J. considered two factors, namely the degree of risk in accepting the retainer and the degree of success achieved by the solicitors. He set out his analysis of each of these factors clearly and concisely as follows:

> As to the first of the above elements, I am unable to see any reason why the employees who were dismissed would not be entitled to their "entitlements" under the *Employment Standards Act* and to compensatory damages, if any. It appears to me that there was no serious issue as to liability in this case. In these circumstances, I cannot find that there was any material risk in accepting the retainer.
>
> When I asked counsel for the Consortium to explain the risk, his reply was that the difficulty arose out of procedural complexity. In my judgment, that is not the sort of risk that should influence the multiplier. That sort of risk is adequately covered by an award of a Base Fee in the full amount of the usual charges made by the legal professionals, as I have approved in this case....
>
> As to the second element, what has been achieved? Former employees now have available to them a procedure for the prompt determination of their claims. For Achieving that result, the solicitors, in my opinion, are fairly compensated for their services to August 8 last by the Base Fee of $109,411.28, including GST. Any premium based on a high degree of success must depend on the recovery in each case, which was not the subject of evidence before me.

10 The appellants argue that Southey J. erred in his consideration of both the risk factors and the success factors and, further, that he failed to give weight to the views of the class members who, it is argued, appear content with a significant multiplier. No one appeared in opposition to the appellants.

Analysis

11 Central to a consideration of these arguments is s. 33 of the Act. It reads as follows:

> **Agreements for payment only in the event of success**
>
> 33. — (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.
>
> **Interpretation, success in a proceeding**
>
> (2) For the purposes of subsection (1), success in a class proceeding includes,
>
> (a) a judgment on common issues in favour of some or all class members; and
>
> (b) a settlement that benefits one or more class members.
>
> **Definitions**
>
> (3) For the purposes of subsections (4) to (7), "base fee" means the result of multiplying the total number of hours worked by an hourly rate;

"multiplier" means a multiple to be applied to a base fee.

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member.

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

Idem

(8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee.

Idem

(9) In making a determination under (7)(b), the court may consider the manner in which the solicitor conducted the proceeding.

12 This section makes clear that the motion seeking to apply a multiplier to the base fee can be brought only after the class proceeding has been concluded successfully as defined in s. 33(2). Section 33(7)(b) gives the judge a discretion in determining whether to apply a multiplier or not. Hence, on appeal, while this court is not free to simply substitute its own exercise of discretion for that exercised at first instance, reversal of the order appealed from may be justified if the motions judge gave no weight or insufficient weight to considerations relevant to his decision. See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.) at 76-77.

13 In applying this standard of review to the decision appealed from, it is appropriate to begin with a consideration of the genesis of the *Class Proceedings Act, 1992*. It was enacted following much legislative study and in the wake of a detailed

report of the Ontario Law Reform Commission laying out the broad rationale for such legislation. One of the objects which the Act seeks to achieve is the efficient handling of potentially complex cases of mass wrongs. See *Dabbs v. Sun Life Assurance Co. of Canada*, a judgment of the Ontario Court of Appeal, released (September 14, 1998), Doc. CA C30326, M22971, M23028 (Ont. C.A.) at p. 3.

14 Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.

15 With that background, I turn to the judgment appealed from. As I have said, Southey J. addressed two criteria in concluding that he would not apply a multiple to the base fee: the degree of risk assumed by the solicitors and the degree of success they achieve. In my view, he was correct in focusing on these two considerations. Section 33(7)(b) makes clear the relevance of "the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success". Section 33(9) invites a consideration of the manner in which the solicitor conducted the proceedings. However, for the reasons that follow I have concluded that he erred in giving no weight to considerations relevant to each of the risk and success criteria.

Risk Factors

16 The multiplier is in part a reward to the solicitor for bearing the risks of acting in the litigation. The court must determine whether these risks were sufficient that together with the other relevant considerations a multiplier is warranted. While this determination is made after the class proceeding has concluded successfully, it is the risks when the litigation commenced and as it continued that must be assessed.

17 The only risk factor considered by Southey J. was whether the defendant might ultimately escape liability. Because there was no real doubt about that liability, he determined that there was no material risk in accepting the retainer.

18 Since this class proceeding was concluded quickly, the risk assessment was properly focussed on the risks incurred at the outset in undertaking the proceeding and did not have to extend to the risks, if any, in continuing it. Nonetheless, in my view there was from the beginning a second material risk that was a relevant consideration, namely the risk that comes with this action being brought as a class proceeding, particularly the risk of non-certification. The certification step in a class action is a significant one, often requiring extensive preparation by counsel. If certification is denied, a solicitor who has agreed to a fee contingent on success recovers nothing. Moreover, when this action was commenced, certification could not be predicted with certainty. A debate was quite possible about whether the common issues requirement would be met or whether a class proceeding was the preferable procedure given the enforcement mechanisms provided by the *Employment Standards Act*. This risk factor was material and ought to have been given weight.

19 It is true that this risk factor will be present in most class proceedings. This factor should be recognized so that solicitors faced with a class proceeding retainer will have the necessary economic incentive to take on the matter. They will know that if, in prosecuting the action, they can meet the success criterion there will be a real opportunity to have some multiple attached to the base fee. To accord due weight to this consideration is to serve the legislative objective of enhanced access to justice.

Success Factors

20 Section 33(9) invites the court, in determining whether a multiplier is appropriate, to consider the manner in which the solicitor conducted the proceeding. Just as the real opportunity to receive an enhanced reward for incurring the risks of the litigation serves as an incentive for the solicitor to take on the retainer, that opportunity is also designed to serve as an

incentive for the solicitor to achieve the best possible results for the class, expeditiously and efficiently.

21 The only success factor considered by Southey J. was that a procedure had been provided to former employees for the prompt determination of their claims. This was insufficient, in his view, to warrant the application of any multiple to the base fee.

22 In my view, this fails to recognize that the solicitors achieved immediate, partial success in extracting a commitment from the defendant to comply forthwith with the *Employment Standards Act*. Second, the ultimate settlement of the common issues was achieved quickly. Third, the settlement provided for a creative and effective mini-hearing process that resulted in the complete resolution of all individual claims within little more than a year. These factors are all relevant to the degree of success with which the solicitors conducted the proceedings and all deserved to be considered in determining whether a multiplier was appropriate.

Views of Class Members

23 In reaching his decision Southey J. did not consider the views of class members about whether a multiplier should properly be applied to the base fee. In my view, he was correct in doing so. The Act does not appear to invite such a consideration. Moreover, in this case those views, which are said to constitute acceptance or even approval of a multiplier, can be gleaned only by a very tenuous process of inference. One simply cannot say with any certainty that the views of class members on this issue are as they are argued to be.

24 In summary, therefore, I have concluded that Southey J. erred in the exercise of his discretion in failing to give due weight to relevant risk and success considerations. If appropriate weight is accorded them, I think the conclusion must be that this is an appropriate case to apply a multiplier to the base fee.

25 I recognize that the selection of the precise multiplier is an art, not a science. All the relevant factors must be weighed. Here, while the risk of an adverse finding on liability was minimal, there was a material risk of non-certification. As well, as I have outlined, there were significant elements of success in the manner in which the solicitors conducted the proceedings. Weighed against these success factors is the fact that following the April 17, 1997 settlement, individual class members had to incur further legal fees to finally realize on their claims.

26 In the end, these considerations must yield a multiplier that, in the words of section 33(7)(b), results in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might well be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well.

27 In this case, then, taking into account all the relevant considerations I have recited, in my view the appropriate multiplier is two. This reflects the risk and success factors at play. It represents a multiplied fee that is significantly less than ten per cent of gross recovery. It reflects the fact that this case does not exemplify the greatest risk or the greatest success. It is within the range contemplated by the retainer agreement. And finally, the resulting compensation should provide a sufficient real incentive for solicitors in future similar cases.

Disposition

28 I would therefore allow the appeal and provide for a multiplier of two to be applied to the base fee up to April 17, 1997, the date of the settlement order. I would vary the order below accordingly. The appellants do not seek costs of the appeal and I would order none.

Appeal allowed in part.