

Backgrounder on the Hepatitis C Tainted Blood Class Action Settlements

There are two federal class action settlements for Canadian victims of the Hepatitis C tainted blood scandal. Each settlement had an original value of over \$1 billion.

- The first, (1986-90) was created in 1999, is for Canadians infected between January 1, 1986 and July 1, 1990.
- The second, (Pre/Post) established several years later, is for Canadians infected before 1986 or after July 1, 1990.

The Pre/Post tainted blood victims were excluded from the first settlement because their claim was not as strong on liability. There was substantial public criticism of federal government's position, with several provincial premiers calling for compensation to be extended to the Pre/Post victims. In the face of an unrelenting federal government, modest settlements for the Pre/Post group were created by the Canadian Red Cross and by the governments of Ontario, British Columbia, Quebec, Alberta, and Manitoba. Thus, a divide was perpetuated. Canadians infected by Hepatitis C tainted blood between 1986 and 1990 qualified for compensation of hundreds of thousands of dollars. Canadians infected before or after that time period received about 10% or less of the amounts paid to the 86-90 group.

The Pre/Post Settlement & the \$65 Million shortfall

In 2005, the Paul Martin government decided to do the right thing and agreed to compensate the Pre/Post victims. Negotiation of the terms of the settlement continued under the Harper conservatives. A core element of the Pre/Post Settlement Agreement is that compensation is "based on the principles of parity with the 1986-1990 settlement."

Unfortunately, the Harper government slightly underfunded the Pre/Post settlement. Several hundred claimants will now receive 20 cents or less on the dollar. Conversely, the 86-90 settlement has a substantial surplus. The federal government can ask the supervising courts to payout surplus from 86-90 to put into Pre/Post but has declined to do so.

The Pre/Post settlement is divided into segregated funds. The Past Economic Loss and Dependents (PELD) fund has a deficit of about \$65 million. The main compensation fund has a surplus of about \$15 million. The Pre/Post settlement has about 6 to 12 more months to run, at which time the settlement will be wound up. After a hearing in December 2016, the supervising courts ordered that when the settlement is wound up, the surplus in the compensation fund will be transferred to the PELD fund to pay outstanding PELD claims. This will result in payments of about 20 cents on the dollar to the outstanding PELD claimants. For the most part, they are widows and orphans of victims who died as a result of the disease. They all completed the paperwork and submitted to a rigorous approval process in good faith with the full expectation that they would be compensated.

As of 2016, the 86-90 settlement had a surplus of over \$200 million. At a hearing in the summer of 2016, lawyers for the 86-90 victims asked the courts to approve using the surplus to pay enhanced benefits. Canada's lawyers asked to have the surplus paid back to the federal government. At the hearing, the judges asked Canada's lawyers if it would be willing to use the money to top up the Pre/Post settlement. Canada's lawyers advised that they did not have those instructions (i.e. – the answer was no). Canada's position has received negative media coverage and criticism from Hepatitis C victims.

The Government of Canada's request for the 86-90 surplus was rejected. Justice Perell stated that although Canada had established that it "could" be paid the surplus, it had not persuaded the judges that it "should" be paid the surplus. The courts, instead, allocated about \$160 million of the surplus for enhanced benefits. Thus, the disparity between 86-90 and Pre/Post victims has grown even greater. And, there remains a surplus of \$40 million in the 86-90 settlement.

The Solution

There will be a financial status hearing in the 86-90 settlement in early 2018. This presents the government with another opportunity to do the right thing and close the \$50 million shortfall that will exist after the \$15 million left in the compensation fund is rolled into the PELD.

- Canada can ask the courts to return the \$40 million surplus to the federal government for the express purpose of putting it into the Pre/Post PELD fund. The judges have signaled that they are likely to grant that request.
- Canada can provide an additional \$ 10-12 million into the Pre/Post PELD Fund to cover the existing settlement.

