Canadian Hemophilia Society
Help Stop the Bleeding
Société canadienne de l'hémophilie
Arrêtons l'hémorragie

1986-1990 Hepatitis C Settlement Agreement surplus must be directed at enhancements to benefits for class members

20 QUESTIONS AND ANSWERS

Questions 1 to 4 give a quick overview of the Settlement Agreement and the Trust Fund surplus.

Questions 5 to 11 provide more in-depth, background information.

Questions 12 to 14 explain the rationale supporting various recommendations for enhancements to benefits for class members.

Questions 15 to 20 respond to some of the main objections to returning the surplus to government.

QUESTIONS 1 TO 4 - Overview of the Settlement Agreement and the Trust Fund surplus

1. What is the 86-90 Hepatitis C Settlement Agreement?

Following widespread contamination of blood and blood products with hepatitis C virus (HCV) in the late 1980s, a settlement of the 1986-1990 Hepatitis C Class Action was approved by the courts in Ontario, British Columbia and Quebec in 1999. The settlement created a fund paid for by the federal, provincial and territorial governments totalling but not exceeding $1.18 billion. This amount and the investment income generated are used to pay scheduled benefits to class members over the course of their lifetimes and to their dependants after their death depending on the severity of their illness and what losses they suffer as a result of infection with HCV.

2. How did the Trust Fund surplus come about?

As the fund was created with a predetermined amount, and not based on the total projected needs of class members, the sufficiency of the fund was not known with certainty. Consequently, the courts created a Joint Committee with the mandate to implement the 1986-1990 Hepatitis C Settlement Agreement, to supervise the ongoing administration of claims and every three years, to review the financial sufficiency of the Trust Fund to ensure that it is adequate to meet the expected needs of class members and family class members. After the most recent financial sufficiency review, the actuaries retained by the Joint Committee, representing the class members, and the federal government expressed the opinion that the Trust Fund is sufficient to meet the expected needs of class members and family class members and there is an estimated surplus of between $236 million and $256 million.

3. How many people are directly concerned by this?

Based on the statistics found on the hepc8690.ca website, as of January 2016 the claims of 5,322 infected persons and 8,860 family members had been approved for a total of 14,182. Additionally, as of September 30, 2015, the Administrator had received 246 late claim requests after the June 30, 2010 First Claim Deadline from persons who do not meet the exceptions to the deadline listed in the Plans and the court-approved protocols in place. Over the last three years, approximately two late claim requests per month have been made. Hence, there potentially could be more as people discover they have been infected. Nearly half of the Canadians who are living with HCV are unaware of their infection[i].

4. What are the provisions for disposing of the surplus?

The orders approving the settlement allow the Joint Committee and the governments to apply to the courts when there is a surplus. The courts have discretion to decide what to do with the surplus. They can also decide that all or a portion of it should be kept in the Trust Fund. Applications regarding the surplus will be considered by the courts at a Joint Hearing that will take place in Toronto on June 20-22, 2016. At the Joint Hearing, the courts will hear submissions regarding whether the courts should exercise their discretion to allocate all or a portion of that surplus in accordance with the orders they issued in 1999 approving this settlement and, if so, how it should be allocated. There is an understanding that the provinces and territories are parties with standing and that they will not make any applications but may respond to applications.

QUESTIONS 5 TO 11 - Background information

5. What is the Joint Committee and what is its role?

Appointed by the courts, members of the Joint Committee have the mandate to implement the 1986-1990 Hepatitis C Settlement Agreement and to supervise the ongoing administration of claims. Every three years, it reviews the financial sufficiency of the Trust Fund to ensure that it is adequate to meet the expected needs of class members and family class members. The Joint Committee works closely with all service providers, including the administrator of the Claims Centre, and reports frequently to the courts. Without limiting the generality of the foregoing, the duties and responsibilities of the Joint Committee include:

a. recommending from time to time persons for appointment by the courts pursuant to the provisions of Article Ten;
b. establishing protocols, which must be approved by the courts, for the Administrator, Trustee, Referees and Arbitrators for the administration of this agreement and for the processing and payment of claims, and rescinding or amending any of such protocols with the approval of the courts;
c. receiving and assessing information received from the Administrator, the Trustee, the Auditors and Fund Counsel and applying to the courts for advice and direction;
d. retaining actuaries to determine the financial sufficiency of the Trust Fund from time to time;
e. receiving advice from the Investment Advisors on the investment of the assets of the Trust; and
f. making applications to the courts pursuant to Section 10.01(1).

Decisions of the Joint Committee require the approval of all members of the Joint Committee.

6. Who has an interest in how the surplus should be used and what are they suggesting?

First and foremost, **class members and family class members of the Settlement Agreement**. They have Joint Committee members who represent their interests. The Joint Committee did an extensive consultation with class members and family class members in 2015 about how the surplus could be used to enhance the benefits. Over 486 people attended consultation meetings in person or through the webcasts and over 600 written submissions were received by the Joint Committee. The **Canadian Hemophilia Society (CHS)**, **Action Hepatitis Canada (AHC)**, the **Manitoba Public Guardian and Trustee**, and **the Administrator of the fund** also have interests because they have members who are class members or family class members or they interface with these individuals. For example, member groups of the coalition AHC are in contact with the transfused class members while the CHS has contact with its inherited bleeding disorder members who are also class members. All these aforementioned groups also provide the Joint Committee with their recommendations. Based on all the input received, and after taking into account the appeal decisions and its own views, the Joint Committee developed a comprehensive list of possible benefits to class members and family class members. A comprehensive list of the Joint Committee recommendations is found under question 13 below but all those consulted pointed to the fact that late claimants should be considered and enhancement should be made to address many of the shortcomings of the plan, particularly for family class members who were not as well covered by the plan's original benefits when compared to the directly infected victims.

The federal government also has an interest because orders approving the settlement allow the governments to apply to the courts when there is a surplus. They are asking the surplus be returned to the federal government so as to use these funds to pursue policy initiatives for the benefit of the public that address the continuing public health burden of HCV-infected populations in Canada in the face of the highly effective but very costly new drug therapies.

7. Why should benefits to claimants be enhanced?

When the settlement was created in 1999, the amount of the fund was predetermined. It was not a situation where the parties negotiated the global settlement amount by estimating its constituent parts. In other words, the benefits payable had to be made to fit within the fund provided. The risk of error was borne almost entirely by the claimants. The exact number of victims and the full impact of the infection were not well known. In 2016, seventeen years later, the number of victims is well known and all those involved in administering the plans have a better idea of the serious physical, psychological, social and economic consequences of HCV infection and disease. After the surplus was recognized by the fund's actuaries in 2015, consultations by the Joint Committee and community-based groups were conducted with claimants and it became clear that class members have not received full compensation for their injuries and that the surplus should be used to enhance current benefits. Loss of employment income, reduction in pension benefits, increased home and health care costs and denial of insurance are just a few of the direct economic impacts of hepatitis C related disease. Therefore, we believe the surplus should be allocated to enhance the benefits to class members.

8. What does the federal government have to gain by recuperating the surplus?

It is an unexpected source of revenue of a quarter billion dollars that can be used towards other ends. In its motion to the courts, the government indicated that it could use these funds to pursue policy initiatives for the benefit of the public that address the continuing public health burden of HCV-infected populations in Canada in the face of the highly

effective but very costly new drug therapies. What is not clear is how this money could be used federally with respect to the very costly new drug therapies given that providing treatment falls mostly under the competence of provinces except for specific populations that are under federal responsibility (e.g. First Nations and Inuit, veterans, members of the Canadian Forces and the Royal Canadian Mounted Police, refugee protection claimants and inmates of federal penitentiaries).

9. What do the provinces and territories have to gain should the surplus be returned to the federal government?

Nothing, given the fact that the federal, provincial and territorial governments' contributions, under the Settlement Agreement, are capped in addition to be on a pay-as-you go principle. The assets of the trust include the settlement funds paid at the outset by the federal government and invested under the terms of the Settlement Agreement and the Funding Agreement ("Invested Fund") and the obligation of the provincial and territorial governments to pay their 3/11th share of the liabilities as they arise to a maximum of 3/11ths of $1.118 billion plus treasury bill rate interest. ("PT Notional Fund"). On the current actuarial projections, the PT Notional Fund is insufficient to pay 3/11ths of the total liabilities and will be exhausted by the year 2026. The Invested Fund is more than sufficient to pay the 8/11ths of the liabilities and the shortfall in the PT Notional Fund. The shortfall in the PT Notional Fund is accounted before Excess Capital is realized. All of the Required Capital has been allocated to the Invested Fund and all of the Excess Capital is in the Invested Fund. If the allocation benefits recommended by the Joint Committee (the "Allocation Benefits") are paid from the Excess Capital in the Invested Fund, then no call will be made on the PT Governments to fund the Allocation Benefits. The PT Notional Fund shortfall will not change and it will exhaust in 2026 (based on the current actuarial projections).

10. What would be the consequences of returning the surplus to the federal government?

Returning the surplus to the federal government would be a flagrant breach of a promise resulting in numerous consequences. Some examples would be the inadequate pension benefits available to class members because of the years lost from work, the inadequate level of financial support for crucial home care, the lack of much needed financial support to compensate family members who have acted or continue to act as caregivers and in doing so have seen their own jobs negatively impacted because of the unavoidable time commitments.

11. Why is the estimated range of the surplus so wide, between $206,920,000 and $256.6 million?

Following the triennial financial sufficiency review triggered on December 31, 2013, the courts issued consent orders declaring that, after taking into account an amount to protect the class members from major adverse experience or catastrophe (the "Required Capital"), the trust assets exceeded the liabilities by an amount between $236,341,000 and $256,594,000 as of December 31, 2013.

The amounts by which the trust assets exceed the liabilities calculated by the Joint Committee's actuaries, Eckler Ltd., did not take into account that class members below level 3 who meet the protocol for treatment are reclassified as level 3 and therefore eligible to the fixed payment at level 3 set out in section 4.01(1)(c) of the Plans. The Joint Committee instructed Eckler Ltd. to calculate what effect this has on the liabilities. The liabilities increase by $29,421,000. When the liabilities are restated to take into account

this increase, the assets exceed the liabilities by $206,920,000. From an actuarial perspective, $206,920,000 of the assets held in the trust are actuarially unallocated. These actuarially unallocated assets are excess capital ("Excess Capital").

The federal motion is asking that the actuarially unallocated money and assets in an amount between $236.3 million to $256.6 million (the "Excess Capital") not be varied at this time. In the end, it will be up to the courts to rule on the surplus to be considered.

QUESTIONS 12 TO 14 - Rationale supporting various recommendations for enhancements to benefits for class members

12. Why should late claimants be admitted into the plan?

As at September 30, 2015, the Administrator had received 246 late claim requests after the June 30, 2010 First Claim Deadline from persons who do not meet the exceptions to the deadline listed in the Plans and the court-approved protocols in place. Over the last three years, approximately two late claim requests per month are made. Many have good reasons for not having submitted their application by the deadline including not knowing the existence of the plan or not knowing that they had a right to apply.

13. What are the various recommendations for enhancements to benefits for class members and their rationale?

(i) Late claims - Proposed court-approved protocol

The Joint Committee recommends that the courts approve a protocol which would permit class members who missed the June 30, 2010 First Claim Deadline to apply to receive an Initial Claim Package and have his or her claim processed if they are able to satisfy a Referee that they applied late for reasons beyond their control or that there is a reasonable explanation for their delay.

The value of this benefit is approximately $32.5 million including administrative expenses.

(ii) A 10% increase in fixed payments

The Joint Committee recommends an increase of 10% retroactively (on payments that have already been made) and prospectively (going forward) on certain fixed payments under the Transfused or Hemophiliac HCV Plans to rectify in an equitable way fixed payments that were deemed too low. This proposed 10% increase would apply to:

- the fixed disease level payments under section 4.01(1) of the Transfused or Hemophiliac HCV Plan, which are summarized at: hepc8690.ca/content/claimants/essential/compensationSchedule-e%20.pdf;
- the $50,000 (1999 dollars) fixed payment if an election is made under 5.01(1) of the Transfused or Hemophiliac HCV Plan;
- the $120,000 (1999 dollars) fixed payment if an election is made under 5.01(2) of the Transfused or Hemophiliac HCV Plan;
- the $50,000 (1999 dollars) fixed payment if an election is made under section 4.08(2) of the Hemophiliac HCV Plan; and
- the $72,000 (1999 dollars) fixed payment if an election is made under 5.01(4) of the Hemophiliac HCV Plan.

The value of this benefit is approximately $51.4 million including administrative expenses.

(iii) Family class member payments – an increase of $5,000 (1999 dollars) in the fixed payment to a child 21 years or older and an increase of $5,000 (1999 dollars) in the fixed payment to a parent

The Joint Committee received many submissions that the payments made to family class members were inadequate to compensate for their loss when the death of their infected family member was caused by hepatitis C. The Joint Committee considered recommending increases in payments to each category of family members, however, the surplus available isn't enough to do this and to also provide for other benefits to be addressed.

The Joint Committee recommends at this time an increase of $5,000 (1999 dollars) in the fixed payment to children 21 years or older at the time of the death of the infected class member and an increase of $5,000 (1999 dollars) in the fixed payment to parents, both retroactively and prospectively. In the Joint Committee's opinion, the existing fixed payments to these two categories of family members are out of line with the amount of the existing fixed payments made to other family members.

The value of this benefit is approximately $22.4 million including administrative expenses.

(iv) Eliminate deductions of collateral benefits in calculating loss of income and loss of support claims

Under the Transfused and Hemophiliac HCV Plans, the calculation of loss of income and loss of support claims does not allow collateral income to be included in pre-claim net income yet the provisions require that any collateral benefits such as Canada Pension Plan (CPP) and Quebec Pension Plan (QPP) disability payments, disability insurance, Employment Insurance (UEI/EI) and Multi-Provincial and Territorial Assistance Program (MPTAP) be deducted as post-claim net income. The claims data demonstrates that class members have had significant amounts deducted in their income loss calculation for CPP/QPP disability, UEI/EI, sickness, accident or disability insurance, and EAP/MPTAP/Nova Scotia Compensation Plan in respect of HIV.

The Joint Committee recommends at this time that collateral benefits not be deducted from post-claim net income in the calculation of annual loss of net income, both retroactively and prospectively. This means that the amounts previously deducted for these collateral benefits on loss of income and loss of support would be reimbursed and these items would not be deducted going forward.

The value of this benefit is approximately $27.7 million including administrative expenses.

(v) Compensation for diminished pension benefits

The Transfused and Hemophiliac HCV Plans do not provide compensation to class members for loss of pension, including CPP pensions, employment-related pension benefits or private pension arrangements such as registered retirement savings plans or individual pension plans suffered as a result of their infection with HCV.

To provide compensation for diminished pension due to disability, the Joint Committee recommends at this time a 10% increase on loss of income and loss of support payments, subject to a cap on the income to which the increase is applied of $200,000 per year for years prior to 2014 and $200,000 per year indexed for years 2014 forward. The Joint Committee recommends that this increase be paid retroactively and prospectively to compensate for lost pension benefits.

The value of this benefit is approximately $19.8 million.

(vi) Increase loss of services from 20 hours per week to 22 hours per week

The Administrator's data demonstrates that for the majority of class members, 20 hours is less than full compensation for the actual loss of services in the home. In addition, class members have reported that the rate per hour payable is lower than what they actually pay to replace the services.

Because of the limits of the funds available and the competing interests of other benefits to be addressed, the Joint Committee recommends at this time an increase in the maximum number of hours compensated for loss of services in the home by two hours per week (for a total of 22 hours), payable retroactively and prospectively.

The value of this benefit is approximately $34.8 million including administrative expenses.

(vii) Increase maximum payable for cost of care from $50,000 (1999 dollars) to $60,000 (1999) dollars per annum

The Administrator estimated that the current maximum reimbursement of $50,000 (1999 dollars) per year for cost of care is inadequate to cover the costs actually incurred in 10% to 15% of cases. The Joint Committee also heard from some class members and family class members that, in some cases, care is or was required at disease levels below level 6.

Because of the limits on the funds available and the competing interests of other benefits to be addressed, the Joint Committee recommends at this time that the maximum award for costs of care at disease level 6 be increased by $10,000 (in 1999 dollars for a total of $60,000 per year), payable retroactively and prospectively.

The value of this benefit is approximately $629,000 including administration costs.

(viii) Include a $200 allowance for family members who accompany HCV infected persons to HCV medical appointments

The Joint Committee heard from class members and family class members that time, vacation/sick days and/or wages were lost by family class members who accompanied class members to medical appointments relating to their hepatitis C infection.

The Joint Committee recommends at this time that out-of-pocket expenses include an additional amount of $200 (2014 dollars) per visit to a family class member who accompanies a class member to his or her medical appointment seeking medical advice or treatment due to his or her HCV infection. This benefit would be payable prospectively only.

The value of this benefit is approximately $2 million.

(ix) Increase cap on funeral expenses from $5,000 (1999 dollars) to $10,000 (1999) dollars

The Plans provide for payment of an amount up to $5,000 (1999 dollars) to reimburse uninsured funeral expenses for a deceased class member whose death was caused by his or her infection with HCV. The claims data and the submissions made by claimants demonstrate that the amount of $5,000 is inadequate to reimburse the expenses incurred by most claimants who have claimed this benefit.

The Joint Committee recommends at this time an increase of the maximum award for funeral expenses by $5,000 (in 1999 dollars for a total of $10,000), payable retroactively and prospectively.

The value of this benefit is approximately $2.1 million including administrative expenses.

An additional buffer to cover future benefit payments

In order to ensure that the benefits recommended by the Joint Committee which are payable in the future can be paid in the event of a catastrophe, a portion of the surplus must be set aside as a buffer to provide this protection. The Joint Committee's actuaries have calculated that the buffer required for the recommended benefits payable is approximately $12.2 million.

Retaining the remaining surplus for further uses recommended by the Joint Committee

The Joint Committee recommends that the approximately $1.5 million of surplus remaining be kept by the Trustee at this time so that the Joint Committee can make further applications to use it. Among the additional items being investigated by the Joint Committee that may be funded with these additional monies is the creation of a new Claims Facilitator position. The role of this person would be to assist class members in submitting claims and filling out the associated paper work, which many class members and family class members reported they found overwhelming. Another project under review is the replacement of the claims administration software as the initial software currently being used is no longer supported by Microsoft and must be replaced at substantial expense.

14. Why should the enhancements be retroactive?

Past inequities need to be corrected.

QUESTIONS 15 TO 20 - Some of the main objections to returning the surplus to government

15. Will enhancing the benefits and including late claimants require material amendments to the Settlement Agreement?

No, according to the Joint Committee, the courts can use their discretion to allocate the surplus for the direct benefit of class members and family class members. In the fall of 1999, a settlement of the January 1, 1986 to July 1, 1990 Hepatitis C class actions was approved by the courts in Ontario, British Columbia and Quebec (the "courts"). The consent orders modifying and approving the Settlement Agreement allow the Joint Committee or any party to apply to the courts when there are actuarially unallocated money and other assets held by the Trustee and they give the courts the unfettered discretion to decide what to do with any such excess assets. Furthermore, in his decision of December 17, 2013, about the Late Claims Requests Protocol, Justice J Perell noted that (96) "*while the Settlement Agreement with some exceptions imposes a firm deadline for applying claims, there is nothing in the Settlement Agreement as modified by Paragraph 9 of the Approval Order that imposes a temporal limitation on the court's jurisdiction to allocate benefits. Rather, the pre-condition for the exercise of the court's unfettered discretion is just that the allocation of benefits be from actuarially unallocated assets*."

16. Haven't the claimants been sufficiently compensated and why shouldn't the surplus be used for another urgent cause?

The consultations with class members and family class members clearly demonstrate that they were inadequately compensated by a plan that did not foresee the serious physical, psychological, social and economic consequences of HCV infection and disease. The surplus can be used to redress this situation without any additional injection of funds. It would be immoral and unethical to redirect the funds to another cause at the detriment of

the victims of the tainted blood tragedy who were not adequately compensated by the funds earmarked for them.

17. Isn't the government doing enough through its funding of hepatitis C victims of tainted blood?

Victims are not being asked to be overcompensated but rather to correct the oversights inherent in the plan when it was created by using the funds allocated to this end, without injecting any new moneys.

18. Isn't most of what you are asking for a provincial/territorial responsibility?

While the provincial and territorial governments were parties in creating a fund paid for by the federal, provincial and territorial governments, the oversight of this fund is under the jurisdiction of the courts of Ontario, British Columbia and Quebec. Because the assets of the trust include the settlement funds paid at the outset by the federal government, this is why the federal government is identified as the government able to apply to the courts when there is a surplus whereas the provinces and territories are parties with standing and that they will not make any applications. They may simply respond to applications. Some provinces created their own separate compensation programs which are unrelated to the 86-90 Hepatitis C Settlement Agreement.

19. Now that the new hepatitis C treatments can result in a cure, hasn't the Settlement Agreement lost some of its relevance?

No, because the disease has had an impact on more than claimant's physical health. The Settlement Agreement was not created to simply provide treatment. Furthermore, the long term effects of the new direct acting anti-viral treatments are not yet known and some diseased individuals may still develop liver cancer. Many have been off the job market for a long time and are socially isolated which has its own numerous consequences. Disability may continue to progess and some benefits may need to be adjusted accordingly.

20. Shouldn't the compensation be proportionate to, and not greater than, any losses suffered by the class members affected while respecting the integrity of the Settlement Agreement?

It bears stating that no amount of economic redress compensates for the loss of life or health. No new benefits are being added, only enhancements to the current benefits within the spirit of the agreement. As such, the integrity of the Settlement Agreement is respected.

[i] Trubnikov M, Yan P, Archibald C. Estimated Prevalence of Hepatitis C Virus infection in Canada, 2011. Canada Communicable Disease Report: Volume 40-19, December 18, 2014. Available at: www.phac-aspc.gc.ca/publicat/ccdr-rmtc/14vol40/dr-rm40-19/surveillance-b-eng.php.