

IN THE MATTER OF an appeal filed  
pursuant to the *Rules for Appeals* under  
the *Pre-1986/Post-1990 Hepatitis C  
Settlement Agreement* and its *Protocols*

CLAIM FILES:

08-14040, 08-14041, 08-14042, 08-14043, 08-14044,  
08-14047, 08-14048, 08-14049, 08-14050, 08-14051, 08-14052, 08-14053, 08-14055,  
08-14058, 08-14059, 08-14060, 08-14061, 08-14062, 08-14063, 08-14064 and 08-14065

**REASONS FOR DECISION**

**INTRODUCTION**

[1] The Claimants in twenty-one (21) related files have each appealed a decision of the Administrator dated December 10, 2008, in which the applications for compensation as Family Members under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) were denied. In each application, the Administrator concluded that one of the criteria in subsection 4.01(1) was not met, namely proof that the death of the HCV Infected Class Member was caused by her infection with HCV or that she had not attained Disease Level 4 or higher prior to death.

**FACTS**

[2] On November 5, 2008, the twenty-one Claimants each delivered a separate application for compensation as Family Members under the *Settlement Agreement*. The applications were made on the following basis in each file:

08-14040 – Child over 21  
08-14041 – Child over 21  
08-14042 – Grandchild  
08-14043 – Grandchild  
08-14044 – Grandchild  
08-14047 – Child over 21  
08-14048 – Grandchild  
08-14049 – Grandchild  
08-14050 – Child over 21  
08-14051 – Child over 21

08-14052 – Grandchild  
08-14053 – Grandchild  
08-14055 – Child over 21  
08-14058 – Child over 21  
08-14059 – Child over 21  
08-14060 – Grandchild  
08-14061 – Grandchild  
08-14062 – Child over 21  
08-14063 – Grandchild  
08-14064 – Grandchild  
08-14065 - Grandchild

## **DECISIONS OF THE ADMINISTRATOR**

[3] In identical decisions dated December 10, 2008, the Administrator denied the applications for compensation in each of the twenty-one (21) related files. In the reasons, the Administrator stated as follows:

### **Criteria for Class Membership**

The Settlement Agreement provides compensation for certain Family Members of the HCV Infected Class Member.

In accordance with Section 4.01(1) of the Settlement Agreement, the criteria for filing a claim as a Family Member are the following:

*(1) To be eligible for Family Member compensation, a person claiming to be the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of an alive HCV Infected Class Member or an HCV Infected Class Member whose death was caused by the HCV Infected Class Member's infection with HCV must deliver to the Administrator, within one year after the date of approval of an application for compensation under this Agreement by or on behalf of such HCV Infected Class Member or within one year of the claimant attaining his or her age of majority, whichever event is the last to occur, an application form prescribed by the Administrator together with:*

*(a) the applicable proof with respect to the HCV Infected Class Member as required by Sections 2.01 or 2.02, and 2.03, unless the required proof has been previously delivered to the Administrator; and*

*(b) proof that the claimant is or was the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of the HCV Infected Class Member.*

In addition to the above and as per section 3.04 of the Agreement, compensation to Family Members is only payable if the deceased HCV Infected Class Member had attained Disease Level 4 or higher prior to death.

Since the deceased HCV Infected Class Member did not meet one of the criteria mentioned above, (i.e. death caused by the infection with HCV or Disease Level 4 or higher), your claim must be rejected. [Emphasis Added]

## **REQUESTS FOR REVIEW**

[4] The twenty-one Claimants each delivered a Request for Review on the following dates:

08-14040 – January 13, 2009  
08-14041 – January 15, 2009  
08-14042 – January 15, 2009  
08-14043 – January 15, 2009  
08-14044 – January 15, 2009  
08-14047 – January 13, 2009  
08-14048 – January 13, 2009  
08-14049 – January 13, 2009  
08-14050 – January 13, 2009  
08-14051 – January 13, 2009  
08-14052 – January 13, 2009  
08-14053 – January 13, 2009  
08-14055 – January 13, 2009  
08-14058 – January 13, 2009  
08-14059 – January 15, 2009  
08-14060 – January 15, 2009  
08-14061 – January 15, 2009  
08-14062 – January 12, 2009  
08-14063 – January 12, 2009  
08-14064 – January 12, 2009  
08-14065 – January 12, 2009

[5] Five of the Claimants specified reasons for appealing the decision of the Administrator:

08-14041:

The loss of a mother can't be replaced but the family should be compensated if for no other reason that this tragedy shouldn't happen to somebody else.

08-14047:

My mother was my friend, my confidant, my support...

Her life was taken away too quickly with this disease with no fault of hers. I feel this money is owed to me for the negligence of blood services.

08-14050

My mom was taking [sic] away from me too soon – no fault of hers. She was my best support, the one I always called when I needed comforting.

08-14055

A mother is a lifetime of love & sharing. Unfortunately, due to negligence, my mother's life was cut short. A mother is beyond measurable worth. However, I think decency dictates that the people left behind should at least be financially compensated for loss of companionship, protection and care.

08-14062:

D'après le rapport "Résumé de Sortie" de l'Hôpital [...] daté le 28 juillet 2006, je constate [sic] que le décès de ma mère [...] était dû au virus Hépatite C active. Alors pour cette raison, je ne suis pas d'accord avec la décision prise [sic] par les administrateurs de ce programme de refuser ma demande de réclamation.

[6] The Fund Counsel corresponded with the Claimants and an extension of time was granted in order to permit supplementary evidence or submissions to be delivered.

However, the Claimants did not file any supplementary evidence or submissions.

[7] On April 15, 2010, the files were delivered to the Appeals Officer.

## **ISSUE**

[8] The issue to be determined is whether the Claimants are entitled to compensation as Family Members.

## **ANALYSIS**

[9] In the decision dated December 10, 2008, the Administrator denied the claim on the basis that "one of the criteria" in subsection 4.01(1) was not met. It was unclear, on reading the decision, whether the applications for compensation were denied on the basis that there was no proof that the death of the HCV Infected Class Member was caused by her infection with Hepatitis C or that she had failed to attain Disease Level 4 or higher.

[10] By e-mail dated April 18, 2010, I requested the Administrator to advise me in writing whether the applications for compensation were denied on the basis that there

was no proof that the death of the HCV Infected Class Member was caused by her infection with Hepatitis C or that she had failed to attain Disease Level 4 or higher.

[11] By e-mail dated April 19, 2010, the Administrator advised that the primary application for compensation in relation to the HCV Infected Class Member was approved at Disease Level 3. In the Treating Physician Form, the physician indicated that the HCV Infected Class Member was at Disease Level 3. He also specified that the Hepatitis C virus did not materially contribute to her death.

*ii) Relevant Provisions of the Settlement Agreement - Sections 4.01 and 4.02 of Family Member Compensation and sections 3.01 and 3.04 of Compensation for HCV Infected Class Members who have died*

[12] In the Reasons for Decision on the appeal in Claim File 07-10265, I analysed the interaction between the provisions in section 4.01 and 4.02 dealing with Family Member Compensation and sections 3.01 and 3.04 of the provisions governing compensation for HCV Infected Class Members who have died. In the reasons, I stated as follows:

[10] A Family Member claim is subsidiary to a claim that is made under Article Two by an HCV Infected Class Member or under section 3.01 by an HCV Personal Representative of an HCV Infected Class Member who has died. In the context of the present appeal, the Family Member claim relates to a deceased HCV Infected Class Member. As a result, the eligibility requirements in subsection 3.01(1) must be considered in order to assist in interpreting the requirements under Article Four for a Family Member claim made in relation to an HCV Infected Class member who has died. The relevant sections of the *Settlement Agreement* “[...] must be interpreted in a textual, contextual and purposive way” [See *Canada Trustco Mortgage Co. v. Canada* [2005] SCR 601 at paragraphs 10 and 11].

[11] In my Reasons for Decision on the appeal in Claim File 07-00542, I analysed the provisions in Article Three of the *Settlement Agreement* concerning the payment of compensation for a deceased HCV Infected Class Member and stated, in part, as follows:

[15] Article Three of the *Settlement Agreement* contains the framework governing the compensation process for HCV Infected Class Members who have died, including the eligibility requirements in section 3.01 and the provisions for the payment of compensation in sections 3.02, 3.03 and 3.04. The expression “HCV Infected Class Member” is

defined, in part, in section 1.01 as meaning "... collectively Primarily-Infected Class Members and Secondarily-Infected Persons".

[16] The eligibility requirements that must be met by an HCV Personal Representative for a claim to be approved are outlined in section 3.01 of the *Settlement Agreement*, which states, in part, as follows:

**3.01 Eligibility – HCV Infected Class Members Who Have Died**

(1) A person claiming to be the HCV Personal Representative of an HCV Infected Class Member who has died must deliver to the Administrator, within three years after the death of such HCV Infected Class Member or within two years after the Implementation Date, whichever event is the last to occur, an application form prescribed by the Administrator together with:

[..]

(d) proof that the death of the HCV Infected Class Member was caused by his or her infection with HCV except as provided in Section 3.03(1)(ii).

[17] In order to be eligible for compensation under either section 3.02 or 3.03, section 3.01(1) requires an HCV Personal Representative to deliver to the Administrator all of the elements of proof described in paragraphs (a) through (d), as reproduced above.

[...]

[19] The compensation payable under Article Three for the claim of an HCV Infected Class Member who has died is governed either by section 3.02 or 3.03, depending upon the date of death. In particular, section 3.02 applies where the death occurred prior to January 1, 1999, and section 3.03 applies where the death occurred on or after January 1, 1999.

[...]

[13] Section 3.04 of the *Settlement Agreement* is intended to provide greater certainty in interpreting and applying certain compensation provisions under the *Settlement Agreement*, including Article Four [relating to Family Member applications], and contains an additional requirement that must be met to succeed in making such claims. Section 3.04 provides as follows:

**3.04 When Compensation Payable**

For greater certainty, compensation under Article Four, Section 3.02(1) and (2) and 3.03(1)(i) is only payable with respect to a deceased HCV Infected Class Member where the deceased HCV Infected Class Member had attained Disease Level 4 or higher prior to death. [Emphasis Added]

By virtue of section 3.04, compensation is only payable under certain provisions, including Article Four, where an HCV Infected Class Member had attained Disease Level 4 or higher prior to death.

[14] Article Four of the Settlement Agreement contains the framework governing the compensation process for Dependents and Family Members of HCV Infected Class Members. With respect to Family Members, section 4.01 prescribes the eligibility requirements that must be met to make a successful claim, and section 4.02 contains the provisions for the payment of compensation.

[15] A person claiming to be a Family Member must satisfy the eligibility requirements in section 4.01 in order to make a successful claim for compensation. Section 4.01 provides as follows:

**4.01 Eligibility – Family Member**

(1) To be eligible for Family Member compensation, a person claiming to be the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of an alive HCV Infected Class Member or an HCV Infected Class Member whose death was caused by the HCV Infected Class Member’s infection with HCV must deliver to the Administrator, within one year after the date of approval of an application for compensation under this Agreement by or on behalf of such HCV Infected Class Member or within one year of the claimant attaining his or her age of majority, whichever event is the last to occur, an application form prescribed by the Administrator together with:

- (a) the applicable proof with respect to the HCV Infected Class Member as required by Sections 2.01 or 2.02, and 2.03, unless the required proof has been previously delivered to the Administrator; and
- (b) proof that the claimant is or was the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of the HCV Infected Class Member. [Emphasis Added]

[16] Subsection 4.01(1) prescribes the eligibility requirements for Family Member compensation claims in two distinct circumstances: where an HCV Infected Class Member is alive or where the death of an HCV Infected Class Member was caused by an infection with HCV. In the latter situation, subsection 4.01(1) permits a person to make a Family Member claim in relation to “[...] an HCV Infected Class Member whose death was caused by the HCV Infected Class Member’s infection with HCV[...]”. In using that expression, subsection 4.01(1) incorporates the requirement in paragraph 3.01(1)(d) to prove that the death of the HCV Infected Class Member was caused by an infection with HCV. Alternatively, the wording of subsection 4.01(1) presupposes that the Administrator has approved the claim by the HCV Personal Representative under section 3.01 which requires, among other things, proof that the death of the HCV Infected Class Member was caused by an infection with HCV. Under either interpretation, the Administrator can only accept a claim for Family Member compensation made in relation to a deceased HCV Infected Class Member in circumstances where there is proof that the death was caused by the HCV virus.

[...]

[18] Section 4.02 of the *Settlement Agreement* contains the provisions governing the payment of compensation to Family Members and states as follows:

#### 4.02 Compensation to Approved Family Members

[...]

(2) Upon approval of the Claim of an HCV Infected Class Member or an HCV Infected Class Member whose death was caused by the HCV Infected Class Member's infection with HCV, the Administrator will notionally transfer the amount corresponding to the HCV Infected Class Member's Disease Level, as set out in Schedule C3, to the Dynamic Non-Segregated Family Benefits Fund.

(3) Subject to Section 5.02(2), each Approved Family Member will be paid compensation in the amounts set out in Schedule C3A in relation to the Disease Level of the HCV Infected Class Member, or in relation to an HCV Infected Class Member whose death was caused by HCV. On payment of such compensation, a corresponding deduction will be made to the notional balance of the Dynamic Non-Segregated Family Benefits Fund.

[...]

[21] Subsection 4.02(3) of the Settlement Agreement provides for the payment of compensation to an Approved Family Member in amounts set out in Schedule C3A in two distinct circumstances: either in relation to the Disease Level of the HCV Infected Class Member or in relation to an HCV Infected Class Member whose death was caused by an infection with HCV. Subsection 4.02(3) must be read in conjunction with the interpretative provision in section 3.04, reproduced in paragraph 13, which states, among other things, that Family Member compensation is only payable with respect to a deceased HCV Infected Class Member who had attained Disease Level 4 or higher prior to death.

[...]

[23] In summary, in the context of a Family Member claim made in relation to a deceased HCV Infected Class Member, the provisions in sections 3.01, 3.04, 4.01 and 4.02 must be read textually, in conjunction with one another and in their context in the Settlement Agreement. When interpreted in this manner, the provisions establish that a Family Member claim is subsidiary to a claim made by an HCV Personal Representative in relation to a deceased HCV Infected Class Member. Under the terms of the Settlement Agreement, an HCV Personal Representative must satisfy the eligibility requirements under section 3.01 in relation to a deceased HCV Infected Class Member, including the delivery of proof under paragraph 3.01(1)(d) that the death was caused by an HCV infection. In circumstances where the eligibility requirements under section 3.01 are satisfied and the claim is approved, the Administrator must transfer funds notionally to the Family Benefits Fund for the payment of any approved Family Member claims. The wording in subsections 4.01(1), 4.02(2) and 4.02(3) confirms that Family Member compensation can only be paid where the death of the HCV Infected Class Member was caused by an infection with HCV and where Disease Level 4 or higher was attained prior to death; otherwise, the claim must be denied. [...] [Emphasis Added]

*iii) Have the Claimants met the requirements of subsection 4.01(1)?*

[13] In the primary application for compensation, the physician indicated in the Treating Physician Form that the HCV Infected Class Member had attained Disease Level 3. He also noted that her infection with the Hepatitis C virus had not materially contributed to her death.

[14] By virtue of section 3.04 of the *Settlement Agreement*, compensation for Family Members under Article Four is only payable with respect to a deceased HCV Infected Class Member where Disease Level 4 or higher was attained prior to death. However, the physician indicated in the Treating Physician Form that the deceased HCV Infected Class Member had attained Disease Level 3 prior to her death. In the circumstances, section 3.04 of the *Settlement Agreement* precludes the payment of Family Member compensation to the Claimants, and the Administrator did not commit an error in denying the applications for compensation. Regrettably, the applications for Family Member compensation cannot succeed.

[15] Although I fully understand that it must be confusing and upsetting to the Claimants to be denied Family Member compensation, it is important to recognize that the terms of the *Settlement Agreement* are the result of an agreement between the Parties which was approved by the Courts; neither the Administrator nor the Appeals Officer has any power or discretion to alter those terms. Two recent decisions delivered on further appeals to the Court have underscored the binding nature of the provisions of the *Settlement Agreement*. In the decision on further appeal to the Court in Claim Files 08-14662, 08-13831 and 07-10252 dated March 25, 2010, Chief Justice Winkler

dismissed the appeals and concluded that the estates of deceased Family Members were not entitled to compensation. He stated, in part, as follows:

A global settlement fund has been negotiated by the representative plaintiffs. The manner in which that fund is apportioned amongst the class members is a product of compromise. This is an approach consistent with the established principle that the settlement doesn't have to afford perfect or complete compensation to each and every class member but rather, must be "fair, reasonable and in the best interests of the class" as a whole. Within that context, it is considered acceptable to draw reasonable distinctions between those within the class in regard to the entitlement to, or quantum of, compensation.

In the decision on further appeal to the Court in Claim File 07-01482 dated April 7, 2010, Mr. Justice Pitfield dismissed an appeal concerning the amount of compensation awarded and stated, in part as follows:

[9] A settlement of this kind in question cannot be expected, nor is it intended, to produce a perfect result. It is intended to produce a result that is fair and reasonable having regard to the interests of the Class generally, the interests of the defendant, and all of the circumstances surrounding the issues in the litigation.

[10] It is not now open to the Administrator, the Appeals Officer or this Court to depart from the terms of the [*Settlement Agreement*] which, as they pertain to this Claimant, have been accurately interpreted and applied by the Administrator.

## CONCLUSION

[16] The appeals are dismissed.

"D. McGillis"

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The Honourable D. McGillis, Q.C.  
Appeals Officer

DATED April 21, 2010

TO: The Claimants  
Fund Counsel  
Administrator