

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 FILE: 07-03130

REASONS FOR DECISION

INTRODUCTION

[1] The HCV Personal Representative has appealed a decision of the Administrator dated November 12, 2009, in which the application for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis that it was not made within the time period specified in subsection 3.01(1). The sole issue on appeal relates to the timeliness of the filing of the application.

FACTS

[2] By letter dated May 15, 2009, the HCV Personal Representative provided detailed information to the Administrator concerning the application for compensation that she was delivering on behalf of the Estate of the HCV Infected Class Member, her deceased husband. She indicated, among other things, that she had been in contact with physicians over the past year to obtain records and was waiting for the hospital to search the health records on microfiche. The application for compensation was included with the letter. Both the letter and the application for compensation were stamped “Received Oct 02 2009”, indicating the date that they were delivered to the Administrator.

[3] In a letter to the Administrator dated September 29, 2009, the HCV Personal Representative stated as follows:

I have spoken to one of your staff members to inform them that I had not received any confirmation that my application had been received back in

May 15th 2009. I would determine that the package has been lost in the mail. I have resent my application via Purolator so that I may be sure of its arrival.

May you please inform me via telephone or mail upon receiving it.

Please note during this time I have received additional health records from the hospital and I will forward them together with the physician form as soon as possible. [Emphasis Added]

[4] The next day, in an e-mail dated September 30, 2009, the daughter of the HCV Personal Representative sent a scanned copy of the letter dated September 29, 2009 to the Administrator. The letter differed in some respects from the letter reproduced in paragraph 3, but was substantially the same in its content.

[5] On October 2, 2009, the Administrator received the application for compensation made by the HCV Personal Representative. The General Information Form indicated, among other things, that the HCV Infected Class Member was a Primarily-Infected Person who was infected with Hepatitis C as a result of numerous blood transfusions received during dialysis treatments from 1979 until 1984. The HCV Infected Class Member died on September 7, 1984.

[6] The HCV Personal Representative included a notarized copy of the Last Will and Testament (“Will”) of the HCV Infected Class Member with the application for compensation. The attestation on the Will was dated November 7, 2000; it was signed and stamped by a Notary Public. The signature of a Member of Provincial Parliament appeared on the attestation above the signature of the Notary Public; there was no date to indicate when the Member of Provincial Parliament had signed his name on the document. The Member of Provincial Parliament also signed the last page of the Will and wrote the following words above his signature: “I certify this to be a true copy of the original”.

[7] By letter dated November 27, 2001, the HCV Personal Representative was advised that the Estate of the HCV Infected Class Member was eligible for compensation under a provincial plan in the amount of \$25,000.00. It would appear that the copy of the Will notarized on November 7, 2000 was delivered in support of the application under the provincial plan.

DECISION OF THE ADMINISTRATOR

[8] In a decision dated November 12, 2009, the Administrator denied the claim on the basis that the Claimant had not delivered the application for compensation within the time period prescribed in subsection 3.01(1) of the *Settlement Agreement*. In the decision, the Administrator stated, in part, as follows:

We are writing to advise you that your claim has been denied for compensation under the Pre-1986/Post-1990 Hepatitis C Settlement Agreement. The reasons for denial are set out below.

Criteria for Class Membership

The Settlement Agreement provides compensation for HCV Infected Class Members who have died.

In accordance with Section 3.01(1) of the Settlement Agreement, the first criterion for eligibility is in regards to the date the application must be delivered to the Administrator. This section reads as follows:

*(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 from prescribed by the Administrator...*

In accordance with Section 1.01 of the Settlement Agreement, the definition of "Implementation Date" is based on the Approval Date of the Agreement (i.e. July 9, 2007). The Implementation Date was August 2007; therefore, the deadline for submitting an application is/was August 2009, or within three years after the death of the HCV Infected Class Member.

Your claim form package was delivered to the Administrator on October 2, 2009. Upon review it was noted that HCV Infected Person passed away on September 7, 1984 which is more than 3 years after the date of death and more than two years after the date of implementation. Based on this the Administrator

must reject your claim as the date of eligibility has passed. [Emphasis by Administrator]

REQUEST FOR REVIEW

[9] On December 1, 2009, the Claimant delivered a Request for Review, together with documentation including a letter dated November 28, 2009. In the letter, she specified the reasons for appealing and stated, in part, as follows:

I forwarded my claim in May of 2009 and it was not received by the administrator. I was sincerely sorry I forwarded my claim application via regular mail with Canada Post. I should have sent it via a courier. All my future correspondence will be sent via a courier.

SUPPLEMENTARY EVIDENCE AND SUBMISSIONS ON APPEAL

[10] The HCV Personal Representative delivered the following supplementary evidence: a letter that she wrote to a Member of Provincial Parliament, together with his signed and stamped response at the bottom of the page; and an affidavit sworn by her daughter.

[11] On January 7, 2010, the HCV Personal Representative wrote the following letter to a Member of Provincial Parliament:

I am writing to you to inform you that back in August of 2008 you had notarized a form as a Commissioner of Oath for myself as a Estate Claimant for Crawford Agency Pre86Post90 Hepatitis C victims. It was for my late husband's claim; he was a dialysis patient for 5 years and had contracted Hep C. in January of 1981 and later died in 1984.

The deadline for my claim was August 2009. My claim was mailed on May 15 2009. It was lost in the mail. I did not make copies of my documents and sent it regular mail.

I was not aware it was lost until after the deadline had passed. I have resent my claim (via a courier this time and made copies of my documents). Eligibility was denied and I now have the opportunity to appeal. I am presently trying to retrace my past documents.

I had come in to your office late August or early September with my daughter, [...] and my grandson. I had my Will/Testament and you notarized the section in

the claim where a [...] Commissioner of Oath was required. I specifically recall [...] having photocopied the papers. [...] [Emphasis Added]

[12] At the bottom of the letter, the Member of Provincial Parliament wrote as follows and placed his stamp as a M.P.P. over his signature:

To Whom it May Concern:

I, [a Member of Provincial Parliament], have notarized a document for the HCV Personal Representative for the Estate Claim of her late husband, [the HCV Infected Class Member] for Crawford Agency Pre86Post90 HepC on [sic] or about the time of August/Sept. 2008. [Emphasis Added]

[13] In an affidavit sworn on April 30, 2010, the daughter of the HCV Personal Representative stated as follows:

1. I am the daughter of [...], the HCV Personal Representative of the Estate of [the HCV Infected Class Member].
2. My mother filed a claim under the Pre-1986/Post-1990 Hepatitis C Settlement Agreement on behalf of the estate of my father, [the HCV Infected Class Member].
3. During the summer of 2008, I assisted my mother in completing the Claim Application forms.
4. On May 15, 2009, I mailed the Claim Application Package in a mail box located at the corner of [...]. The mail box was located in front of my mother's residence at [...]. My mother was present when I mailed the Claim Application Package. I reside at [...].
5. After mailing the Claim Application Package, I noticed that the mail box had been vandalized. My mother informed me that the mail box had been set on fire. I noticed that the mail box has been vandalized quite a few times in the past.
6. In November 2009, the mail box located at the corner of [...] had been removed by Canada Post.
7. I believe that the Claim Application Package was destroyed or lost in the mail.
8. I make this affidavit in support of the claim filed on behalf of the Estate of my father, [the HCV Infected Class Member] and for no other purposes.

ISSUE

[14] The issue to be determined is whether the application for compensation should be deemed to have been filed within the time period prescribed in subsection 3.01(1) of the *Settlement Agreement*.

ANALYSIS

i) Section 3.01 of the Settlement Agreement

[15] Article Three of the *Settlement Agreement* contains the framework governing the compensation process for HCV Infected Class Members who have died. The eligibility requirements that must be met by an HCV Personal Representative for an application for compensation to be approved are found 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:

[...]

[16] Subsection 3.01(1) of the *Settlement Agreement* requires that an application for compensation made by an HCV Personal Representative on behalf of an HCV Infected Class Member who has died must be delivered within three years after the death of the HCV Infected Class Member or within two years after the implementation date of the *Settlement Agreement*, whichever event is the last to occur.

ii) Should the appeal be allowed on the basis of the evidence?

[17] In a letter to the Administrator dated September 29, 2009, reproduced in paragraph 3, the HCV Personal Representative confirmed that she had spoken to a staff

member concerning the receipt of the application for compensation. In particular, she advised the staff member that she “[...] had not received any confirmation that my application had been received back in May 15th 2009”. She further stated her belief that the package was lost in the mail and advised that she would “resend it” by courier. She also noted that, in the intervening period, she had received additional health records from the hospital that she would forward as soon as possible. There was nothing in the letter to indicate any awareness on her part that the application did not meet the prescribed time limit when she stated that the package was “lost in the mail”.

[18] On appeal, the HCV Personal Representative delivered supplementary evidence including a written confirmation from her Member of Provincial Parliament that he had “notarized” the Will of the HCV Infected Class Member in or about August or September 2008 for the purposes of the application for compensation under the *Settlement Agreement*. As indicated in paragraph 6, the signature of the Member of Provincial Parliament appears in two places on the copy of the Will that was delivered in support of the application for compensation. There is no reason to question the evidence of the Member of Provincial Parliament, and I accept that he signed the copy of the Will in August or September 2008. The evidence therefore indicates that the HCV Personal Representative was in the process of gathering and preparing materials to be used in support of the application for compensation well in advance of May 15, 2009.

[19] I am satisfied, when the evidence is considered in its totality, that an application was originally made by Claimant in compliance with the deadline specified in subsection 3.01(1) of the *Settlement Agreement*. In particular, the explanation of the HCV Personal Representative in the letter dated September 29, 2009 that the application for

compensation was sent on May 15, 2009 and “lost in the mail” was made without any knowledge on her part that the time period had expired. Furthermore, the evidence of the Member of Provincial Parliament corroborates the statement in her letter dated May 15, 2009 that she had been working on gathering the materials required for the application for over a year. Finally, I have considered the guidance provided by Chief Justice Winkler in the Reasons for Decision on further appeal to the Court in claim file 07-00464. In the decision, Chief Justice Winkler allowed an appeal where there was conflicting evidence as to whether the Claimant had received a blood transfusion, stating as follows:

In my view, this is a case where the principle that, with respect to class membership, if an error is to be made, it should be made on the side of inclusion rather than exclusion, should be invoked.

I have determined that the principle of class inclusiveness should be applied in the circumstances of the present case by way of analogy and that “if an error is to be made, it should be made on the side of inclusion, rather than exclusion”.

[20] In arriving at the decision in this matter, I have not considered the evidence in the affidavit sworn by the daughter of the HCV Personal Representative.

[21] For these reasons, the application for compensation delivered by the HCV Personal Representative on October 2, 2009 shall be deemed to have been delivered within the time period prescribed in subsection 3.01(1) of the *Settlement Agreement*, and the Administrator shall consider the application on its merits.

CONCLUSION

[22] The appeal is allowed.

"D. McGillis"

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

DATED May 14, 2010

TO: HCV Personal Representative
Fund Counsel
Administrator