

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: 10-20928

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated October 4, 2010, in which the application for compensation as a Family Member 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 prescribed in subsection 4.01(1). The three siblings of the Claimant delivered applications for compensation after the Administrator had made the decision in the present file. Their appeals are dealt with in a separate decision.

FACTS

[2] On December 10, 2008, the primary application made by the HCV Infected Class Member was approved.

[3] On September 1, 2010, the Claimant delivered an application for compensation as a Family Member, a child under 21, together with a letter dated August 29, 2010 that stated as follows:

I am filing a claim as a family member of a victim of Hepatitis C virus that was contracted through blood transfusions before 1986. According to the Instructions for Family Members of HCV Infected Class Members on your website, “no person may file a Claim after 30 June 2010”. However, a series of exceptions is provided, notably “where an application is made by a Family Member [...] within one year following the date on which the application submitted on behalf of the HCV Infected Class Member from who the claim is derived was approved”. I am therefore filing a claim after the 30 June 2010 deadline for

compensation under this latter exception. I would, however, like to bring three concerns I have with the deadline to your attention.

I would like to bring to your attention that I only recently discovered that my mother, [name deleted], received compensation and have no idea of the precise date that my mother's claim was approved. I therefore have no idea whether or not my claim is being filed "within one year following the date on which the application submitted on behalf of the HCV Infected Class Member from who the claim is derived was approved". I would also like to mention that my mother recently died on 19 August 2010 of liver failure due to cirrhosis of the liver, which was caused by the HCV that she contracted from blood transfusions prior to 1986. It was only after her death that someone mentioned to me that family members could also claim compensation. I hope you'll understand that my recent loss makes the deadline of 30 June 2010 seem completely arbitrary and very difficult to accept.

Hopefully, I will have filed this claim in time to fit into the above-mentioned exception. If you have any questions or require any further information, please do not hesitate to contact me at the coordinates provided below. [Emphasis Added]

DECISION OF THE ADMINISTRATOR

[4] In a decision dated October 4, 2010, the Administrator denied the application for compensation for the following reasons:

You applied for Family Member as the Child of an HCV Infected Class Member. As noted previously in order to be eligible for compensation you must deliver your application within one year after the date of approval of the HCV Infected Class Member's Application or within one year of the claimant attaining the age of majority, whichever event is the last to occur. The HCV Infected Class Member's claim was approved on December 10, 2008 and your application was delivered to the Administrator on September 1, 2010, which is more than one year after the Approval of the Primary Claim. Based on this the Administrator has no choice but to reject your claim as the eligibility deadline has passed. [Emphasis Added]

REQUEST FOR REVIEW

[5] The Claimant delivered a Request for Review on October 29, 2010, together with a document entitled "Reasons for Appealing the Administrator's Decision". In specifying his reasons for appealing, he made the following submissions:

1. While s. 1.12 of the Settlement Agreement states that the “interpretation of this Agreement will be governed by the Laws of Ontario”, the Administrator, who is situated in Ontario, is regulated by the Laws of Ontario regardless of any explicit mention thereof in the Agreement.
2. It is neither within the power of the parties to the Agreement, nor within the power of Approval Orders of the Court to abrogate or derogate from the Laws of Ontario or in any other way render the Agreement or the parties exempt from the Laws of Ontario.
3. Section 4.01 of the Settlement Agreement stipulates that Family Members of the HCV Infected Class Member “must deliver to the administrator, within one year after the date of approval of an application for compensation under this Agreement [...]”
4. The limitation period of one year is arbitrary to the extent that it has no basis in legal precedent, whether statutory or at equity or law.
5. The fixing of discovery at the date of approval of the HCV Infected Class Member’s application for compensation under the Agreement is arbitrary to the extent that it has non basis in legal precedent, whether statutory or at equity or law.
6. According to s. 4 of the *Limitations Act*, S.O. 2002, the basic limitation period is “the second anniversary of the day on which the claim was discovered.”
7. Since the HCV Infected Class Member’s claim was approved on December 10, 2008 and my application was delivered to the Administrator on September 1, 2010, it meets the requirements of the limitation period as set in s. 4 of the *Limitations Act*, S.O. 2002.
8. Subsection 5(1) of the *Limitations Act*, S.O. 2002 specifies that a “claim is discovered on the earlier of (a) the day on which the person with the claim first knew (i) that the injury, loss or damage occurred.”
9. As the HCV Infected Class Member died of cirrhosis of the liver caused by the HCV on 19 August 2010, discovery of death caused by the HCV, whether real or imputed, could not have occurred before this date.
10. As recognised under s. 7.01 of the Agreement, the funds of the Agreement constitute a Trust and according to s. 7.02 the Administrator is Trustee of said funds.
11. As Trustee of the funds to be distributed to beneficiaries under the Agreement, the Administrator had a fiduciary obligation both to obtain information concerning Family Members of HCV Infected Class Member upon application and to contact and inform Family Members of their right to compensation as beneficiaries upon approval of the HCV Infected Class Member’s application.
12. According to the “Notice Program for Certification and Settlement Approval Hearings”, notice was to be sent to all class members.
13. At no time did the Administrator attempt to obtain information from the HCV Infected Class Member concerning Family Members or inform her of their right to compensation.

14. At no time was any Family Member contacted by the Administrator to inform them of their right to compensation as beneficiary upon approval of the HCV Infected Class Member's application and of the limitation period of one year.
15. For the reasons mentioned in paragraphs 13 and 14, the Administrator is in breach of his fiduciary obligations toward the Family Member as beneficiary to the Agreement.

[6] The Claimant delivered no further submissions on appeal.

ISSUE

[7] The issue to be determined is whether the Administrator erred in denying the application for compensation on the basis that it was not delivered within the time period prescribed in subsection 4.01(1) of the *Settlement Agreement*.

ANALYSIS

[8] In the Reasons for Decision on the appeal in Claim File 07-10239, I considered the provisions in Article Four of the *Settlement Agreement* governing the payment of compensation for Dependants and Family Members and stated, in part, as follows:

iii) Eligibility Requirements in section 4.01 for Compensation as a Family Member

[10] Under the terms of the judicially approved *Settlement Agreement*, 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:

Article Four

Compensation to Dependants and Family Members

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.

[9] Subsection 4.01(1) of the *Settlement Agreement* requires the application for compensation of a Family Member to be delivered by the person claiming to be a Family Member within one year after the date of approval of an application made by or on behalf of the HCV Infected Class Member. [Emphasis Added]

[9] In the reasons for appealing, the Claimant made two submissions that must be addressed. First, he stated that the one year deadline in the *Settlement Agreement* is arbitrary and has no basis in law. In any event, the provisions of the *Limitations Act* in Ontario govern, and the application for compensation was made within the limitation period prescribed in the statute. Second, the Administrator breached its fiduciary duty as the Trustee of the compensation fund by failing to obtain information concerning Family Members and to inform them of their right to compensation and the applicable deadline for bringing an application.

[10] With respect to the submissions of the Claimant concerning the *Limitations Act*, it is important to emphasize that the application for compensation was made under the terms of the *Settlement Agreement*. In decisions made on further appeal, the Courts have emphasized that the *Settlement Agreement* was made in the context of a certified class proceeding and may be regarded as contractual in nature in some respects; its terms

constitute the entire agreement between the parties, are binding and must be applied.¹ The time period prescribed in subsection 4.01(1) of the *Settlement Agreement* is therefore not “arbitrary”, as submitted by the Claimant. To the contrary, it is a deadline that was negotiated in the context of the overall compensation process adopted in the *Settlement Agreement*, agreed to by the parties and approved by the Courts. For this and other reasons that need not be detailed, the *Limitations Act* of Ontario has no application to any of the terms of the *Settlement Agreement*.

[11] I also cannot accept the submission of the Claimant that the Administrator had a fiduciary duty to inform the Family Members of their right to compensation and the deadline for bringing an application. In administering the compensation plan, the Administrator exercises the duties and responsibilities prescribed in section 8.01 of the *Settlement Agreement*. The Administrator has no duty, fiduciary or otherwise, under the *Settlement Agreement* to take any steps to determine the names of Family Members with a view to providing information to them concerning their rights and obligations under the *Settlement Agreement*.

[12] In the Reasons for Decision on the appeal in Claim File 10-19049, I concluded that a Family Member has a personal obligation to deliver an application for compensation within the time period prescribed in subsection 4.01(1) of the *Settlement Agreement* and stated, in part, as follows:

ii) Did the Administrator err in denying the claim?

[10] The evidence establishes that the primary application for compensation of the HCV Infected Class Member was approved on December 15, 2008. More than one year later, on February 3, 2010, the Claimant delivered the application

¹ See Reasons for Decision dated March 25, 2010 in Claim Files 08-14662, 08-13831 and 07-10252 (Winkler C.J.O.); Reasons for Decision dated April 7, 2010 in Claim File 07-01482 (Pitfield J.); and Reasons for Decision dated January 20, 2011 in Claim File 09-15731 (Bauman C.J.B.C.).

for Family Member compensation as a Spouse. The Request for Review was not delivered by the Claimant, but by the HCV Infected Class Member who explained that she had missed the deadline for delivering the applications for Family Member compensation due to health problems suffered by her and her son. In written submissions on appeal, the Claimant indicated, among other things, that the HCV Infected Class Member was “taking care of the application” and he was taking care of their son. He also noted that the disabling effects of the Claimant’s injury “lasted all autumn”.

[11] Subsection 4.01(1) of the *Settlement Agreement* requires, in mandatory terms, “the person claiming to be a Family Member” to deliver the application for compensation within one year after the date of approval of the HCV Infected Class Member’s application. The responsibility for complying with the terms of subsection 4.01(1) rests on the person claiming to be a Family Member. The Claimant therefore had a responsibility to ensure that he delivered his application for compensation as a Family Member within the time period prescribed in subsection 4.01(1). The difficult family circumstances that arose in the fall of 2009 and the fact that he apparently relied on the injured and ill HCV Infected Class Member to assume his responsibility to deliver his application in a timely manner cannot excuse his non-compliance with the mandatory time period. Unfortunately, the Claimant did not comply with the deadline prescribed in subsection 4.01(1) of the *Settlement Agreement*. As a result, he is not eligible for compensation as a Family Member under section 4.01 of the *Settlement Agreement*, and the Administrator did not err in denying the claim for compensation. [Emphasis Added]

[13] In the Reasons for Decision on appeal in Claim File 10-19081, I noted that the deadline for Family Member compensation under subsection 4.01(1) of the *Settlement Agreement* is clearly specified on the website in the “Instructions” for Family Member applications, as well as in the “Claim Application Package for Family Members and/or Dependants” provided for Family Member claimants. In particular, both the website and the Claim Application Package specify the deadline for the filing of Family Member applications in the following clear and express terms:

Deadline for Family Member Claim

Family Members must submit an application form to the Administrator within one year after the date of approval of an application for compensation under this Agreement by or on behalf of the HCV Infected Class Member or within one year of the claimant attaining the age of majority, whichever is the last to occur. [Emphasis Added]

Furthermore, both the website and the Claim Application Package give the coordinates of the Administrator, including the telephone number, for claimants who require assistance. A person who requires assistance for any reason, including determining a deadline date, may telephone the office of the Administrator. Finally, the website and Claims Application Package for HCV Infected Class Members make reference to “Family Member and/or Dependant Claims”. An HCV Infected Class Member is or ought to be aware that Family Members and Dependents can make claims under the *Settlement Agreement*. The failure of an HCV Infected Class Member to inform a Family Member of the approval date of a primary claim cannot be used to excuse non-compliance with the mandatory time period in subsection 4.01(1) of the *Settlement Agreement* for the delivery of an application.

[14] The evidence establishes that the primary application for compensation of the HCV Infected Class Member was approved on December 10, 2008. Over a year and a half later, on September 1, 2010, the Claimant delivered the application for compensation. Subsection 4.01(1) of the *Settlement Agreement* requires, in mandatory terms, a Family Member application for compensation to be filed within one year after the date of approval of the HCV Infected Class Member’s application. Unfortunately, the Claimant did not comply with the deadline prescribed in subsection 4.01(1) of the *Settlement Agreement*. As a result, he is not eligible for compensation as a Family Member under section 4.01 of the *Settlement Agreement*, and the Administrator did not err in denying the claim for compensation.

CONCLUSION

[15] The appeal is dismissed.

"D. McGillis"

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

DATED March 30, 2011

TO: Claimant
Fund Counsel
Administrator