

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: 07-10265

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated December 31, 2008, in which his claim for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis 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 December 5, 2007, the Claimant filed a claim for compensation under the *Settlement Agreement* as a Family Member who was the Spouse of an HCV Infected Class Member. He and the deceased HCV Infected Class Member were married on November 18, 2005. He has received compensation under the *Red Cross Settlement* in the amount of \$10,000.00.

DECISION OF THE ADMINISTRATOR

[3] In a decision dated December 31, 2008, the Administrator denied the claim for compensation on the basis that the Claimant was not a Family Member, as defined in the

Settlement Agreement. In its 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.

As you may already know, every claim for compensation is reviewed and approved based on our review of documentation confirming a series of different but related proven facts. As soon as a claim submission fails to meet one of several approval criteria as set out in the Settlement Agreement, the claim must be denied. It is important to note that in some cases, the subsequent claim evaluation steps were not completed after determining the need to deny the claim. Should you opt to appeal our decision to deny your claim and should you succeed on appeal, any and all pending evaluation steps will have to be completed. [Administrator's Emphasis]

REQUEST FOR REVIEW AND SUPPLEMENTARY EVIDENCE

[4] On February 3, 2009, the Claimant, in his capacity as the HCV Personal Representative, filed a Request for Review. In his reasons for appealing the decision, he stated as follows:

Letter provided from [the Doctor] dated January 26, 2009 where she recanted herself as to her original statement on the claim forms dated November 20, 2008. The Doctor now states that the Hep C that caused my wife to get cirrhosis of the liver can be the reason of her death. As was stated by [the Doctor] no autopsy was done and [the Administrator] should grant the benefit of the doubt since she has now recanted herself.

[5] In her letter dated January 26, 2009, the Doctor stated as follows:

[TRANSLATION] Further to your request for precision concerning the cause of death of [the deceased HCV Infected Class Member], it is impossible for me to confirm beyond any doubt that her infection with Hepatitis C, which was the cause of her cirrhosis, was the cause of her death, in the same way that I will never be able to confirm that Hepatitis C did not contribute to her death because an autopsy was not performed.

[6] Neither the Claimant nor his representative filed any supplementary submissions.

ISSUE

[7] The issue to be determined is whether the Claimant is entitled to compensation as a Family Member.

ANALYSIS

i) Generic Reasons

[8] A review of the Reasons for Decision denying the claim for compensation confirms that the Administrator has used “generic” reasons that did not make any reference to the facts of the case. In the Reasons for Decision rendered on the appeal in Claim File 07-03416, I stated as follows in a case where the Administrator had also used

generic reasons:

[17] A decision-maker, such as the Administrator, who has the obligation to conduct an evidentiary assessment and to make a decision that affects the right of a claimant to obtain compensation has a corresponding obligation imposed by the duty of fairness to provide some reasons to explain the decision reached in each particular case. In the context of the framework established in the *Settlement Agreement*, the reasons do not have to be elaborate and, indeed, may even be very minimal in some cases. Furthermore, there is nothing to preclude the Administrator from using certain generic or standard paragraphs in a decision to explain the applicable provisions or definitions that apply to the claim. However, the decision must also contain sufficient detail to demonstrate that the Administrator understood and considered the specific circumstances of the case, as revealed in the evidence. In the decision, *R. v. Sheppard*, [2002] 1 S.C.R. 869, Binnie J., writing for the Court, explained in paragraph 24 the practical function of reasons as follows:

“... reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be”.

[18] Both a claimant and the public at large have a significant interest in seeing that redress is provided under the *Settlement Agreement* in appropriate circumstances and in understanding why it is not provided in others. In the absence of reasons that explain succinctly the result in the particular case, there is no justification for the decision and no transparency in the decision-making process. In other words, reasons constitute a form of accountability and also assist a claimant in deciding whether to exercise the right of appeal. Indeed, a claimant may decide not to appeal in circumstances where the decision is properly explained.

[19] The Appeal File contained abundant evidence to justify the decision made by the Administrator. In the circumstances, I have decided that it would be simpler and more expeditious for me to prepare reasons that support the decision, rather than remitting the matter to the Administrator [See, by way of analogy, the approach taken by Rothstein J. in *Apotex v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61 at paragraph 72]. I hasten to note that the Administrator could have satisfied the requirement to provide reasons by simply adding a few succinct sentences to its decision. [Emphasis Added]

[9] In its decision, the Administrator denied the claim on the basis that “one of the criteria” in subsection 4.01(1) was not met. It is impossible to determine on reading the decision whether the claim was 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. However, in view of the supplementary evidence

filed on appeal, there is sufficient evidence in the Appeal File to enable me to make the necessary factual findings and to determine whether the claim for Family Member compensation meets the requirements in the *Settlement Agreement*.

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

[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 *Pelletier v. Canada*, [2008] 3 F.C.R. 40 (F.C.A.) at paragraph 47].

[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 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:

(a) an original or notarial copy of the death certificate of the HCV Infected Class Member; and

(b) unless the required proof has already been previously delivered to the Administrator:

(i) if the deceased was a Primarily-Infected Class Member, the proof required by Sections 2.01 and 2.03; or

(ii) if the deceased was a Secondarily-Infected Person, the proof required by Sections 2.02 and 2.03;

(c) the original certificate of appointment of estate trustee, grant of probate or of letters of administration or notarial will (or a copy thereof certified to be a true copy by a lawyer or notary) or such other proof of the right of the claimant to act for the estate of the deceased as may be required by the Administrator;

and

(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).

(2) Notwithstanding the provisions of Section 2.01(1)(b), if a deceased Primarily-Infected Class Member was not tested for the HCV antibody or HCV, the HCV Personal Representative of such deceased Primarily-Infected Class Member may deliver, instead of the evidence referred to in Section 2.01(1)(b), evidence of any one of the following:

(a) a liver biopsy consistent with HCV in the absence of any other cause of chronic hepatitis;

(b) an episode of jaundice within three months of receiving Blood in the absence of any other cause;

(c) a diagnosis of cirrhosis in the absence of any other cause;
or

(d) where the claimant is a Primarily-Infected Hemophiliac, that the Primarily-Infected Hemophiliac has tested positive for HIV prior to his or her death.

Nothing in Section 3.01 will relieve any claimant from the requirement to prove that the death of the Primarily-Infected Class Member who died prior to January 1, 1999 was caused by his or her infection with HCV.

[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. [...]

[18] In circumstances where the eligibility requirements specified in section 3.01 are met, the HCV Personal Representative becomes an “Approved HCV Personal Representative”, which is defined in section 1.01 in the following terms:

“Approved HCV Personal Representative” means an HCV Personal Representative whose claim made pursuant to Section 3.01 or Section 5.05 has been accepted by the Administrator.

[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. [Emphasis Added]

[12] As indicated in the last paragraph of the preceding quote, section 3.03 of the *Settlement Agreement* dictates the compensation to be paid for an HCV Class Infected Member who has died on or after January 1, 1999. For the purposes of the present appeal, it is unnecessary to consider section 3.03, other than to note that, in subsection 3.03(1), compensation payments made in relation to a deceased HCV Infected Class Member are in addition to the payment of other amounts, including Family Member claims under Article Four.

[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, 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 Dependants 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.

[17] When the Administrator accepts a claim for Family Member compensation, the person becomes an “Approved Family Member”, as defined in section 1.01. The definition of “Approved Family Member” provides as follows:

“Approved Family Member” means a Family Member referred to in clause (a) of the definition of Family Member as defined herein, whose Claim made pursuant to Section 4.01 has been accepted by the Administrator.

Clause (a) of the definition of Family Member in section 1.01 states as follows:

“Family Member” means:

- (a) the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of an HCV Infected Class Member;
[...]
unless any person described above opts out of the Class Action in which he or she would otherwise be a Class Member.

A Spouse is therefore included in the definition of Family Member for the purposes of compensation under section 4.02. The term “Spouse” is also defined, but it is unnecessary to consider the definition in the context of the present appeal, as the Claimant is a Spouse, within the meaning of the definition.

[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

(1) The Trustee will create a notional fund within the Compensation Fund, to be known as the “Dynamic Non-Segregated Family Benefits Fund”, for the purpose of monitoring and accounting for 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.

(4) Any positive balance remaining in the Dynamic Non-Segregated Family Benefits Fund on the Termination Date will be distributed pro-rata to Approved HCV Infected Class Members or their HCV Personal Representative based upon the amounts notionally transferred pursuant to Section 4.02(2). [Emphasis Added]

[19] Subsection 4.02(1) mandates the creation of a notional fund, the Dynamic Non-Segregated Family Benefits Fund (“Family Benefits Fund”) within the Compensation Fund “...for the purpose of monitoring and accounting for compensation to Approved Family Members”.

[20] Subsection 4.02(2) is significant, as it requires the Administrator to transfer funds notionally to the Family Benefits Fund for the payment of Family Member compensation “[u]pon 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 [...]”. As a result, the notional transfer of funds to be used for the payment of compensation to Family Members can occur only after the Administrator has approved a claim under Article Two by an HCV Infected Class Member or under section 3.01 by an HCV Personal Representative in relation to an HCV Infected Class Member who has died. In other words, unless a claim is approved under Article Two or section 3.01, the Administrator cannot make any funds available under subsection 4.02(2) for the payment of Family Member claims.

[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.¹ Subsection 4.02(3) must be read in conjunction with the interpretative provision in section 3.04, reproduced in paragraph 13, which states, among

¹ The compensation payable to an Approved Family Member under subsection 4.02(3) of the *Settlement Agreement* is expressly made subject to subsection 5.02(2), which requires a deduction of 8/11ths of any amount previously paid to or on behalf of a Family Member under the *Red Cross Settlement*, as defined in section 1.01.

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.

[22] By virtue of the wording of subsection 4.02(3), Schedule C3A is incorporated by reference into and forms part of the *Settlement Agreement*. Schedule C3A is entitled “Compensation to Family Members” and outlines a grid of lump sum compensation payments for Family Members. The amounts of compensation vary depending upon whether the HCV Infected Class Member has attained a specific Disease Level or is deceased, as the case may be.

[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 was attained prior to death; otherwise, the claim must be denied. This interpretation is also consistent with the purpose of the *Settlement Agreement*, which is to settle all claims relating to or arising from the infection of persons with Hepatitis C through the blood system in Canada during the Class Period, on the terms set out in the *Agreement*.

iii) Has the Claimant met the requirements of subsection 4.01(1)?

[24] In the Supplementary Evidence filed on appeal, the Doctor stated in a letter dated January 26, 2009 that it was impossible to confirm “beyond any doubt” that Hepatitis C was the cause of the death of the HCV Infected Class Member and could also not state that it had not contributed to the death, as no autopsy was performed. When the letter is read as whole, the Doctor has asserted that, in the absence of an autopsy, she can neither confirm nor deny that the death of the HCV Infected Class Member was caused by the infection with the Hepatitis C virus. In the circumstances, there is insufficient proof to establish that the death of the HCV Infected Class Member was caused by the infection with HCV. As a result, the Claimant has failed to meet a fundamental eligibility requirement in subsection 4.01(1), namely that the death of the HCV Infected Class Member was caused by her infection with HCV. Regrettably, his claim for compensation as a Family Member therefore cannot succeed.

[25] Given my conclusion that the supplementary evidence did not establish that the death of the deceased HCV Infected Class Member was caused by the infection with the Hepatitis C virus, it is unnecessary to consider whether she had attained Disease Level 4 prior to death as required by section 3.04 of the *Settlement Agreement*.

iv) Compensation under another program

[26] As indicated previously, the Claimant had applied for and received compensation under the terms of the *Red Cross Settlement*. In the Reasons for Decision rendered in Claim File 07-00464, I commented on the perception of inequity that may arise when compensation is awarded under one plan or agreement and denied under another. In particular, I stated as follows in paragraph 41 of that decision:

[41] I can appreciate the frustration and distress that this decision will cause to the Claimant, particularly given that the member of the provincial review committee found him to be eligible for a benefit under that program. It must be recognized that the framework governing eligibility for compensation under the terms of the *Settlement Agreement* is completely different from the one applied by the member of the review committee in the context of the provincial agreement.

Although I fully understand that it must be confusing and upsetting when compensation is granted under the auspices of one program or agreement and yet denied under another one, the terms of the *Settlement Agreement* govern the present claim and must be applied. It is also 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.

CONCLUSION

[27] The appeal is dismissed.

“D. McGillis”

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

DATED April 22, 2009

TO: Claimant’s Representative
Fund Counsel
Administrator