

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: 09-17799

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated October 5, 2009, 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 specified in subsection 4.01(1).

[2] This is one of nine appeals from Family Members, all of whom are related to one of two HCV Infected Class Members. The primary application for compensation made by the female HCV Infected Class Member was approved on February 12, 2008, and the primary application of the male HCV Infected Class Member was approved on July 28, 2008. The deadlines for the filing of the Family Members claims were either February 12, 2009 or July 28, 2009, depending on whether the Family Member application was made in relation to the female or the male HCV Infected Class Member. The nine appeals are in Claim Files 09-17723, 09-17799, 09-17813, 09-17814, 09-17819, 09-17800, 09-17833, 09-18021 and 09-18051. The principal evidence in support of the appeals was delivered in Claim File 09-17723.

FACTS

[3] On July 28, 2008, the primary application made by the HCV Infected Class Member was approved. The HCV Infected Class Member was represented by a highly experienced senior litigator.

[4] Over a year later, on September 15, 2009, a paralegal clerk in the office of the lawyer sent the following letter to the HCV Infected Class Member concerning the Family Member claims:

Please find enclosed the forms for the family members [sic] claims.

You should have these forms signed by the respective claimants as soon as possible, as well as have them attach a copy of proof of relationship (i.e. birth certificate). Once complete, send them directly to the claims office at:
Pre 1986/Post 1990 Hepatitis C
Suite 3-505
133 Webber Street North
Waterloo, Ontario N2J 3G9

[5] On September 28, 2009, the Claimant delivered an application for compensation under the *Settlement Agreement* as a Sibling of an HCV Infected Class Member; the application was signed on September 22, 2009. She included with her application a copy of the letter from the law firm, reproduced in paragraph 4.

DECISION OF THE ADMINISTRATOR

[6] In a decision dated October 5, 2008, the Administrator denied the claim on the basis that the Claimant had not delivered the application for compensation within the one year time period specified in subsection 4.01(1) of the *Settlement Agreement*. In the decision, the Administrator stated, in part, as follows:

You applied for Family Member compensation as the Sibling 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 is the last to occur. The HCV Infected Class Members [sic] claim was approved July 28, 2008 and your application was delivered to the Administrator on September 28, 2009, which is more than one year after the Approval of the Primary Claim. Based on this the Administrator must reject your claim as the eligibility deadline has passed.
[Emphasis Added]

REQUEST FOR REVIEW

[7] On November 2, 2009, the Claimant delivered a Request for Review and specified her reasons for appealing, in part, as follows:

I received the forms for family member claim for Hepatitis C compensation on Sept. 23/09. The cover letter with the forms came from my brother's lawyer's office [...] stated "You should have these forms signed by representative as soon as possible" That very day, Sept. 23/09, I filled out the forms and mailed them to Crawford Class Action Services. AT NO TIME was I aware that there was a deadline (not that I could have sent them in any earlier anyway). [...]

[8] The supplementary evidence delivered in the related claim file consisted of letters from the Administrator dated December 2, 2009 approving the Family Member applications of minor Grandchildren of the HCV Infected Class Member.¹

ISSUE

[9] Is it in the interests of justice to allow the appeal?

ANALYSIS

i) Interpretation of section 4.01 of the Settlement Agreement

[10] In the Reasons for Decision on the appeal in Claim File 07-10239, I analysed 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

¹ Subsection 4.01(1) of the *Settlement Agreement* provides a different time period for the delivery of applications for minor children.

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. [Emphasis Added]

[11] Subsection 4.01(1) of the *Settlement Agreement* requires, in mandatory terms, the application for compensation of a Family Member to be delivered within one year after the date of approval of an application made by or on behalf of the HCV Infected Class Member.

ii) Is it in the interests of justice to allow the appeal?

[12] The evidence in the claim file establishes that the HCV Infected Class Member was represented by a highly experienced lawyer for the purposes of the application for compensation under the *Settlement Agreement*. The application for compensation of the HCV Infected Class Member was approved on July 28, 2008. By letter dated September 15, 2009, a paralegal clerk in the office of the lawyer sent the Family Member claim

forms to the HCV Infected Class Member. In the letter, she stated that the forms should be sent to the Administrator by the Family Member claimants as soon as possible with the requisite proof of relationship. Unfortunately, it appears that the paralegal clerk in the law firm made an error in calculating the date by which the Family Member claims had to be delivered in order to comply with the time period prescribed in subsection 4.01(1) of the *Settlement Agreement*. Rather than sending the letter to the HCV Infected Class Member in sufficient time to have the Family Member claims delivered by the required dates in either February or July 2009, depending upon the application to be made, she sent the letter in September 2009 for a deadline that she had apparently erroneously calculated as a date early in 2010. The HCV Infected Class Members and the Family Members had relied on the law firm for the provision of advice concerning their applications for compensation.

[13] Subsection 4.01(1) of the *Settlement Agreement* requires, in mandatory terms, a Family Member application for compensation to be delivered within one year after the date of approval of the HCV Infected Class Member's application. The Family Member application therefore had to be delivered before February 12, 2009. There is no provision in the *Settlement Agreement* to permit the Appeals Officer to extend the time for the delivery of an application for Family Member compensation.

[14] Despite the absence of a provision permitting the extension of the time period in subsection 4.01(1) of the *Settlement Agreement*, the factual circumstances of the present appeal require intervention in order to prevent a manifest injustice from occurring. Otherwise, an isolated administrative error made in the office of a highly experienced lawyer would result in severe and irreparable prejudice to the Family Members of an

approved HCV Infected Class Member by preventing them from delivering their applications. The evidence in the claim file demonstrates that the Family Members had a continuing intention to pursue their applications and relied on advice given by the law firm concerning the deadline for the delivery of the applications. Furthermore, given the approval of the HCV Infected Class Member's claim, the Family Member applications are clearly meritorious and would be approved by the Administrator upon delivery of the proof of relationship required in subsection 4.01(1) of the *Settlement Agreement*. In the circumstances, there is no prejudice to anyone other than the Family Members arising from the delay. Finally, in the absence of an intervention, the Family Members would have no other effective recourse to remedy the prejudice caused to them. Given the unusual facts, my intervention is required in the interests of justice in order to remedy an otherwise irreparable prejudice. I should add that this is a highly unusual situation and my decision in this matter is strictly limited to the facts of this case.

[15] The application for compensation as a Family Member delivered by the Claimant on September 22, 2009 shall be deemed to have been delivered within the time period prescribed in subsection 4.01(1) of the *Settlement Agreement*, and the Administrator shall consider the application on its merits.

CONCLUSION

[16] The appeal is allowed.

"D. McGillis"

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

DATED March 5, 2010

TO: Claimant
Fund Counsel
Administrator