

THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR DATED
DECEMBER 16, 2024

CLAIM NUMBER: 712297

DATE OF HEARING: April 23, 2025

DATE OF ORAL SUBMISSIONS: May 9, 2025

DATE OF DECISION: September 4, 2025

REFEREE: Wes Marsden

APPEARANCES: Claimant & Five Witnesses
Belinda Bain, Fund Counsel

Decision

BACKGROUND:

- 1) The Claimant, an Ontario resident, submitted an application for compensation as a Family Member under the 1986-1990 Hepatitis C Settlement Agreement (the “Settlement Agreement”) Transfused HCV Plan (the “Plan”). A.F. was the primarily infected person who passed away on December 20, 2017. A.F. was the Claimant’s paternal aunt. She was also affectionally known by the Claimant as T.M. which is an endearing Croatian term for aunt. I will refer to her as T.M. throughout this decision.
- 2) On December 16, 2024, the Settlement Administrator denied the claim for compensation on the basis that the Claimant did not qualify as a Child of the primarily infected person pursuant to the definition contained in the Plan.
- 3) The Claimant subsequently filed an appeal of the Administrator’s decision. The Claimant submits that pursuant to section 1.01 of the Plan, the definition of “Child” includes a child to whom a person has demonstrated a settled intention to treat as a child of his or her family.
- 4) The Claimant takes the position that she ought to fall within the definition of “child” under the Plan, due to the close relationship she had with T.M. She states that T.M. had a settled intention to treat the Claimant as her own child.

- 5) Fund Counsel submits that the Claimant does not qualify for compensation on the basis that the evidence does not support a finding that T.M. had a settled intention to treat the Claimant as one of her own.
- 6) The Claimant requested that a Referee review the Administrator's decision. On April 23, 2025, a Zoom hearing was completed using the Zoom media platform. The Claimant called five witnesses who all testified about the close nature of the Claimant's relationship with T.M. In addition, the Claimant also testified and was subjected to cross-examination. Because of the abundance of evidence and supporting materials, the final submissions were adjourned to May 9, 2025. The Claimant was self-represented during the process. The Claimant provided a written copy of her oral argument following the submissions. In addition, Fund Counsel had presented preliminary written submissions well in advance of the hearing.
- 7) The Claimant's two siblings are also appealing the Administrator's decisions in their respective files. I proposed to the parties that I would release all three decisions at the same time as similar issues are being raised in the three appeals. The parties did not object to proceeding in this manner. However, on July 10, 2025, the Claimant requested that she receive her decision prior to the hearing of her siblings' appeals. Accordingly, I am finalizing this matter before hearing the appeals in the siblings' matters.

SETTLEMENT AGREEMENT:

8) Section 3.07 of the Plan provides for compensation to be paid to Family

Members of a Primarily Infected Person who's death was caused by HCV:

3.07 Late Claim by Family Member

A person referred to in clause(a) of the definition of Family Member in Section 1.01 claiming to be a Family Member of a HCV Infected Person who has died and who is determined eligible to make a Late Claim pursuant to Appendix E of this HCV Late Claims Benefit Plan or a person referred to in clause (a) of the definition of Family Member in Section 1.01 claiming to be a Family Member of a deceased HCV Infected Person whose Late Claim is accepted by the Administrator a Late Claim application form prescribed by the Administrator together with:

- a. proof as required by Sections 3.05(1)(a) ¹ and (b)² (or, if applicable, Sections 3.05(3)(Tran) or 3.05(3)(Hemo) or (4)) and 3.05(5)(Tran) or 3.05(5)(Hemo) and (6)³, unless the required proof has been previously delivered to the Administrator); and
- b. proof that the claimant was a Family Member the HCV Infected Person referred to in clause (a) of the definition of Family Member in Section 1.01.

9) The plan also provides the following definition of "Family Member" in s.1.01:

"Family Member" means:

- a. the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of a HCV Infected Person;
- b. the Spouse of a Child, Grandchild, Parent or Grandparent of a HCV Infected Person;
- c. a former Spouse of a HCV Infected Person;
- d. a Child or other lineal descendant of a Grandchild of a HCV Infected Person;
- e. a person of the opposite sex to a HCV Infected Person who Cohabited for a period of at least one year with that HCV Infected Person immediately before his or her death;
- f. a person of the opposite sex to a HCV Infected Person who was Cohabiting with that HCV Infected Person at the date of the HCV Infected Person's death and to whom that HCV Infected Person was providing support or was under a legal obligation to provide support on the date of the HCV Infected Person's death; and
- g. any other person to whom a HCV Infected Person was providing support for a period of at least three years immediately prior to the HCV Infected Person's death.

10) This same section of the plan also provides the following definition of "Child":

- a. an adopted child;

- b. a child conceived before and born alive after his or her parent's death; and
- c. a child to whom a person has demonstrated a ***settled intention*** to treat as a child of his or her family; ***[Emphasis Added]***

11) The primary issue in this appeal is whether T.M. demonstrated a settled intention to treat the Claimant as a child of her family. The term “settled intention” is not defined in The Plan.

12) The primarily infected person was the Claimant’s aunt. She was infected with HCV and passed away on December 20, 2017. A claim made by the estate was approved on May 4, 2021. On September 9, 2024, the Claimant submitted a late claim request. On September 12, 2024, a Court Appointed Referee granted the Claimant permission to file a late claim. On December 16, 2024, the Administrator denied the claim on the basis that the Claimant did not qualify as a “Family Member” pursuant to The Plan.

EVIDENCE AT THE HEARING

13) The Claimant called five witnesses who all testified that the Claimant had a very strong and close relationship with T.M. Fund Counsel acknowledged the Claimant’s incredibly strong bond with T.M. All the witnesses spoke about T.M. treating the Claimant like a daughter. I have considered all the evidence and will highlight some of the key points.

- 14) The first witness was the Claimant's husband. He testified that the Claimant's relationship with T.M. was more like a mother/daughter relationship. He noted that the Claimant's biological parents did not attend their wedding. Rather, T.M. prepared the Claimant for the wedding and bought her wedding dress. The Claimant would also bathe T.M. and tend to her homemaking chores when she was ill. They would also go on vacations together. In the witness' opinion, T.M. was more of mother than her own biological mother. During cross-examination, the witness indicated that the Claimant never called T.M. "mother". The witness also testified that he never saw T.M. discipline the Claimant, nor did she have control over the Claimant's finances. He further stated that the Claimant did not rely on T.M. completely for finances.
- 15) The second, third and fourth witnesses were all long-time friends with the Claimant. These witnesses all confirmed that T.M. was like a mother figure to the Claimant. The second witness (M.I.) testified that T.M. purchased the Claimant's wedding dress and helped with her university tuition. During cross-examination, M.I. testified that the Claimant's visits to T.M.'s residence were temporary and that she was not aware of any attempts by T.M. to adopt the Claimant. She never observed T.M. discipline the Claimant.
- 16) The third witness (A.F.) has known the Claimant since kindergarten. In her opinion, the Claimant was closer to T.M. than her biological mother. She also confirmed that the Claimant provided care to T.M. when her health deteriorated. During cross-examination, A.F. testified that the Claimant resided with her

parents until she moved out and that her primary residence was at her parent's house during her school age years. She never heard the Claimant call T.M. "mother", however, A.F. believes that the connection was very much like a mother-daughter relationship.

- 17) The fourth witness (D.T.) has also been a long-time friend with the Claimant and is also a distant relative. She testified that T.M. referred to the Claimant and her siblings as her own children. The Claimant always seemed to reach out to T.M., particularly when she achieved certain milestones. During cross-examination, D.T. testified that the Claimant's biological parents provided the primary financial support for the Claimant. She also stated that adoption does not go over well in their Croatian culture as your "parents are your parents."
- 18) The fifth witness (J.L.) was T.M.'s long-time friend. She also testified that T.M. considered the Claimant and her siblings as her own children. She stated that T.M. counselled the Claimant on her education, housing and relationships. J.L. believes that the Claimant had the biggest role in T.M.'s health care. During cross-examination, J.L. testified that T.M. required dialysis in the early 90's and that this was required before T.M. was diagnosed with Hep C. She also confirmed that the Claimant never actually moved in with T.M. and that she never witnessed T.M. disciplining the Claimant. She also confirmed that T.M. would occasionally discuss the children's best interests with the Claimant's biological mother and that her mother had a voice. T.M. was never named as an official guardian by the courts.

- 19) The Claimant also testified. She considered T.M. to be a second mother and believes she had a closer relationship to T.M. than her biological mother. T.M. helped the Claimant with her school and provided guidance on her field of studies at university. She also confirmed that adoption was not possible because of their Croatian cultural beliefs. T.M. was gentle and loving and would never yell at the Claimant and her siblings.
- 20) During cross-examination, the Claimant testified that T.M. purchased her food and clothing while growing up and that she went on vacations with her parents. The Claimant remained in the family home until 2009 when she purchased a home with her husband. There was never a time when T.M. had complete financial responsibility for the Claimant with the exception of extended stays with T.M. in the summer at the cottage. The Claimant never expected to be financially dependent on T.M. as she was on a fixed income. The Claimant acknowledged that she never resided with her aunt on a permanent basis. When T.M. was sick and at the end of life, it was as though the Claimant was the parent and T.M. was the child. The Claimant confirmed that her father and grandfather received family member payments from the Hep C Settlement Agreement.
- 21) Some of the witnesses testified that the Claimant's biological mother was somewhat of a "cold" person and not really immersed in the Claimant's life. The Claimant also spoke about some unconventional disciplinary measures that she endured from her mother.

SUBMISSIONS:**Claimant:**

22)The Claimant takes the position that she falls within the definition of “child” under the Plan, due to the close relationship she had with T.M. She states that T.M. had a settled intention to treat her as her own child.

23)The Claimant further submits that the Administrator’s decision violates the Charter and Human Rights. The Claimant submits that T.M. was denied the ability to have biological children due to medical negligence and that denying her legal recognition as a parent contravenes Charter and Human Rights principles. Recognizing T.M.’s role as a parent is essential to restoring T.M.’s dignity and autonomy and is necessary to prevent further discrimination against a person who was unjustly denied motherhood.

24)The Claimant also submits that the position taken by the Administrator violates section 15 of the Charter in that denying the recognition of a niece or nephew as a child pursuant to the Plan is discriminatory and unjust. The Claimant argues that the Charter is applicable because the Settlement Agreement (Administrator) is acting on behalf of the Government, which is bound by the Charter.

Fund Counsel:

25) Fund Counsel acknowledges that the Claimant had an incredibly strong and close relationship with T.M. However, Fund Counsel submits that nieces and

nephews are not included in the definition of Family Members under the Plan.

Had it been the intention that nieces and nephews were to receive compensation, the parties and the Courts could have included them in the definition of Family Members.

26) Fund Counsel further submits that while not defined under the Plan, the phrase “settled intention to treat as a child of one’s own” has a specific meaning in estates and family law jurisprudence. The leading case from the Supreme Court of Canada, *Chartier v. Chartier* (1999 CanLII 707), provides that every case must be determined on its own facts and it must be established from the evidence that the adult acted so as to stand in the place of a parent to the child. Kindness, common courtesy or hospitality is not enough.

27) Regarding the application of the Charter and Human Rights, Fund Counsel cited a decision where the Supreme Court of Canada held that the Charter does not apply to private litigation.¹ In addition, Counsel referenced an Ontario Superior Court of Justice decision which held that the Ontario Human Rights Code does not apply to a distribution protocol in a class action.²

28) Fund Counsel submits that the Claimant did a great job in reviewing the caselaw and that they do not disagree much on the applicable principles. Rather the

¹ See *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573.

² *Eidoo. V. Infineon Technologies A.G.*, 2015 ONSC 5493, paragraph 6.

competing views arise from their respective application of the evidence to the legal test set out in the caselaw.

- 29) This legal test for determining whether a parental relationship exists is set out in *Chartier, supra* at paragraph 39:

The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent.

- 30) Fund Counsel also references an Ontario Court of Justice decision in *Watts v.*

Watts, 2011 ONCJ 104 where Justice Spence cites a research paper prepared by Professor Rogerson. This well-known family law professor examined the caselaw post *Chartier, supra*. She concludes as follows at page 8:

However, in my opinion, the ***threshold for a parental status finding must be pegged at a sufficiently high point that it avoids the imposition of obligations and the acquisition of access and custody rights except where the step-parent can be clearly shown to have assumed the role of the natural parent and in substantial substitution for the natural parent's role.***

- 31) Fund Counsel also tendered a legal opinion from the law firm Branch McMaster who concluded that the Claimant does not qualify for compensation based on the requirements set out in the Settlement Agreement and the applicable principles arising from the leading court decisions.

- 32) Fund Counsel notes that the legal opinion provided by Branch MacMaster summarized the cases dealing with the legal term “Settled Intention”. She notes that there was not a single case where a niece or nephew fell within the “Settled Intention” scenario.

DECISION:

- 33) The Claimant applied for compensation under the terms of the Hepatitis C 1986-1990 Class Action Settlement. The terms of the Settlement Agreement provide a detailed outline of who is eligible for compensation from the Fund and how eligibility is established. The Transfused HCV Plan is applicable in this case and is set out in Schedule A of the Settlement Agreement.
- 34) As noted at the outset of this decision, the primary issue is whether the Claimant qualifies as a “Child”. Specifically, was she a child to whom T.M. had demonstrated a settled intention to treat her as a child of her family.
- 35) Having considered the evidence presented in this matter and the oral and written submissions of the parties, I am not satisfied that the Claimant qualifies for compensation. Specifically, I find that the Claimant does not fall within the definition of “child” pursuant to the Plan. In order to qualify as a “child”, I would need to be satisfied that T.M. demonstrated a settled intention to treat the Claimant as a child of T.M.’s family.
- 36) Like Fund Counsel, I recognise that the Claimant had an incredibly strong bond with her aunt. The Claimant did a great job in calling witnesses to corroborate

the strength of this relationship. However, I must also be satisfied that T.M. took on the formal responsibility for the Claimant's upbringing.

37) The phrase "settled intention" is not defined in the Plan, however, in *Chartier, supra*, the Supreme Court of Canada provided a list of relevant factors. These considerations are restated as follows:

- Whether the child participates in the extended family in the same way as would a biological child;
- Whether the person provides financially for the child (depending on ability to pay); -
- Whether the person disciplines the child as a parent;
- Whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child;
- The nature or existence of the child's relationship with the absent biological parent.

38) In this case, the evidence established that with the exception of some extended visits to T.M.'s house or cottage, the Claimant's primary residence was at her parent's house. In fact, she continued to reside at their home during her post-secondary schooling and remained there until she purchased a house with her spouse. According to the evidence, the Claimant's parents had primary financial responsibility for the Claimant. They fed the Claimant, took her on trips and performed all the child-rearing obligations. Clearly, the Claimant's aunt had a fixed income and could only provide limited financial support. I place minimal weight on the financial contribution factor due to T.M's limited ability to provide financial support.

39) In my view, one of the more significant considerations is that the Claimant's biological parents were not absent. Rather, they were the Claimant's primary

caregivers. She resided with them on a full-time basis and relied on her parents for sustenance. They cannot be characterized as “absent” biological parents.

40) In the *Watts, supra* decision, the Court cites a research paper completed by Professor Rogerson. She conducted a review of the cases dealing with this issue post *Chartier*. This decision was made in a family law context where Justice Spence of the Ontario Court of Justice was grappling with the issue of whether a person should be required to pay support. Professor Rogerson wrote that the imposition of obligations and the acquisition of access and custody rights should only be imposed where the person can clearly be shown to have assumed the role of the natural parent and in substantial substitution for the natural parent’s role. Professor Rogerson’s opinion is relevant in this case in the context of considering a person’s entitlement to a benefit for the loss of guidance, care and companionship as opposed to obligations imposed on someone. Based on the evidentiary considerations noted above, I am not convinced that T.M. assumed the role of the natural parent, nor was she acting in substantial substitution for the natural parents. I also note that one of the witnesses testified that T.M. would not make parental decisions herself. Rather, she would talk to the Claimant’s natural parents regarding issues that required parental decisions.

41) When applying the relevant legal considerations to the facts in this case, I cannot conclude that the T.M. had a settled intention to treat the Claimant as her own child. She clearly loved the Claimant very much and indeed was likely the

closest person in T.M.s life, however, this is not sufficient to meet the definitions at set out in “The Plan.”

APPLICATION OF THE CHARTER AND HUMAN RIGHTS

42) The Claimant submits that the Administrator’s decision violates section 7 and 15 of the Charter. Specifically, the Claimant submits that because of medical malpractice, T.M. was denied the ability to have biological children and that it is essential to recognize T.M. as a parent in order to restore her dignity and autonomy. In addition, the Claimant submits Human Rights legislation protects the right to family life, which should include non-traditional structures when they arise due to medical injustices. In essence, the Claimant is submitting that because of the blood transfusions, T.M. lost her ability to bear children and that these purported injustices can be remedied by recognizing her as a parent pursuant to the Plan.

43) In her submissions, Fund Counsel referenced the decision of *Retail, Wholesale and Department Store Union, local 580, supra* where the Supreme Court of Canada clearly stated that the Charter does not apply to private litigation. Further, section 32 of the Charter specifically provides that the Charter only applies to the legislative, executive and administrative branches of government.

44) It is important to note that the Settlement Agreement in this case arose from civil actions that were commenced by Transfused Plaintiffs. Indeed, it was negotiations arising from private litigation that led to the Plan as opposed to a

government programming initiative. As such, find that the Charter does not apply to the Settlement Agreement because it is a creation that arises from private litigation and is administered by a private Class Action Services Company. There is a Joint Committee that consists of legal counsel. The primary duty of the Joint Committee is to oversee and supervise the implementation of the compensation plans. This committee reports to the Courts as opposed to a government body.

45) Regarding the Human Rights argument, Justice Perrell clearly stated in *Eidoo, supra*, that the Ontario Human Rights Code does not apply to a distribution protocol in a class action. In that case, the Plaintiffs also argued that the distribution protocol discriminated against certain individuals.

46) Fund Counsel also submits that it is not fair to suggest that T.M.'s inability to have children arises from medical negligence associated with the Hep C. diagnosis. Rather, Fund Counsel submits that T.M. had longstanding kidney issues long before she contracted Hep C as she had required two kidney transplants in the past. She had struggled with efforts to conceive long before she was diagnosed with Hep C at the age of 45.

47) In view of the foregoing, I agree with Fund Counsel's submission that an order of the Court cannot be equated with government action for the purposes of Charter Application.

48) To conclude, I find that the Administrator has properly determined that the Claimant does not qualify as a Child of the Primarily Infected Person. The

decision of the Administrator to deny the Claimant compensation pursuant to Settlement Agreement is upheld.

Date September 4, 2025

A handwritten signature in black ink, appearing to read 'Wes Marsden', with a stylized flourish at the end.

Wes Marsden, Referee