

FEDERAL COURT

PROPOSED CLASS PROCEEDING

ESTATE OF GORDON ALLEN

Plaintiff

and

HIS MAJESTY THE KING

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules* serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.



Date _____ Issued by _____

Address of
local office: 90 Sparks Street
Ottawa, Ontario
K1A 0H9

TO: His Majesty the King
C/O the Registry
Federal Court of Canada
90 Sparks Street
Ottawa, Ontario
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AND TO: The Attorney General of Canada
C/O the Registry
Federal Court of Canada
90 Sparks Street
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CLAIM

Overview

1. This proposed class proceeding concerns the Defendant's errors in the calculation of charges imposed on Canadian veterans for accommodation and meals ("A&M Charges"). A&M Charges are payable by veterans of the Canadian Armed Forces ("CAF"), overseas service veterans, war-service civilians, and others ("Class Members"). Class Members were required to pay A&M Charges while receiving adult residential care, intermediate care, or chronic care. The Defendant's errors resulted in the Plaintiff and Class Members being significantly overcharged for the cost of their care.

2. The *Veterans Health Care Regulations* ("VHCRs") provide benefits to Class Members for the basic costs of accommodation and meals related to long-term care. Veterans Affairs Canada ("VAC") administers A&M Charges under the VHCRs. VAC requires Class Members to pay A&M Charges, to a maximum amount, as a mandatory fee for the cost of their care.

3. Annual adjustments to A&M Charges under the VHCRs ensure monthly charges do not exceed the lowest provincial rate for such charges or increases in the Canadian Consumer Price Index. A&M Charges are based on a maximum monthly amount that is the lesser of: (a) the lowest monthly user charge for accommodation and meals permitted by a province ("Provincial Rate"); or (b) annual increases to income factors specified in paragraph 2(a) of a schedule to the *War Veterans Allowance Act*, which is adjusted to reflect changes to the Canadian Consumer Price Index ("CPI Rate").

4. Since at least 1 October 1998, the Defendant has miscalculated annual adjustments to A&M Charges by failing to apply the lowest Provincial Rate, typically the monthly user charge rate for accommodation and meals in the territories, including the Northwest Territories (or “NWT”). At relevant times, the NWT charged lower monthly user charges for accommodation and meals than other provinces. Section 35 of the *Interpretation Act* defines “province” in every enactment to include territories, including the NWT. The Defendant’s errors resulted in higher A&M Charges to individual veterans.

5. At material times, the Defendant has required the Plaintiff and Class Members to pay substantially more for the cost of their care than required by law.

6. The Defendant is liable to the Plaintiff and Class Members for damages, equitable compensation, and/or restitution, and related amounts, plus interest, arising from overcharges. Class Members are a venerable group who include veterans who served Canada and/or its allies during war and other military conflicts. Class Members have suffered harm because of the Defendant’s errors and omissions in calculating A&M Charges. The Defendant caused, and continues to cause, Class Members, many of whom became disabled because of their service to Canada, to expend more of their limited financial resources for the cost of their long-term care than prescribed by law.

7. The Plaintiff therefore claims on behalf of the Plaintiff estate, and on behalf of Class Members:

- (a) an order pursuant to Part 5.1, Rules 334.12, 334.16, and 334.17 of the *Federal Courts Rules* certifying a class proceeding, and appointing the Estate of Gordon Allen as a Representative Plaintiff;

- (b) a declaration that the Defendant has erred in calculating A&M Charges, thereby requiring the Plaintiff and Class Members to pay greater A&M Charges than required by law;
- (c) an order for damages in an amount equal to the amount of excess A&M Charges the Plaintiff and Class Members were wrongfully required to pay because of the Defendant's calculation errors;
- (d) an order for restitution equal to the amount of excess A&M Charges the Plaintiff and Class Members wrongfully paid;
- (e) an order for general damages in an amount to be proven at trial;
- (f) an order for equitable compensation to account for loss of use of monies because the Defendant over-charged Class Members based on erroneous calculation of A&M Charges;
- (g) pre-judgment and post-judgment interest on all overpayments of A&M Charges;
- (h) costs of this action;
- (i) costs of notice and of administering a plan for distribution of the recovery in this action, plus applicable taxes, pursuant to Rule 334 of the *Federal Courts Rules*; and
- (j) such further and other relief as this Court deems just.

8. The statutory grounds for the claim include:

- (a) *Federal Courts Act*, R.S.C. 1985, c. F-7 and *Federal Courts Rules*, SOR/98-106;
- (b) *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50;
- (c) *Department of Veterans Affairs Act*, R.S.C., 1985, c. V-1, and *Veterans Health Care Regulations*, SOR/90-594;
- (d) *War Veterans Allowance Act*, R.S.C., 1985, c. W-3;
- (e) *Interpretation Act*, R.S.C. 1985, c. 21; and
- (f) such further and other statutory or regulatory provisions as counsel may submit and this Court accept.

Parties

a) Plaintiff

9. Gordon Allen honourably served Canada in the European theatre as a member of the CAF during the Second World War. During his service, Mr. Allen suffered an injury that affected him throughout his life. Mr. Allen passed away in 2022 after admission into a long-term care facility in 2019, during which time Mr. Allen paid the maximum A&M Charges for his care. Jack Allen is the estate trustee of the Plaintiff, the Estate of Gordon Allen.

b) Defendant

10. His Majesty the King is named pursuant to section 3 of the *Crown Liability and Proceedings Act* on behalf of the Government of Canada and the Minister of Veterans Affairs.

11. The Minister of Veterans Affairs, through VAC, is responsible for administering the *VHCRs*, including calculating A&M Charges and determining the A&M Charges VAC requires Class Members to pay.

Mandatory A&M Charges

12. Canada's commitment to the care of injured or disabled veterans dates to the First World War.

13. In introducing Budget 2016 in Parliament, the Defendant reiterated its commitment to veterans, stating: "Our veterans have dedicated their lives to the defence of their country. They deserve our gratitude, our respect and our support. We made a solemn promise that they will have it. And we will keep that promise."

14. As part of Canada's long-standing commitment to veterans, the *VHCRs* require VAC to financially support the needs of eligible veterans who require facility-based care. Under the *VHCRs*, veteran eligibility for long-term care support, as well as the type of long-term care setting, depends on the type and location of military service, income, health care needs, and whether the need for long-term care is related to a service-related disability.

15. The *VHCRs* require that, unless exempted, veterans in long-term care who receive financial support from VAC must contribute to the cost of their accommodation and meals by paying A&M Charges. Individuals exempted from paying A&M Charges include those whom VAC assesses to be in receipt of care for a service-related disability and individuals who are assessed to be 78% disabled or more. Additionally, certain individuals in receipt of chronic care by virtue of having insufficient income are assured a minimal monthly income equal to the applicable War Veterans Allowance income factor. Any income exceeding that amount, however, must be contributed toward the cost of their care and they are also required by VAC to pay up to the maximum A&M Charges.

16. At the time of enactment in 1990, the *VHCRs* included provisions for an annual adjustment formula for A&M Charges based on the lowest user charge for accommodation and meals permitted by a province.

17. On 15 July 1998, the Defendant revoked certain provisions of the previous *Veterans Health Care Regulations* and enacted the current section 33.1. Section 33.1 of the *VHCRs* revised the annual adjustment formula for setting the maximum monthly A&M Charges for eligible veterans residing in care facilities, effective 1 October 1998.

18. The Defendant calculates the maximum A&M Charges annually on 1 October and the rate remains in effect until 30 September of the following year. The Defendant therefore adjusts the A&M Charges a veteran is required to pay effective 1 October each year, and the contribution is presumptively the same until 30 September of the next year.

19. VAC requires individuals to pay their A&M Charges directly to the facility where they receive care or to VAC, depending on the circumstances.

Annual Adjustments to the A&M Rate

20. The formula for annual adjustments to maximum monthly A&M Charges is in section 33.1(4) of the VHCRs, which provides that the maximum monthly accommodation and meal charge for any of the 12 months after September 30 of a year is the lesser of (a) or (b):

(a) the lowest monthly user charge for accommodation and meals permitted by a province, under section 19 of the *Canada Health Act*, on July 1 of the same year;

OR

(b) the maximum monthly accommodation and meal charge that applied immediately prior to October 1 of the same year, multiplied by the ratio that

(i) the income factor specified in paragraph 2(a) of the schedule to the *War Veterans Allowance Act* that is effective on July 1 of the same year

bears to

(ii) the same income factor that was effective on July 1 of the preceding year.

21. Section 19 of the *War Veterans Allowance Act* prescribes quarterly adjustments to income factors—basic monthly income amounts—specified in a schedule to the *War Veterans Allowance Act* that reflect changes in the Canadian Consumer Price Index.

Calculation Error

22. Since at least 1 October 1998, the Defendant has miscalculated annual adjustments to A&M Charges by failing to use the lowest monthly user charge for accommodation and meals permitted by the territories, including the NWT. The NWT had lower charges for accommodation and meals than other provinces during the relevant period. Section 35 of the *Interpretation Act* defines “province” in every enactment to include territories, including the NWT. The errors resulted in higher annual adjustments to A&M Charges the Defendant requires Class Members to pay.

23. The Plaintiff claims, on behalf of the estate and all Class Members, damages or restitution in an amount equal to the amount of all excess A&M Charges, equitable compensation to account for loss of use of the overcharged amounts, and/or interest and any related loss caused by the errors in calculating A&M Charges.

Violation of the *Veterans Health Care Regulations*

24. Requiring Class Members to pay excess A&M Charges violates the terms of the *VHCRs*, including section 31.1.

Negligence

25. The overpayment of A&M Charges violates the duty and standard of care the Defendant owes to the Plaintiff and the Class Members under the *VHCRs* and constitutes negligence. The Plaintiff and the Class Members suffered damages caused, in fact and in law, by the Defendant’s negligence in miscalculating and applying annual adjustments

to A&M Charges. The damages suffered by the Plaintiff and the Class Members are direct and not too remote in law.

Unjust Enrichment

26. Requiring individuals to pay excess A&M Charges is unjustified in law. There is no juristic reason for failure to comply with the *VCHRs* by properly calculating annual adjustments to amounts Class Members must pay to contribute to the cost of their long-term care. The Defendant has been unjustly enriched by overcharging Class Members through improper calculation of A&M Charges. The Plaintiff and Class Members have been unjustly deprived of these amounts.

Breach of Fiduciary Duty

27. As the sole administrator of accommodation and meal benefits and A&M Charges under the *VHCRs*, the Defendant owed a fiduciary duty to the Plaintiff and Class Members.

28. The Defendant's unique position as the sole administrator of accommodation and meals benefits and A&M Charges under the *VCHRs* left the Plaintiff and Class Members uniquely, and peculiarly, vulnerable to the exercise of power and/or control maintained by the Defendant.

29. The Defendant breached its fiduciary duty by failing to ensure the Plaintiff and the Class Members did not pay excessive A&M Charges, which resulted in an unjustified financial benefit to the Defendant and VAC. The breach of fiduciary duty caused the Plaintiff and Class Members damage and loss for which the Defendant is liable.

Breach of Contract

30. The Plaintiff and the Class Members served Canada, including in war and/or other military conflicts. In recognition of their service, accommodation and meals benefits under the *VHCRs* are meant to financially support eligible veterans in an appropriate long-term care setting.

31. The Defendant made common representations to the Plaintiff and Class Members in documents, direct mailings, brochures, orientation kits, and web postings that eligible individuals were required to pay only appropriate A&M Charges.

32. The Defendant has failed to honour its contractual obligations by unreasonably requiring the Plaintiff and the Class Members to pay excess A&M Charges.

Accounting

33. Further, or in the alternative, the Plaintiff and the Class Members, are entitled to an accounting and disgorgement of the benefits that accrued to the Defendant arising from the calculation errors. The accounting should include all money, and any other form of consideration, had or received by the Defendant up to and including the date of the trial of this proposed class proceeding. The Defendant should be ordered to pay all amounts as may be determined pursuant to the accounting, along with equitable compensation and/or interest for the loss of use any amounts improperly charged.

Estate of Gordon Allen

34. Gordon Allen entered the CAF in or about 1940 and honourably served Canada during the Second World War. He participated in the Normandy invasion in June 1944 and was later injured in Belgium in the Autumn of 1944. After serving time in a British field hospital, he was discharged from the CAF in 1946. In 2019, the Defendant approved Mr. Allen for financial support for long-term care at a facility in Ontario where Mr. Allen received care. Despite Mr. Allen's request for an exemption from A&M Charges, the Defendant required Mr. Allen to pay A&M Charges at the maximum rate. Mr. Allen, who died in 2022, was directly affected, harmed by, and received no benefit from the excess A&M Charges the Defendant wrongfully required him to pay toward the cost of his care.

The Proposed Class

35. For purposes of sections 334.16(1)(b) and 334.17(1)(a) of the *Federal Courts Rules*, the Plaintiff proposes the following class definition:

All individuals, including veterans of the Canadian Armed Forces, reserve force members, overseas service veterans, war-service civilians or pensioners, and their survivors, including eligible estates of all such persons, who received benefits for long-term care under the *Veterans Health Care Regulations* and paid, at any time since at least 1 October 1998, accommodation and meals charges.

The Plaintiff proposes that this action be tried at Ottawa.

28 October 2024



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