Date: 20071214

Docket: T-916-06

Citation: 2007 FC 1322

Ottawa, Ontario, December 14, 2007

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

THE ESTATE OF HORACE YALE KRASNICK and RONALD MARK KRASNICK

Applicants

and

MINISTER OF VETERANS AFFAIRS CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application seeks judicial review of the decision of the Director General, National Operations Division of the Department of Veterans Affairs dated May 5, 2006 denying Horace Yale Krasnick eligibility for reimbursement of Chronic Care Benefits in the period from June 17, 2000 to October 8, 2004. The application seeks to quash that decision and the decisions which it affirms; the application also seeks in the alternative a declaration as to certain sums of money, with interest, and certain declarations as to the *Charter*. For the reasons provided, I find that the application is allowed to the extent that the Minister is to reconsider the matter having in mind these Reasons which indicate that monthly payments for the 18 months preceding October 2004 are allowable,

together with interest, all as more particularly set out in these Reasons. The Applicants are awarded costs to be taxed in the middle of Column III.

[2] This application was commenced in the name of Horace Yale Krasnick (referred as HYK by the parties but whom I will call Horace) and his son Ronald Mark Krasnick (referred to as RMK by the parties but whom I will call Ronald); who had power of attorney respecting the affairs of Horace.

[3] In brief, Horace served with the Canadian Armed Forces in the Second World War during which time he was injured in the right knee for which he received a small pension from the Department of Veterans Affairs (DVA). Horace died in his 91st year in June 2006, about two weeks after this application was commenced. This application has been carried on in the name of the Estate of Horace and of Ronald who became executor of Horace's will. Ronald is Horace's only heir.

[4] From 1955 to 1999, Horace lived at home and subsequently in a facility in the Côte St. Luc area of Montreal. In 2000, at the instance of his son, Horace was examined by medical specialists in Montreal who recommended that he be placed in a long-term care facility. Ronald was an orthopaedic doctor but resided and practiced in the United States and deemed it impractical to move his father there. There appears to have been a lack of availability of proper care facilities in the public sector and, after consultation with the specialists who recommended that he be placed in a long-term care facility, Horace was placed in a facility known as Chateau Westmount Nursing

Home (sometimes called CW by the parties) on June 17, 2000 where he remained for the rest of his life. The expenses incurred by Horace at such facility were in the order of $4,850.00 per month. They were paid first out of the assets of Horace and later when the assets ran out, were paid by Ronald.

[5] In about October 2004, Ronald was informed, by coincidence, that Horace might be eligible to receive benefits from DVA to alleviate the expenses paid for his care at Chateau Westmount. On October 8, 2004, Ronald filed an application with DVA on his father's behalf for receipt of benefits in respect of the care he was receiving. Subsequently, DVA advised Ronald that his father would be entitled to benefits of $4,063.44 per month. Payments of those benefits were made effective as of October 2004. However, the claim for reimbursement retroactive to the date that Horace entered the care facility on June 17, 2000 was denied. The Applicants now seek recovery of all or a portion of the money spent on care facilities for Horace between June 17, 2000 and October 2004 or at least declarations as to entitlement to the same and other relief.

ISSUES

[6] The Applicants raised a large number of "issues" some of which were argued at the hearing to a greater or lesser degree. Some new issues were raised at the hearing including some which were endeavoured to be raised only during argument in reply. The issues can, at the end of the day, be reduced to two:

1. Effective Notice: Was the DVA required to provide specific notice to Ronald as to benefits available to Horace and if so, as of what time. Even if specific

notice was not required, was the DVA required to provide general notice and; if so, was what they did adequate?

If such notice was required but not given, must the decision of May 5, 2006 limiting recovery to on and after October, 2004 be set aside?

2. Limitation of Recovery: Was the decision of May 5, 2006 correct, in the result, in limiting recovery to expenses incurred on and after October 2004? If not, must the decision be set aside?

DECISION AT ISSUE

[7] The decision in respect of which judicial review is sought is that of the Director General (Hebert) dated May 5, 2006. This purported to be a "final decision" under the scheme of the *Veterans Health Care Regulations* SOR/90-594 section 36 which provides for a first decision, a review of that decision if requested, followed by a "final decision" under subsection (2), if requested.

[8] A first decision is set out in a letter dated February 14, 2005 from a Client Service Agent of DVA (Dunoso). That letter simply stated, in substance:

> *This is to inform you of the Residential Care arrangement regarding Mr. Krasnick Horace's* [*sic*] *admission at the Château Westmount Residence on October 2004.*

> *Please be informed of the following amounts effective from October, 8th 2004 to September 30th, 2005:*
>
> - *Accommodation fees at Château Westmount:* *$4 850.00 per month*
> - *Responsibility of the Veteran:* *$ 786.56 per month*
> - ***The Responsibility Veteran Affairs Canada:*** ***$ 4 063.44 per month***

[9] A review was requested. Ronald and solicitors acting for Horace both made written submissions. A review decision by letter dated November 15, 2005 from a Regional Director General (Bastien) maintained the original decision. In substance it said:

> *Your file was carefully reviewed and every consideration has been given to your case. Unfortunately, the decision rendered must be maintained as it is in accordance with our regulations. In fact, a client is eligible to receive indeterminate care or chronic care in a departmental facility, contract bed or other facility when the client's health needs are confirmed by a nurse's or area counsellor assessment, which was completed in October 2004.*

[10] A "final decision" was requested. Applicants' solicitors made submission. This resulted in the Hebert decision of May 5, 2006. That decision was fourteen in pages in length, not all of which will be reproduced. It concluded:

> *The decision of the Department issued November 15, 2005 is confirmed, under subsections 34.1(4) of the Veterans Health Care Regulations. The effective date of eligibility for the cost of chronic care at the Chateau Westmount residence is October 2004.*

[11] The parties are agreed that the earlier decisions, Dunoso and Bastien, can be considered to be subsumed in the Hebert decision of May 5, 2006 and that it is sufficient to seek judicial review only of the Hebert decision and not of the two earlier decisions.

CONCESSIONS BY THE PARTIES

[12] Due to the multiplicity of issues, sub-issues and points in argument raised by the parties, both in their memoranda and at the hearing it is important to note what was conceded by Counsel during the course of the hearing:

1. For the Applicants

- The Applicants are claiming relief only under section 22.1 of the *Veterans Health Care Regulations* and not otherwise. In particular they do not seek relief under section 21 or section 22 of those Regulations.
- The Court need not be concerned with the income qualification provisions of subsections 22.1(2) or (3). The Respondent agrees.
- The claim for $6,829.32 for pension benefits from February 2000 to February 2001 has been settled and is not at issue in these proceedings. The Respondent agrees.
- The fixing of $4,063.44 as the appropriate quantum for the monthly sum is not, in its calculation, contested by the Applicants or Respondents.

2. For the Respondent

- Horace was at all material times a "veteran pensioner" within the meaning of paragraph 22.1(1)(a) of the Regulations.
- Chateau Westmount (CW) was at all material times a "community facility" within the meaning of section 22.1 of the Regulations.

FACTUAL BACKGROUND

[13] The parties each state that most of the facts are not in dispute. A brief chronology:

- World War II: Horace served with the Canadian military. He remained in Canada and was not posted to an area of active combat. During the period of his service, he injured to his right knee for which he received a pension amounting, in later years, to over $500.00 per month.

- April 1, 1999: Ronald was appointed Mandatary over the affairs of Horace.

- Mid 1999 into 2005: Ronald had concerns as to Horace's state of health. Horace was examined by medical specialists and diagnosed with dementia, medication is recommended (Dr. Kirk's letter of August 26, 1999).

- October, 1999: the DVA writes to Horace requesting that he complete and return a form so as to continue to receive his pension for his knee. Horace does not respond. It may be that the correspondence was mis-addressed.

- February 2000: DVA stops paying Horace a pension for his knee.

- June 17, 2000: Horace is placed in long-term care in Chateau Westmount.

- June 2000: Ronald states that he has communications with "someone" at DVA to advise them that Horace has been placed in a long-term care facility and that Ronald is his mandatary. Ronald also states that he filled out a form respecting Horace and his dementia and attached a note to that effect which he sent to the DVA. There is no documentary record to substantiate these allegations. A form received at a later time (about January 2001) is in the record but no note was attached.

- November-December 2000: a M. Jodoin from the DVA claims to have visited Horace's old address and placed telephone calls to Horace's existing number but was unable to identify Horace or his whereabouts. There is no direct evidence on this point.

- December 2000: Ronald has a telephone conversation with someone at DVA. A person identified as R.R. Baker at DVA made a record of a conversation occurring on December 13, 2000:

> *Le 13 décembre 2000, le Dr. Rod Krasnick (chirurgien orthopédiste), fils de notre pensionné, a communiqué avec nous. Nous l'informons que la pension d'invalidité de son père est suspendue depuis le 1er février 2000 (allées et venues inconnues). Le Dr. Krasnick détient une procuration pour son père et sa mère. Mme. Krasnick (mère) réside présentement au Jewish Nursing Home, 5750 Lavoie. Le Dr. Krasnick demande que le conseiller de son père lui fasse parvenir la documentation nécessaire afin de rétablir les paiements de la pension d'invalidité de son père. Il expédiera une copie de sa procuration sur demande. Ses coordonées ont été inscrites dans le RPSC, sauf son numéro de facs qui est le suivant : 609 871-9301. Une activité est*

> *expediée à M. Jodoin ce jour pour information et toute action jugée nécessaire.*

- The interaction between the DVA, Horace and Ronald in 1999 to 2001 is set out in an affidavit of the Respondent's affiant Orlanda Drebit, Director of Client Services and Quality Management and Service Policy Division, Veterans Services Branch of the DVA, at paragraph 27:

> *a. Beginning in October, 1999, the DVA wrote a series of letters to HYK informing him that his Benefit Declaration had not yet been completed and he faced a possible suspension of his disability pension. The letter invited HYK to send in the information and contact the district office should he require further information. On February 10, 2000 a decision was made to suspend HYK's pension effective February 1, 2000.*
>
> *b. The benefit Declaration Form was finally completed in December, 2000 and received on January 21, 2001 under a Power of Attorney in the name of the Applicant RMK. The DVA decision of January 24, 2001 reinstating HYK's pension noted that contact with HYK was established. HYK subsequently attended a pension medical examination to assess his pension condition in February, 2001. The suspension was lifted, monthly payments resumed effective Feb 1, 2000 and back payments of $6676.75 were paid to HYK.*
>
> *c. A letter was sent to HYK on November 24, 2000 at his old address inviting him to attend a pension medical examination in relation to his pension condition. On January 10, 2001 the DVA sent another letter to HYK care of his new address at the Chateau Westmount inviting him again to attend a pension medical examination in relations to his pension condition. HYK then attended the*

> *examination on February 13, 2001. The medical examination resulted in an increase in the assessment of his pension condition to 30%. On October 2, 2001, a letter was sent to the address of his son RMK in New Jersey. The letter informed HYK of an increase in his pension to 30% for his knee condition. It invited him to contact the District Office if any further information is required.*

- Two pages of the Benefit Disability Form (sometimes referred to as BD form) completed by Ronald on behalf of his father Horace are copied in the Record as part of Exhibit I to Drebit's affidavit and apparently were received by the DVA early in 2001. That form indicates Horace's address as being that of Ronald in the United States and Ronald's address label with the US address is attached. The document is undated. The printed portion of the form states, among other things:

  > *If you are completing this form on behalf of the member/ former member of the forces, please attach a brief explanation.*

  There is no indication on any of the pages of the exhibit that he did so.

- February 2001: Horace is examined by a DVA person (presumably a medical practitioner) for his knee condition. His pension is restored. He is not examined in respect of his mental or other health conditions.

- October 2004: Ronald having learned by chance that benefits may be available to defray Horace's costs for his long-term care makes an

> application for benefits on Horace's behalf. That application is not in the record. In their letter dated January 11, 2006, the Applicants' solicitors at page 5 stated that October 2004 was the date of notification by the DVA of Horace's entitlement to make a claim as well as the application date.

[14] There was correspondence between the parties and the three decisions, initial, review and final as referred to previously were made.

STANDARD OF REVIEW

[15] Both parties agree that the standard of review as it applies to any determination of law, including construction of a statute or regulation, is that of correctness. In respect of a finding of fact, the Respondent argues that the standard is patent unreasonableness, and the Applicants argue that the standard is simply reasonableness. It is not necessary to resolve this difference in positions since the relevant facts are agreed and the issue resolves itself into what the parties did and said in making submissions prior to and in respect of the decision under review, as far as the Applicants are concerned, and findings in the decision of the DVA as for as the Respondent is concerned.

ISSUE 1 – EFFECTIVE NOTICE: **Was the DVA required to provide specific notice to Ronald as to benefits available to Horace and if so, as of what time. Even if specific notice was not required, was the DVA required to provide general notice and; if so, was what they did adequate?**

[16] The first issue raises the question of whether the DVA had a duty to advise Horace or his mandatary Ronald as to benefits possibly available in respect of long-term care expenses and if so, when and how did that duty arise.

[17] Ronald says that the DVA should have known or had sufficient basis for inferring that Horace was suffering from dementia or some similar condition that made it impossible to communicate with him directly and required that he be placed in a long-term care facility. The inferences, he says, can be gathered from the fact that about January 2001 at the latest, the DVA was aware that Horace was at Chateau Westmount and that Ronald had a Power of Attorney.

[18] The record is clear that, at no time prior to October 2004, did Ronald take any specific steps to make the DVA aware of his father's condition or the reason for his placement in a long-term care facility. Ronald had his father examined by medical specialists in 2000 as a result of which he determined that it would be prudent to put Horace in a long-term care facility. Ronald did not contact the DVA at that time so as to permit them to make their own assessment of the situation and either concur with Ronald's decision or propose alternative courses of action. The Power of Attorney appoints Ronald as mandatary for Horace; he is impressed with high duty of care. Among Ronald's duties as mandatary should Horace be unable to look after himself or administer his affairs by reason of any sickness, deficiency or ineptitude, are those set out as requiring Ronald to:

> *2. do all that is necessary and expedient to assure the personal protection of the Mandator, his well-being both moral and material, without restricting the generality of the foregoing, the Mandatary shall:*
>
> > *a) do all things necessary and expedient in order to provide the necessities of life for the Mandator;*
> >
> > *b) protect, care for and sustain the Mandator if the latter manifests that he is unable to care for himself;*

> *c) consent to all the needs of the Mandator required by reason of the state of the health of the Mandator of whatever nature, (medical or otherwise) provided that they appear to be beneficial, notwithstanding their effects and which are opportune in the circumstances and that the risks presented are not disproportionate to the anticipated benefits;*

[19] The evidence is clear that during the period in question when Horace was placed in a long-term care facility in the year 2000, the DVA had a substantial programme directed to the public and to veterans as to the services and benefits offered to veterans. An extensive website was available to the public. Brochures were made available at regional offices, fairs and exhibitions and to anyone asking for information. Cheques sent to veterans included informational stubs and slips. Little effort would have been required of Ronald or anyone else to initiate inquires and receive information as to services and benefits available. The evidence is that while Ronald did make efforts and communicated with the DVA about reinstatement of his father's pension respecting his knee injury, he took no steps to inform the DVA about the medical assessment made in 2000 as to his father's mental condition or the reason for his placement, at the instance of Ronald, in Chateau Westmount. Ronald had advised the DVA to communicate with Horace at Ronald's United States address and that is what happened. Horace was never actually at the United States address.

[20] In October 2004, Ronald took steps to inform the DVA as to his father's mental condition. The DVA made its own assessment of Horace's condition and awarded benefits for long-term care as of and after October 2004. This is the first time that DVA had actual notice as to Horace's condition.

[21] Ronald argues that he has been placed in a "Catch 22" situation. He argues that since he was not aware that the DVA offered benefits for long-term care he could not be expected to apply for them. He says that DVA had sufficient information so that it ought to have known that his father was in long-term care and that the DVA should have taken positive steps to inform Ronald of the possible benefits available.

[22] The DVA says that it was unaware of Horace's condition until Ronald advised it in October 2004 at which time Horace was assessed and action was taken to provide benefits as of that time. Since Ronald did not advise the DVA earlier as to Horace's condition the DVA says that it had no opportunity to conduct its own examination and make its own assessment as to an appropriate course of action. The DVA says that, given the hundreds of thousands of persons that it has to deal with, it is impossible and inappropriate that it should be required to give personal and detailed attention to any one individual when there exists even a suggestion or inference that something of interest may have arisen.

[23] Neither the *Department of Veterans Affairs Act* nor the *Veterans Health Care Regulations* make any specific reference to any duty placed on DVA to take specific steps to inform "clients" as to benefits available, whether generally to all clients or to any specific client in any specific situation.

[24] The Applicants argue that a fiduciary duty exists between the DVA and its clients such as Horace. The nature of a "fiduciary duty" that may or may not be imposed on the Crown or

department has been extensively canvassed by the Supreme Court particularly in the context of aboriginal law. There are limits to fiduciary duties and concepts. As expressed by Binnie J. for the Court in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 especially at paragraphs 81 to 83, the fiduciary duty imposed on the Crown does not exist at large but only in relation to specific interests; not all obligations are fiduciary in nature, it is necessary to examine the particular obligation or interest.

[25] In this case, the DVA has an obligation to make provision for the care of veterans depending on their needs and circumstances. Not all veterans in all circumstances are to be given every benefit. Certain benefits are provided for in the Regulations depending on "eligibility", a term that will be considered later in these reasons. There is nothing in the Act or Regulations or other Acts or Regulations that requires the DVA to make specific benefits known to everyone or to certain persons or to be prescient and determine from signs, signals or inferences that some persons may be in need of benefits and if so, what benefits and when.

[26] In the specific circumstances of this case, the DVA made sufficient efforts to provide general information to the public and appears quite willing to make specific information available to persons who identify themselves as clients, upon request. When Ronald made a specific request on behalf of Horace for long-term benefits, the DVA acted promptly upon that request.

[27] I do not find that the DVA breached any duty imposed by any relevant Act or Regulation or that there was any special fiduciary duty imposed on the DVA in respect of the present situation.

[28] The Applicants rely upon *Authorson v. Canada (Attorney General)* (2000), 53 O.R. (3d) 221 and the finding of Brockenshire J., especially at page 234, in a class action that, where certain funds were placed in the hands of the DVA to be invested and disbursed on behalf of veterans, that the DVA became a fiduciary in that respect. The case proceeded to the Ontario Court of Appeal and to the Supreme Court of Canada, [2003] 2 S.C.R. 40 where the Crown no longer denied that it had a fiduciary duty. I find that the circumstances of that case do not apply here. In *Authorson*, there was a specific fund set aside for a specific purpose. In the case here, there is simply a regulatory duty to provide and administer benefits under the circumstances set out in the Regulations. No higher or fiduciary duty arises.

[29] The Applicants further argue that section 15(1) of the *Charter* applies and that Horace, as a veteran no longer mentally competent to deal with his affairs, has been deprived of equal benefits. The Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 canvassed what a claimant must first established before the *Charter*, section 15, comes into play. Binnie J. for the Court summarized three factors at paragraph 23:

> *(1) whether a law imposes differential treatment between the claimant and others; (2) whether an enumerated or analogous ground of discrimination is the basis for the differential treatment; and (3) whether the law in question has a "discriminatory" purpose or effect.*

[30] Applicants' Counsel argues that the Regulations fail to make provision for care of or access by those who are not mentally competent. This is not a "discriminatory" provision of the Regulations but, taking the argument at its best, failure to make special provision for one particular

group of persons. There is no “discrimination” in the Regulations, all persons are treated the same, no group directly or indirectly is discriminated against and application of the Regulations does not have a discriminatory effect. The Applicants simply do not get beyond point (1) of the *Law* test.

[31] Further, the Applicants fail the third branch of the *Law* test. As set out by the Supreme Court of Canada in *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at paragraph 58, while a financial deprivation may exist it must be shown that the legislation promotes the view that a person is less capable or less worthy of recognition or value as a human being or as a member of Canadian society:

> ***58*** *The question therefore is not just whether the appellant has suffered the deprivation of a financial benefit, which he has, but whether the deprivation promotes the view that persons with temporary disabilities are "less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration" (emphasis added). In Miron v. Trudel, [1995] 2 S.C.R. 418, McLachlin J. noted, at para. 132, that "distinctions made on enumerated or analogous grounds may prove to be, upon examination, non-discriminatory".*

[32] Nothing in the Regulations has been shown to diminish the sense of capability or worth or value of mentally incompetent veterans. The Regulations provide a scheme whereby benefits may be provided, nothing in that scheme reflects badly on a person in any way contemplated by *Granovsky*.

[33] Thus, I find that the *Charter* does not assist the Applicants. Therefore, I do not have to address the issue as to whether reliance upon the *Charter* can survive Horace’s death.

<u>ISSUE 2 – LIMITATION OF RECOVERY</u> – Was the decision of May 5, 2006 correct, in the result in limiting recovery to expenses incurred on and after October 2004? If not, must the decision be set aside?

[34] This issue raises the question as to when and how the right to receive benefits arises and whether there is a limitation as to how far back one can reach in providing recoupment for expenditures.

[35] The *Veterans Health Care Regulations*, despite frequent amendments, are not happily drafted. Many of the terms which require consideration in this case are not clearly defined.

[36] Section 22.1(a) of the Regulations is the only provision upon which the Applicants rely. It says:

> *22.1(1) Subject to subsections (2) and (3) and sections 23 and 33.1, the following clients are eligible to receive chronic care in a community facility, other than in a contract bed, to the extent that the chronic care is not available to them as an insured service under a provincial health care system:*
>
> *(a) veteran pensioners;*

[37] What we do know from the concessions made by the parties is:

- Horace was a "veteran pensioner" at all material times.
- Chateau Westmount was a "community facility" at all material times.
- There is no need to be concerned with subsections 22.1 (2) and (3) which deal with income restrictions.

- There is no need to be concerned with sections 23 and 33.1 which go to the level of the rate to be established and deductions. The amount fixed at $4,063.44 per month is satisfactory to all.

[38] Thus, section 22.1(1)(a) can be read as follows in this case:

> *22.1(1)(a) Horace is eligible to receive chronic care at Chateau Westmount in the sum of $4,063.44 per month.*

[39] Horace had been in the Chateau Westmount facility since June 2000 and remained there until his death in June 2006. However, the initial decision and all subsequent decisions of the DVA limited the time period over which reimbursement was made to the period from October 2004 to June 2006. The first decision of February 14, 2005 does not say why this time frame was adopted. The review decision of November 15, 2005, the text of which was repeated earlier said that October 2004 was the time *"…when [Horace's] health needs [are] confirmed by a nurse's or area counsellor's assessment."*

[40] The "final" (Hebert) decision of May 5, 2006 says something different particularly at page 11. It says first of all that a determination of "eligibility" needs to be made and "eligibility" is not established until a "determination" is made by DVA (called VAC in the letter). The analysis concludes by saying that no amount can be paid prior to the date of application.

[41] As to "eligibility" the Regulations do not state that the DVA is to determine eligibility nor is any process for such determination by the DVA or anybody else set out. Paragraph 22.1(1)(a)

simply says that certain persons "are eligible". Even if the DVA was to satisfy itself in that regard, and it is quite reasonable for it to do so, there is nothing in the Regulations that would entitle a person to benefit only as of the date that such a determination is made. There is simply no basis for the statement made at page 11 of the Hebert decision that:

> *Eligibility is not established until a decision to that effect is rendered by [DVA]*

[42] Consideration then must be given to the conclusion by Hebert that:

> *In conclusion, neither the present or former terms of subsection 34.1(4) [of the Regulation] would permit the retroactive award from a date prior to the date of application for care.*

[43] There is no clear language to that effect in subsection 34.1(4). That section was amended effective February 15, 2006 (one day after the first or Dunoso decision). Prior to February 15, 2006 it read:

> *A claim for reimbursement or payment must be made by the person or on the person's behalf within 18 months after the latter of:*
>
> > *(a) the day on which the expenditure was incurred, and*
> >
> > *(b) the day on which notification is received by or on behalf of the person that the person is eligible to receive benefits, services or care under these Regulations for the health need for which the expenditure was incurred.*

[44] After February 15, 2006, subsection 34.1(4) read:

> *(4) A claim for reimbursement or payment must be made by or on behalf of the person within 18 months of the day on which the expenditure was incurred.*

[45] Much was made in argument as what was the date the claim was made and what was the date of notification. The evidence is not clear as to what exactly happened on October 2004 therefor, I must take as admissions and binding upon the parties, the statements that the Applicants through their Counsel made in the course of making submissions to the Minister and, in respect of the Minister, the statements and findings in the Hebert, May 5, 2006 decision.

[46] In the submission made by Applicants' counsel by letter dated January 11, 2006 to DVA, which was the submission leading to the decision of May 5, 2006 now under review, Applicants' counsel said at page 5 after reciting the provisions of the "old", and then existing, subsection 34.1(4):

> *7. Accordingly, a person is entitled to reimbursement of his or her expenditures for Long-Term Care benefits, if he or she makes a claim within 18 months after he or she receives notice of the entitlement for benefits under the Regulations. The notification that is intended by this provision must be notice from the DVA. Neither HYK nor RMK receives any notification from the DVA of HYK's entitlement for Long-Term Care benefits until October 2004 (even if HYK had somehow earlier received notice of these benefits, his mental incapacity would obviously render him incapable of communicating this information, hence such notification to HYK alone would have served no purpose). Upon notification, RMK filed a claim with the DVA, within the 18 months required. Thus, the Krasnicks' claim is timely, and they should be reimbursed for HYK's Long-Term Care benefits without further delay.*

[47] Thus, the Applicants, through their counsel, have asserted and must accept that October 2004 is both the date of "notification" and the date of making a claim.

[48] Thus, in accordance with the position taken by the Applicants in seeking the decision now under review, whether the old or new section 34.1(4) applies, the 18-month period would run back from October 2004,

[49] In making the decision of May 5, 2006 now under review, the Minister's official took the position that the post-February 15, 2005 version of the Regulations was the operative provision so far as subsection 34.1(4) was concerned, thus the 18 month period would run from the date of the application, October 2004. Even if the earlier version of subsection 34.1(4) were to apply, the Minister took the position that a later date, what he described as the "date of notification of the decision" would apply (presumably February 14, 2005). Given that position, the Minister, erroneously concluded, that no award prior to the date of application could be made. To reiterate part of what was said at page 11 of the decision of May 5, 2006:

> *The request for review of the Department's original February 14, 2005 decision was by letter from RK to VAC dated March 15, 2005. Therefore, the above mentioned section 34.1 as amended effective February 15, 2005 may be considered for the purposes of this appeal.*
>
> …
>
> *A significant period may elapse between the date of an applicant applies for benefits, services or care under the VHCRs and the date that the applicant's eligibility thereto is determined. That being said, were it to be determined that the earlier version of subsection 34.1(4) is applicable for the purposes of this final decision, then VAC's position is that the former version may have been more generous but still does not lead to the conclusion in support of the claim for reimbursement. The 18 month period to make a claim for payment or reimbursement of expenditures would have commenced at the date of notification of the decision granting eligibility rather than from the earlier date of application.*

> *In conclusion, neither the present or former terms of subsection 34.1(4) would permit the retroactive award from a date prior to the date of application for care.*

[50] Given that the Applicants asserted that October, 2004 was the operative date for both making the claim and notification and given that the Minister took the position that the "new" provisions of the Regulations were the operative provisions in which case the operative date would again be October 2004, it is appropriate to consider that the limitation period from whichever version of subsection 34.1(4) would apply, operates from October 2004. Thus the provision, in the unique circumstances of this case would operate so as to limit a claim for expenditures to be made reaching back for 18 months from October, 2004.

[51] The Applicants take the position in this application, that while the expenditures were incurred monthly, the claim made was for the entire expenditure reaching back to June 2000 and that the quantum of the claim could not be limited, only the time of making it. Here, the claim for all expenses reaching back to June 2000, they argue, was made in a timely way in October, 2004.

[52] This position is not correct. First, expenses were incurred monthly, not in a lump sum. In the Applicants' counsel's letter of January 11, 2006, previously referred to, at page 4 it was said:

> *These Regulations entitle [Horace] to receive Long-Term Care benefits in the amount of $4,063.44 per month, for his accommodation fees at CW from August 28, 2001 onward.* [Emphasis added]

[53] Those monthly expenditures, while commencing in June 2000 are limited by the provisions of subsection 34.1(4) of the Regulations, as read in the circumstances of this case, to those incurred within 18 months previous to October, 2004.

[54] The Applicants rely on the decision of Strayer J. of this Court in *Trotter v. Canada*, [2005] 4 F.C.R. 193 to argue that any limitation imposed by subsection 34.1(4) should not be read so as to limit the quantum of the claim so long as the claim itself is made in a timely fashion. They rely in particular on a passage found within paragraph 18 of that decision and paragraph 20:

> ***18*** *I wish to emphasize that the language of subsection 39(1) was not adopted as such in respect of prisoners of war and evaders' compensation. It will be noted that subsection 39(1), limiting as it does payments to the date of application, by its terms applies to "a pension awarded for disability". In my view, compensation for prisoners of war is not "a pension awarded for disability". Even in the provisions adopted in 1987 by way of amendments to the Pension Act specifically applying to these persons, the new subsection 71.2(1) provides that "a prisoner of war is entitled, on application, to basic compensation." Such was the language of the 1976 Act which also said [at section 3] that: "a prisoner of war... is entitled on application to the Commission, to compensation." As I have noted, the circumstances of the passage of the 1976 Act and the provisions for a retroactive coming into force indicate that what was intended was that compensation be effective as of April 1, 1976. This was said to be payable "on application", as does subsection [page206] 71.2(1) of the Pension Act. In the context of the 1976 Act that expression "on application" made an authenticated application a condition precedent to receiving compensation, but the date of the application did not define the amount of compensation. Not only was that, I suggest, the intention of Parliament but it was the manner in which that Act was administered throughout its existence. It is true that subsection 71.2(1) which states the entitlement to compensation commences with the words "[s]ubject to subsection (4)". Subsection (4), does make section 39 generally applicable to compensation for former prisoners of war. However, it is applicable "with any modifications*

> *that the circumstances require." In my view, circumstances require a different approach in the matter of entitlement to compensation for former prisoners of war and evaders.*
>
> ***20*** *I believe that by the general cross-reference in subsection 71.2(4) of the Pension Act to most sections of Part III of that Act, making them applicable to compensation, Parliament cannot be taken to have made a specific decision to reduce the compensation payable to former prisoners of war or evaders who happened not to have applied before because they did not know they were entitled to compensation. It would have been legally, if perhaps not politically, easy to so provide in the amendments if that was intended. In the circumstances, subsection 39(1) must be taken as inappropriate in reference to prisoners' compensation and the qualification in subsection 71.2(4) of the applicability of Part III "with any modifications that the circumstances require" to prisoners' compensation must be taken to mean that subsection 39(1) is not applicable.*

[55] However, this is to ignore the very special circumstances of that case where prior legislation had awarded compensation for prisoners of war but overlooked evaders behind enemy lines. Later legislation amended the earlier legislation to include evaders but, if read one way, would have by the operation of limitation periods, made many claims out of time. Strayer J. held that this was not the intention of the amending legislation. Part of what he said is set out in paragraph 18 above. He also said in paragraph 19:

> ***19*** *Subsection 39(1) refers to "a pension awarded for disability". It is apparent that a pension for disability and compensation for the fact of having been a prisoner of war or an evader during the Second World War are two distinct matters. A disability, while it must have its origin in the war, may have been obvious and diagnosed during or at the end of the War and may have been of a continuing nature. But sometimes the effects of war time service are not felt or diagnosed until years after the war. Disabilities come in varying degrees and may change over time. All of these matters require assessments through applications and in some cases, disability may not be perceived or proven for years after the*

> *war or may vary in severity over a period of time. On the other hand, payment to former prisoners of war or evaders has throughout been described as "compensation" and the criteria solely depend on certain demonstrable historical facts occurring during the war. The fact that the compensation is payable on a monthly basis may have been thought to be of a more lasting benefit to those entitled. If compensation had been payable in a lump sum it would be surprising indeed if entitlement were dependent on the date of application for it, even though it would not be payable until application was made.*

[56] *Trotter* has no application here.

[57] The Minister's Counsel argues that it was appropriate to limit recovery to October, 2004 since that is the earliest time that the DVA could make its own assessment as to Horace's health and the availability of long term care facilities whether at Chateau Westmount or elsewhere.

[58] This position of the Minister ignores the position taken and findings made by the DVA in the Hebert decision and from which the Minister cannot resile. As to Horace's mental condition, the Hebert decision at page 5 stated:

> *From the documentation contained in the Appellant's Submission tab D, under the signature of Dr. P. Lysy, who examined Mr. Krasnick prior to his admission to the Chateau Westmount Nursing Home, it is clear that HYK was admitted to the facility in June 2000, due to a deteriorating mental and physical condition. At the time, HYK was assessed as incapable of managing his affairs and in need of long term care. The medical recommendation was that HYK be transferred to the Chateau Westmount. RK, his son and Power of Attorney, consented to such transfer on June 17, 2000.*

[59] It is simply unacceptable for the Minister now to take the position that it has no basis for determining Horace's condition prior to October, 2004. The Hebert decision is clear that the DVA

accepts that, since June 2000, Horace's condition was such that his placement in a long term care facility was appropriate.

[60] As to the appropriateness of Chateau Westmount as such a facility, the Hebert decision again made findings. At page 8:

> *In June 2000 Chateau Westmount was a community facility. The sole Departmental facility is located in the province of Quebec – Sainte-Anne-de-Bellevue. There are "contracted beds" located in the Centre Hospitalier de l'université de lavel* [*sic*] *(CHUL) and Résidence Paul-Triquet.*

[61] The decision proceeds to make reference to section 21 of the Regulations which deals with department facilities and contract beds. The parties are agreed that section 21 is irrelevant. Thus such discussion was not appropriate. At page 9 of the decision, Hebert says:

> *Considering that HYK had resided at Chateau Westmount for the previous four years, and his confused state, the District Office conducted the assessment, verified the health needs, and so authorized HYK's eligibility for the cost of chronic care and service at Chateau Westmount, a private facility, without disrupting his routine and requiring his relocation.*

[62] Having determined that it was appropriate that Horace be placed in Chateau Westmount as a facility, the Minister cannot now argue that it should have been given the opportunity to make that decision earlier.

IN CONCLUSION

[63] The Regulations are not well drafted and not easy to interpret. The parties appeared unwilling to make reasonable compromises. The Applicants took an "I want it all approach". The Minister took a "you will get nothing more" approach. This determination is an attempt to do justice to all sides and to the Regulations. The Minister should review the matter on the basis that

the Applicants, Horace's estate and Ronald, should be reimbursed for monthly expenses incurred during the 18 month period prior to October, 2004. The amount of $4,064.44 per month is seen by all parties as appropriate. An award of interest is appropriate. The rate requested, prevailing prime lending rates plus 1% is appropriate.

[64] As to costs, the Minister suggested no costs, the Applicants wanted solicitor-client costs. Costs at the solicitor-client level are usually only awarded where the conduct of the losing party during the course of the proceedings has been questionable. That is not the case here. The Applicants' counsel suggested that this is in the nature of a "test case". I do not view it that way. The circumstances factually are unique and the Regulations have been amended in any event. Applicants' counsel suggested that an award of costs should include costs incurred in dealing with the Minister leading up to the decision of May 5, 2006. The Court has no power to award such costs.

[65] This is a usual and not extraordinary case where Applicants gained part of what they wanted, but insisted on it all. There were a affidavits filed, some cross-examinations; both parties had two counsel at the hearing, which lasted one and a half days. Costs to be taxed at the middle of Column III having in mind these Reasons, are awarded to the Applicants.

JUDGMENT

For the Reasons given:

THIS COURT ADJUDGES that:

1. The Application is allowed, the decision of May 5, 2006 is set aside and the Matter is returned to the Minister for redetermination in accordance with the reasons.

2. The redetermination is to be made promptly.

3. The Applicants are entitled to costs to be taxed in accordance with these Reasons at the middle of Column III.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-916-06
STYLE OF CAUSE:	THE ESTATE OF HORACE YALE KRASNICK ET AL Applicants and THE MINISTER OF VETERANS AFFAIRS CANADA Respondent
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	10-DEC-2007 and 11-DEC-2007
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