

IN THE MATTER OF an appeal filed
pursuant to the *Rules for Appeals* under
the *Pre-1986/Post-1990 Hepatitis C*
Settlement Agreement and its *Protocols*

CLAIM FILE: 07-07607

REASONS FOR DECISION

INTRODUCTION

[1] The HCV Personal Representative has appealed a decision of the Administrator dated August 14, 2008, in which the claim for compensation made in relation to the deceased HCV Infected Class Member under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis that there was no proof of an infection with HCV.

FACTS

[2] On March 12, 2008, the HCV Personal Representative filed a claim for compensation under the *Settlement Agreement*. In the claim, she stated that the HCV Infected Class Member, her deceased husband, was a Primarily-Infected Person who was infected with the Hepatitis C virus through blood transfusions received in Canada on November 23, 1972 during prostate surgery. The Treating Physician Form confirmed that the HCV Infected Class Member was at Disease Level 6 at the time of his death and that his infection with HCV materially contributed to his death. Furthermore, although the HCV Infected Class Member was not tested for the HCV antibody or the Hepatitis C virus, there was “an episode of jaundice within three (3) months of receiving Blood in the absence of any other cause”. He also had no risk factors for the Hepatitis C virus.

[3] In support of the claim for compensation, the HCV Personal Representative filed extensive hospital records. Those records indicated, among other things, that the HCV Infected Class Member was a hard-working farmer whose medical history was “unremarkable”. He had undergone surgery in 1967 for a small bowel obstruction and in 1968 for hernia repair.

[4] On October 26, 1972, the HCV Infected Class Member was examined by a specialist at the hospital for joint pain and swelling that he had experienced for fifteen months. He had also lost twenty pounds. The specialist made a diagnosis of rheumatoid arthritis and also noted, among other things, swollen lymph nodes. He decided to admit the HCV Infected Class Member to the hospital for further investigation and assessment “... in view of the unexplained finding of lymphadenopathy”.

[5] On November 1, 1972, the HCV Infected Class Member was admitted to the hospital. In the next two weeks, he underwent various examinations and tests, including a lymph node biopsy that confirmed an enlarged, non-malignant lymph node and a cystoscopy that revealed certain bladder and prostate problems. At this point, it was suspected, for various reasons, that he might have Whipple’s disease.

[6] On November 23, 1972, the HCV Infected Class Member had a retropubic prostatectomy. During the operation, there was a “quite marked” blood loss, and he was given transfusions of three units of blood. His post-operative course was uneventful.

[7] On December 16, 1972, the HCV Infected Class Member was discharged from the hospital.

[8] On January 28, 1973, the HCV Infected Class Member fell ill and developed various symptoms, including malaise. On February 4, 1973, approximately two and a half months after his blood transfusions, he developed jaundiced sclerae. The next day, the jaundice was general and he suffered from great malaise. He was admitted to his local hospital on February 6, 1973, and three days later became confused.

[9] On February 10, 1973, the HCV Infected Class Member was transferred to the university hospital where he had undergone his prostatectomy and had received his blood transfusions approximately two and a half months earlier. In the Hospital Admission Record, the staff observations at the time of his admission noted that he was “very jaundiced and confused”. The record entitled “History and Physical Examination”, also prepared on the date of his admission, confirmed that he had developed jaundice six days earlier, was suffering from “a very severe jaundice” and was confused. The tentative diagnosis included “infectious hepatitis”.

[10] The document entitled “Physician’s Clinical Record” contained notes detailing the history and examination of the HCV Infected Class Member from the time of his admission to the hospital until his death. In one of the entries for February 10, 1973, the physician who attended and treated him (“physician”) noted that, on the previous admission, “...the possibility of a Whipple’s disease was postulated...” because the lymphadenopathy was associated with large joint disease and other factors. He wrote the following:

Impression:

- 1) He is in hepatocellular failure; most likely cause is a serum hepatitis (prev. transfusions)
- 2) he may have an explanation for joint disease, lymphadenopathy and disturbed small bowel function in Whipple’s disease which was postulated earlier, but this has not caused his acute liver failure

- 3) not likely to be a toxic hepatitis or drug-induced, from the history
- 4) with [patient] of [over 40 years] and hepatic coma his prognosis is poor. I do not think that exchange transfusions would do any good. [Emphasis Added]

[11] In the Physician's Clinical Record, the notes made by the physician on the next day, February 11, 1973, indicated that the HCV Infected Class Member had "marked jaundice" and was "deeper in a coma". On February 13, 1973, a note made by a resident stated simply "spoke to crossmatch re donors. [The HCV Infected Class Member] is HAA-positive".

[12] On February 16, 1973, the HCV Infected Class Member died at the age of 59. A Statistical Sheet prepared by the physician on that date recorded the final diagnosis as "serum hepatitis" and complications as "hepatocellular failure".

[13] That same date, an autopsy was conducted on the HCV Infected Class Member. The anatomical diagnosis in the Autopsy Report was recorded as "submassive serum hepatitis and sequelae", and the pathologist confirmed that the HCV Infected Class Member was transfused with three units of blood on November 23, 1972 during his prostatectomy. He also stated, in part, as follows:

2. Serum Hepatitis – Submassive

[...]

(b) Jaundice- Retentional and Remorptional – Total Bilirubin – 35.5 gm.%

[...]

(d) Serum – Positive for Australia Antigen (HAA)

[...]

After outlining the findings leading to the diagnosis, the pathologist added the following

note in the Autopsy Report:

NOTANDA:

This was a case of serum hepatitis which developed two months, one and a half weeks following the administration of blood transfusions at the time of a prostatectomy. Australia antigen (HAA) was found in the blood serum prior to death which occurred two weeks after the onset of symptoms.

At autopsy, severe intrahepatic cholestasis [liver disease] was associated with moderate hepatic necrosis and cholemic nephrosis. [...] [Emphasis Added]

In the Microscopic Description portion of the Autopsy Report, the pathologist made the following findings in relation to the liver:

Liver:

A very severe intrahepatic cholestasis was associated with moderate irregular necrosis of the hepatocytes throughout the parenchyma with the latter showing no relation to lobular architecture. Instead the intersecting pathways of necrosis were quite haphazard in distribution, but widespread. Very many bile canaliculae were plugged with bile thrombi [...]. Additionally the areas of liver destruction were often overrun with red blood cells and varying numbers of mononuclear inflammatory cells. [...]

[14] An undated Discharge Summary prepared by the physician after the death of the HCV Infected Class Member summarized his medical history and the circumstances leading to his death. In that report, the physician stated as follows:

The autopsy report showed submassive serum hepatitis with a positive Australia antigen probably secondary to blood transfusions on November 23, 1972. Subsequently the donors of two of the units of blood given at that time were traced and they were checked for Australia antigen and both were discovered to be positive. [...] Final Diagnosis: FULMINATE SERUM HEPATITIS with hepatocellular failure. [Emphasis Added]

[15] The provincial death certificate, filed on February 19, 1973, listed the cause of death as “acute fulminant serum hepatitis”, with an approximate interval of two weeks between onset and death.

[16] By letter dated February 19, 1973, the physician wrote to the family doctor of the

deceased HCV Infected Class Member. He stated, in part, as follows:

During the course of his investigations we discovered that his serum was positive for Australia Antigen and presumably his initial infection dated from the time of his previous hospital admission here in November 1972, at which time he received three units of blood as replacement for fairly brisk blood loss at the time of his retropubic prostatectomy. We are asking the Red Cross to check on these blood makers because for some time they have been testing all units of blood for Australia Antigen. However, some other source of infection may have been present that we do not know about. At any rate it would appear as though he had an acute fulminant hepatitis on the basis of the SH virus and he did not recover. [Emphasis Added]

[17] The HCV Personal Representative has not applied for or received compensation under any other settlement.

DECISION OF THE ADMINISTRATOR

[18] In a decision dated August 14, 2008, the Administrator denied the claim for compensation for the following reasons:

Reasons for Decision

The Settlement Agreement requires the Administrator to determine a person's eligibility for class membership. As you may already know, section 2.01(1)(b) of the Settlement Agreement provides that you must deliver an HCV Antibody Test, PCR Test or similar test report to the Administrator. You have not provided proof of HCV (the Hepatitis C virus).

The Court Approved Protocol, "HCV Antibody and PCR Tests Protocol", defines which HCV test is acceptable. Note that in some cases, the Administrator must consult a microbiologist to obtain his or her expert opinion.

An acceptable HCV Antibody Test includes the following:

- a. a First Generation ELISA or EIA (1989-1990) which is confirmed or supplemented by a RIBA performed in a Canadian laboratory which reveals the presence of antibodies;
- b. a Second Generation ELISA or EIA (1991-1996) which is confirmed or supplemented by a RIBA performed in a Canadian laboratory which reveals the presence of antibodies; or
- c. a Third Generation ELISA or EIA or RIBA (1997 and after) performed in a Canadian laboratory which reveals the presence of antibodies.

Where any of these tests were performed in a laboratory outside Canada, that laboratory must be acceptable to the Administrator, in consultation with a microbiologist.

An acceptable PCR Test includes the following:

- a. a PCR Test dated January 1, 1998, or later, performed at any Canadian laboratory which indicates the presence of the virus; or
- b. a PCR Test which indicates the presence of the virus that has been performed by a laboratory acceptable to the Administrator, in consultation with a scientist with PCR expertise.

If the Primarily-Infected Class Member is deceased and was not tested for the HCV antibody or HCV, you may deliver, instead of the evidence referred to in Section 2.01(1)(b), evidence of any one of the following:

- (a) a liver biopsy consistent with HCV in the absence of any other cause of chronic hepatitis;
- (b) an episode of jaundice within three months of receiving Blood in the absence of any other cause;
- (c) a diagnosis of cirrhosis in the absence of any other cause; or
- (d) where the claimant is a Primarily-infected Hemophiliac, that the Primarily-Infected Hemophiliac has tested positive for HIV prior to his or her death.

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

REQUEST FOR REVIEW AND SUBMISSIONS ON APPEAL

[19] On October 9, 2008, the HCV Personal Representative filed a Request for Review

and specified the reasons for appeal as follows:

Your refusal is based on the inability of myself or the medical system to provide an HCV (Hepatitis C) test for the blood he received. However, the medical records I provided clearly indicate he died from a severe hepatitis reaction from the blood transfusion.

The system was not testing for Hepatitis C at that time, however it was known that a non A-non B hepatitis type existed and there was great concern expressed

in the medical system about contaminated blood, especially the blood coming from American prisons.

The records I provided to you show he was given contaminated blood because it was traced back to the donors.

All blood transfusions in Canada were required to be tested for type B hepatitis after January 1972, nearly a full year before his transfusion. The hospital records included with our initial application show that it was not done, or the blood was used anyway, and therefore it may well have contained Hepatitis C.

[20] In a letter dated November 4, 2008, the son of the elderly HCV Personal Representative filed additional submissions in support of the appeal.

ISSUE

[21] The issue to be determined is whether the Administrator erred in denying the claim for compensation.

ANALYSIS

i) Generic Reasons

[22] A review of the Reasons for Decision denying the claim for compensation confirms that the Administrator has used “generic” reasons that did not make any reference to the evidence or to the provisions of Article Three of the *Settlement Agreement* that apply to claims for compensation where an HCV Infected Class Member has died. In addition, the decision recited sections from the *HCV Antibody and PCR Tests Protocol* that had no relevance to the facts of the present case.

[23] In the Reasons for Decision rendered on the appeal in Claim File 07-03416, I stated as follows in a case where the Administrator had used generic reasons:

[17] A decision-maker, such as the Administrator, who has the obligation to conduct an evidentiary assessment and to make a decision that affects the right of a claimant to obtain compensation has a corresponding obligation imposed by the duty of fairness to provide some reasons to explain the decision reached in each particular case. In the context of the framework established in the *Settlement Agreement*, the reasons do not have to be elaborate and, indeed, may even be

very minimal in some cases. Furthermore, there is nothing to preclude the Administrator from using certain generic or standard paragraphs in a decision to explain the applicable provisions or definitions that apply to the claim. However, the decision must also contain sufficient detail to demonstrate that the Administrator understood and considered the specific circumstances of the case, as revealed in the evidence. In the decision, *R. v. Sheppard*, [2002] 1 S.C.R. 869, Binnie J., writing for the Court, explained in paragraph 24 the practical function of reasons as follows:

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

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

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

[24] In applying the principles enunciated above, I have determined that the decision rendered by the Administrator does not meet the necessary standard. In particular, the Administrator failed to make any factual findings and did not even refer to any of the evidence adduced in support of the claim for compensation. In the circumstances, there is no way of knowing whether the Administrator considered or understood any of the relevant evidence. However, there is sufficient evidence in the Appeal File to enable me to make the necessary factual findings and to prepare the reasons supporting the appropriate decision. In the circumstances, I have determined that it would be simpler and more

expeditious for me to follow this course of action, rather than to remit the matter to the Administrator.

ii) Eligibility Requirements in Article Three of the Settlement Agreement

[25] In my Reasons for Decision on the appeal in Claim File 07-00542, I analysed the provisions in Article Three of the *Settlement Agreement* concerning the payment of compensation for a deceased HCV Infected Class Member. Since those provisions also apply in the present appeal, I have reproduced my analysis from that decision in paragraphs 26 to 36 below for ease of reference, and have modified it, where necessary, to include additional provisions that are relevant in the present appeal.

[26] Article Three of the *Settlement Agreement* contains the framework governing the compensation process for HCV Infected Class Members who have died, including the eligibility requirements in section 3.01 and the provisions for the payment of compensation in sections 3.02, 3.03 and 3.04. The expression “HCV Infected Class Member” is defined, in part, in section 1.01 as meaning “... collectively Primarily-Infected Class Members and Secondarily-Infected Persons”.

[27] The eligibility requirements that must be met by an HCV Personal Representative for a claim to be approved are outlined in section 3.01 of the *Settlement Agreement*, which states as follows:

3.01 Eligibility – HCV Infected Class Members Who Have Died

(1) A person claiming to be the HCV Personal Representative of an HCV Infected Class Member who has died must deliver to the Administrator, within three years after the death of such HCV Infected Class Member or within two years after the Implementation Date, whichever event is the last to occur, an application form prescribed by the Administrator together with:

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

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

(i) if the deceased was a Primarily-Infected Class Member, the proof required by Sections 2.01 and 2.03;¹ or

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

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

and

(d) proof that the death of the HCV Infected Class Member was caused by his or her infection with HCV except as provided in Section 3.03(1)(ii). [Emphasis Added]

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

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

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

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

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

¹ For the purposes of the present appeal, the relevant parts of section 2.01 state as follows:

2.01 Eligibility – Primarily-Infected Class Member

(1) A person claiming to be a Primarily-Infected Class Member must deliver to the Administrator an application form prescribed by the Administrator together with: [...]

(b) an HCV Antibody Test report, PCR Test report or similar test report pertaining to the claimant; [...]

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

[28] In order to be eligible for compensation under either section 3.02 or 3.03 of the *Settlement Agreement*, subsection 3.01(1) requires an HCV Personal Representative to deliver to the Administrator all of the elements of proof described in paragraphs (a) through (d), as reproduced above.

[29] Paragraph 3.01(1)(b) incorporates by reference the requirements in subsection 2.01(1), unless the evidence specified in that provision has already been delivered to the Administrator. The evidence that must be delivered, when paragraphs 3.01(1)(b) and 2.01(1)(a) to (c) are read together, includes records demonstrating the receipt of Blood in Canada during the Class Period, an HCV Antibody or PCR Test report to establish an infection with HCV, and a statutory declaration.

[30] In circumstances where an HCV Personal Representative is unable to provide evidence of an HCV Antibody or PCR Test report, subsection 3.01(2) permits the delivery of certain other types of evidence to prove the existence of a Hepatitis C infection. In the context of the present appeal, the relevant provision is paragraph 3.01(2)(b) which allows evidence of “an episode of jaundice within three months of receiving Blood in the absence of any other cause”; in other words, such evidence may be filed instead of one of the test reports referred to in paragraph 2.01(1)(b). Where one of the permitted alternate forms of evidence is adduced, the concluding sentence in subsection 3.01(2) nevertheless repeats the mandatory requirement, initially articulated in paragraph 3.01(1)(d), to prove that the death of a Primarily-Infected Class Member who died prior to January 1, 1999 was caused by an infection with HCV.

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

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

iii) Compensation Provisions under Article Three of the Settlement Agreement

[32] The compensation payable under Article Three of the *Settlement Agreement* for the claim of an HCV Infected Class Member who has died is governed either by section 3.02 or 3.03, depending upon the date of death. In particular, section 3.02 applies where the death occurred prior to January 1, 1999, and section 3.03 applies where the death occurred on or after January 1, 1999. In the present case, the HCV Infected Class Member died in 1973, and the provisions of section 3.02 therefore govern the compensation, if any, to be paid for the claim.

[33] As indicated in the preceding paragraph, section 3.02 of the *Settlement Agreement* dictates the compensation to be paid for an HCV Class Infected Member who died prior to January 1, 1999. Subsection 3.02(1) is the principal provision concerning such compensation and contains wording that must be considered for the purposes of the present appeal. Subsection 3.02(2) simply provides an alternative choice for Dependents and Family Members concerning the method of compensation. None of the other parts of section 3.02 have any relevance in the circumstances of this case, save and except for subsection 3.02(5) which expressly prohibits the payment of compensation in the absence of proof that the death of the HCV Infected Class Member was caused by HCV infection.

For the purposes of the present appeal, the relevant parts of section 3.02 state as follows:

3.02 Compensation if Deceased Prior to January 1, 1999

(1) If an HCV Infected Class Member died prior to January 1, 1999 and his or her HCV Personal Representative delivers to the Administrator the evidence required under Article Two, Section 3.01, 5.01 and 5.04 within the period set out in Section 3.01(1) or Section 5.01, the Approved HCV Personal Representative is entitled to be reimbursed for the uninsured funeral expenses incurred up to a maximum of 8/11ths of five thousand dollars (\$5,000.00) and, subject to the provisions of Section 3.02(2), the Approved HCV Personal Representative will be paid the amount of 8/11ths of forty five thousand dollars (\$45,000.00) in full satisfaction of any and all Claims that the HCV Infected Class Member would have had under this Agreement if he or she had been alive on or after January 1, 1999. This 8/11ths of forty five thousand dollars (\$45,000.00) payment to the Approved HCV Personal Representative is in addition to the Claims of Dependents and other Family Members pursuant to Article Four and will not affect the personal Claim of someone who is also an HCV Infected Class Member.

(2) Instead of the 8/11ths of forty five thousand dollars (\$45,000.00) payable pursuant to Section 3.01(1), and the payment of the Claims of Dependents and other Family Members pursuant to Article Four, the Approved HCV Personal Representative of an HCV Infected Class Member who died prior to January 1, 1999 and all the deceased HCV Infected Class Member's Dependents and other Family Members having Claims under this Agreement may agree to be paid 8/11ths of one hundred and eight thousand dollars (\$108,000.00) in full satisfaction of all their Claims pursuant to this Agreement (including all potential claims pursuant to Article Four), and such amount will be paid jointly to them, but such payment will not affect the personal Claim of someone who is also an HCV Infected Class Member.

[...]

(5) Notwithstanding any other provision in this Agreement, no compensation is payable to any Class Member under this Agreement with respect to an HCV Infected Class Member who died prior to January 1, 1999 unless there is proof acceptable to the Administrator that the death of the HCV Infected Class Member was caused by his or her infection with HCV. [Emphasis Added]

[34] Subsection 3.02(1) repeats in its opening words the obligation of the HCV Personal Representative to deliver the evidence specified in certain sections of the *Settlement Agreement*, including section 3.01, and makes compensation conditional upon compliance with the requirement to produce such evidence. In other words, if any of the evidence required under section 3.01 is not delivered to the Administrator, compensation

cannot be granted under section 3.02. As indicated in paragraph 30 above, paragraph 3.01(1)(d) requires proof that the death of the HCV Infected Class Member was caused by an infection with HCV in order to establish eligibility for compensation. Furthermore, there is an explicit statement in subsection 3.02(5) that “no compensation is payable” for an HCV Infected Class Member who died prior to January 1, 1999, “...unless there is proof acceptable to the Administrator that the death of the HCV Infected Class Member was caused by his or her infection with HCV”. The failure to produce evidence that the death of the HCV Infected Class Member was caused by an infection with HCV must therefore necessarily result in the denial of the claim for compensation.

[35] In addition, section 3.04 of the *Settlement Agreement* is intended to provide greater certainty in interpreting and applying certain compensation provisions under the *Settlement Agreement*, including subsections 3.02(1) and (2), and contains an additional requirement that must be met to succeed in making such a claim. Section 3.04 provides as follows:

3.04 When Compensation Payable

For greater certainty, compensation under Article Four, Section 3.02(1) and (2) and 3.03(1)(i) is only payable with respect to a deceased HCV Infected Class Member where the deceased HCV Infected Class Member had attained Disease Level 4 or higher prior to death. [Emphasis Added]

Section 3.04 clearly and unequivocally mandates that compensation is only payable under certain provisions, including subsections 3.02(1) and (2), where an HCV Infected Class Member had attained Disease Level 4 or higher prior to death.

[36] The related provisions in subsections 3.01(1), 3.02(1), 3.02(5) and 3.04 of the *Settlement Agreement* must be read together. A textual reading of those sections in their context in the *Settlement Agreement* and in conjunction with one another confirms that no

compensation can be paid under subsection 3.02(1) unless there is proof acceptable to the Administrator to demonstrate that the death of the HCV Infected Class Member was caused by an infection with HCV at Disease Level 4 or higher. Absent such proof, the claim must be denied.

iv) Burden of Proof

[37] Before proceeding further, it is important to determine the evidentiary burden of proof that must be met by an HCV Personal Representative to satisfy the requirements for eligibility and compensation under the provisions of Article Three with respect to an HCV Infected Class Member who died prior to January 1, 1999.

[38] As indicated in paragraph 34 above, subsection 3.02(5) expressly states that no compensation can be paid with respect to an HCV Infected Class Member who died prior to January 1, 1999 unless there is “proof acceptable to the Administrator” that the death was caused by an infection with HCV. The burden of proof to be applied in assessing evidence delivered in support of a claim for compensation under subsection 3.02(1) is therefore “proof acceptable to the Administrator”.

[39] In determining the import of the expression “proof acceptable to the Administrator”, it is important to recognize that, under the terms of the *Settlement Agreement*, other burdens of proof are specified for different provisions. For example, in many instances, a claimant may be required to establish certain requirements “on the balance of probabilities” or “to the satisfaction of the Administrator”.

[40] When the expression “proof acceptable to the Administrator” is considered in this context, it is readily apparent that the standard is intended to accord a broad discretion and significant flexibility to the Administrator in receiving and assessing evidence. In addition,

the words “proof acceptable to the Administrator” clearly denote a less rigorous standard than either of the expressions “on the balance of probabilities” or “to the satisfaction of the Administrator”. Indeed, a burden of proof expressed simply as “proof acceptable” to a decision-maker would necessarily find itself at the lower end of any evidentiary scale.

[41] It is also significant to note that the expression “proof acceptable to the Administrator” appears to be used in the *Settlement Agreement* only in subsection 3.02(5) and paragraph 4.03(1)(b), the latter provision relating to claims of dependants of deceased HCV Infected Class Members. Finally, the usage of the standard “proof acceptable to the Administrator” undoubtedly reflects the reality that, in cases involving deaths prior to January 1, 1999, a higher or more stringent burden of proof would make it virtually impossible to satisfy the requirement of proving that the death of an HCV Infected Class Member was caused by an infection with HCV.

v) Application of Article Three Provisions to the Evidence

[42] The principal question to be addressed in this matter is whether the HCV Personal Representative has satisfied the requirement to prove that the death of the HCV Infected Class Member was caused by his infection with HCV at Disease Level 4 or higher.

[43] The evidence delivered by HCV Personal Representative to the Administrator, under section 3.01 of the *Settlement Agreement*, confirms that the HCV Infected Class Member was transfused with three units of blood during surgery on November 23, 1972, and developed jaundice approximately two and a half months later. On February 16, 1973, only twelve days later, he died from submassive serum hepatitis, also described as fulminate serum hepatitis.

[44] Due to the fact that the HCV Infected Class Member died in 1973, he was not tested for the HCV Antibody or the Hepatitis C virus. As a result, the HCV Personal Representative was unable to comply with the requirement in subparagraph 3.01(1)(b)(i) and paragraph 2.01(1)(b) to provide an HCV Antibody or PCR Test report to prove that the HCV Infected Class Member had an infection with HCV. Instead, as permitted by paragraph 3.01(2)(b), she delivered evidence that the HCV Infected Class Member had developed jaundice within three months of his blood transfusions. However, paragraph 3.01(2)(b) permits the delivery of evidence of “an episode of jaundice within three months of receiving Blood in the absence of any other cause.” [Emphasis added] In the hospital records, there is some evidence to indicate that the blood given to the HCV Infected Class Member during his surgery was Australia antigen positive. That evidence must therefore be analysed in order to determine whether there was “any other cause” for the jaundice, within the meaning of paragraph 3.01(2)(b).

[45] The evidence in the record confirms that, at the time of his transfer to the university hospital on February 10, 1973, the HCV Infected Class Member was suffering from a “very severe jaundice”, and was in hepatocellular failure, with the most likely cause being serum hepatitis from his previous transfusions of three units of blood.

[46] The first reference in the evidence to the possibility that there was an Australia antigen in any of the blood used in the transfusions was in the form of a brief handwritten note made by a resident on February 13, 1973 in the “Physician’s Clinical Record”. In that note, the resident wrote that he had spoken to “crossmatch re donors” and that the HCV Infected Class Member was “HAA-positive”. No other details were provided.

[47] Three days later, the HCV Infected Class Member died. In the Autopsy Report, the pathologist stated in paragraph 2(d) of the summary as follows: “Serum – Positive for Australia Antigen (HAA)”. He also included a note, reproduced in its entirety in paragraph 13 above, that the “Australia antigen (HAA) was found in the blood serum prior to death which occurred two weeks after the onset of symptoms”.

[48] The Discharge Summary, summarized in paragraph 14 above and prepared by the physician who treated the HCV Infected Class Member, provided some additional detail, indicating that the donors of two of the units of blood were traced and a check revealed that they were both positive for the Australia antigen. Again, the source of the information was not indicated, and there were no other notes or documents in the hospital records to confirm this information or when it was received.

[49] Significantly, in a letter dated February 19, 1973 and referred to in paragraph 16 above, the physician wrote to the family doctor of the HCV Infected Class Member and stated, in part, that “[d]uring the course of his investigations we discovered that his serum was positive for Australia Antigen [...]. However, some other source of infection may have been present that we do not know about”. [Emphasis Added]

[50] Given the importance of the evidence concerning the Australia antigen, I have reviewed it carefully and have determined for the following reasons that it must be accorded little, if any, weight. First, the resident wrote in his note on February 13, 1973 that the HCV Infected Class Member was “HAA-positive”. However, that assertion was an inaccurate statement; two of the three units of blood were Australia antigen positive, but there was no evidence to establish that the HCV Infected Class Member was. As such, that note made by the resident must be accorded no weight insofar as it states that the

HCV Infected Class Member was “HAA-positive”. Second, the pathologist noted in the Autopsy Report that the “blood serum” was positive for Australia antigen. However, the evidence indicated that only two of the three units of blood were traced and were found to be positive for the Australia antigen; there was no evidence whatsoever concerning the third unit of blood. As a result, the statement of the pathologist that the “blood serum” was Australia antigen positive was at least a partially inaccurate overstatement, given the absence of any evidence concerning the third unit of blood. In short, although the evidence in the record may appear at first blush to support the assertion that the HCV Infected Class Member received blood contaminated with the Australia antigen, careful scrutiny leads to the conclusion that at least two significant pieces of that evidence, namely from the resident and the pathologist, must be accorded little or no weight.

[51] Taking the evidence at its highest, a review of the hospital records confirms that the Australia antigen was present in only two of the three units of the blood in question. Furthermore, and more significantly, the physician who attended and treated the HCV Infected Class Member from the time of his admission to the hospital until his death specifically wrote that “...some other source of infection may have been present that we do not know about”. No one will ever know what compelled the physician to write those prescient words almost 36 years ago, at a time when the existence of Hepatitis C was unknown. Clearly, two things are certain: he had some doubt that the Australia antigen was the source or cause of the hepatitis infection that led to the death of the HCV Infected Class Member, and he believed that an unknown source of infection may have been present in the transfused blood.

[52] In order to make a decision in this matter, it must be determined whether the HCV Personal Representative has satisfied two evidentiary requirements: first, the delivery of evidence under paragraph 3.01(2)(b) of “an episode of jaundice within three months of receiving Blood in the absence of any other cause”; and second, proof that the death of the HCV Infected Class Member was caused by his infection with HCV and that he had attained Disease Level 4 or higher before his death.

[53] With respect to the requirement under paragraph 3.01(2)(b), I am satisfied that, when the evidence is considered in its totality, it would be unsafe to infer that the jaundice developed by the HCV Infected Class Member within three months of his blood transfusions was caused by the Australia antigen. Furthermore, there were no other known causes of that jaundice. In the circumstances, the HCV Personal Representative has complied with the requirement in paragraph 3.01(2)(b) by delivering acceptable proof “an episode of jaundice within three months of receiving Blood in the absence of any other cause”.

[54] The final question to be addressed is whether there is acceptable proof that the death of the HCV Infected Class Member was caused by an infection with HCV at Disease Level 4 or higher. In that regard, when the evidence is considered in its totality, an inference can be drawn that an unknown source of virulent hepatitis infection was present in some of the blood used in the transfusions. That source of hepatitis infection could only have been the Hepatitis C virus, the existence of which was unknown at the time. In the circumstances, the evidence in the Appeal File, including the hospital records and the Treating Physician Form, constitutes “proof acceptable to the Administrator”, within the meaning of subsection 3.02(5), that the death of the HCV Infected Class Member was

caused by his infection with HCV and that he had attained Disease Level 6 prior to his death.

CONCLUSION

[55] The appeal is allowed. The matter is remitted to the Administrator with the direction that the claim for compensation shall be approved and compensation shall be paid to the HCV Personal Representative under section 3.02 of the *Settlement Agreement*.

"D. McGillis"

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

DATED February 12, 2009

TO: Claimant
Fund Counsel
Administrator