

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: 07-02188

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated September 3, 2008, in which his claim for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis that he did not provide evidence of first infection with Hepatitis C by a Blood transfusion in Canada during the Class Period.

FACTS

[2] On October 16, 2007, the Claimant filed a claim for compensation under the terms of the *Settlement Agreement*. In his claim, he stated that he was a Primarily-Infected Person who was infected with the Hepatitis C virus through a Blood transfusion received during the Class Period. The Treating Physician Form indicated that the Claimant was at Disease Level 5.

[3] In the Blood Transfusion History Form, the Claimant noted that, on March 6, 1980, he had received three Blood transfusions for hemorrhoid bleeding. He included with the Form two documents: a hospital blood form and a laboratory History Record. Both of these documents confirmed, among other things, that the Claimant was transfused with three units of Blood on March 3, 1980. Both records specified the unit numbers of the Blood transfused and the date of the transfusions. The hospital record

contained handwritten entries dated March 6, 1980 concerning the three transfusions, as well as another handwritten entry dated December 1, 1997 that stated “[Patient] in Meditech Hx #33467”; there was no other entry made on the form on that date and no indication of a transfusion. The laboratory History Record was printed out on February 20, 1998 and referred to history record #33467 in the name of the Claimant.

[4] The Claimant had no other risk factors for the Hepatitis C virus, and has received compensation under the *Red Cross Settlement* in the amount of \$10,300.00.

[5] By letter dated January 7, 2008, the Canadian Blood Services forwarded the final report for the Traceback, entitled “Transfusion Summary”, which stated as follows:

Comments: The following products were determined to be transfused, and matched against CBS records to determine if Donor status is known.

3 units confirmed transfused in March 1980.

3 donors HCV negative.

DECISIONS OF THE ADMINISTRATOR

[6] In a preliminary decision dated July 10, 2008, the Administrator advised the Claimant that his claim would be rejected unless he provided further evidence that he “[...] was infected for the first time with HCV by Blood received in Canada during the Class Period.” The Administrator gave the following reasons in support of its decision:

We are writing to advise you that your claim for compensation under the Pre-1986/Post-1990 Hepatitis C Settlement Agreement will be rejected unless you can provide further evidence that you or the HCV Infected Class Member was infected for the first time with HCV by Blood received in Canada during the Class Period.

Criteria for Class Membership

The Settlement Agreement provides compensation for Class Members first infected by Blood received in Canada on or before December 31, 1985, or between July 2, 1990, and September 28, 1998. There is a court approved protocol, which requires the Administrator to investigate the status of the donors of the blood or blood products received by a claimant during the Class Period.

All donor searches are complete and your traceback results have been carefully reviewed. According to the results, the HCV antibody was not present in any of the blood or blood products you received in the Class Period. We know of no other information that would impact on the evaluation of your claim; therefore, your claim must be rejected unless you can prove that you were infected for the first time with HCV by Blood received in Canada during the Class Period notwithstanding the results of the Traceback Procedure.

You must sign and return the Form (following page) within 30 days after you receive this letter. If you wish to provide further evidence, you will then have an additional six (6) months to provide this further evidence to the Administrator.

[7] The Claimant did not complete the Further Evidence of First Infection Form and provided no such evidence.

[8] In a decision dated September 3, 2008, the Administrator denied the claim for compensation, stating as follows:

We are writing to advise you that your claim has been denied for compensation under the Pre-1986/Post-1990 Hepatitis C Settlement Agreement. The reasons for denial are set out below.

Insufficient Further Evidence of First Infection During the Class Period – Final Decision

The Settlement Agreement provides compensation for class members first infected by a Blood transfusion in Canada prior to and including December 31, 1985 and between July 2, 1990 and September 28, 1998.

You will recall that in our last letter to you, we wrote that in the absence of further evidence, your claim would be denied. One of two circumstances applies to your case and may be summarized as follows:

- 1) You did not provide any further evidence to the Administrator; OR
- 2) The further evidence that was submitted failed to overturn the preliminary determination that your claim did not meet class membership criteria.

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 fails 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.

[9] In its decision, the Administrator made no reference to any facts pertaining to the Claimant and stated that the claim for compensation was denied because “one of two circumstances” applied to the case. However, it failed to indicate the “circumstance” that resulted in the denial of the claim for compensation. Indeed, it is impossible to determine the specific reason for the denial of the claim for compensation by reading the decision.

REQUEST FOR REVIEW

[10] On September 29, 2008, the Claimant filed a Request for Review. In his reasons for appealing, he stated, among other things, as follows:

I have checked back for records in [another province], but they have none. I was born in [a city in that other province] and they have no records of my other blood transfusion.

SUPPLEMENTARY EVIDENCE AND SUBMISSIONS FILED ON APPEAL

[11] By letter dated December 8, 2008, the Claimant filed written submissions in support of his appeal in which he stated, among other things, as follows:

[...] on my lab paperwork it stated that I got all 3 units on 06/03/80; but that is not correct, because I received 2 units of blood on 06/03/80, and asked if I could get the last unit the next day, as my back was extremely sore [...]. And this is the reason I wanted to come back the next day for the last unit of blood, which would have been 07/03/80. And we are questioning whether there was a possible clerical error and I didn't receive one of these unit numbers that is in the history record of the blood I received on 06/03/80, and why is there no paperwork for 07/03/80? Is it possible that someone at [the hospital] made a mistake?

The Claimant also filed various newspaper and Internet articles with his Request for Review, all of which I have read carefully.

[12] In an e-mail dated December 9, 2008, the Claimant stated that he received his last (i.e. his third) unit of Blood in the Emergency Department, as the nurse who administered the first two units told him to go to the Emergency to get his “last unit of blood put in”.

He has confirmed that the hospital has no records from its Emergency Department for the 1980's.

[13] In an e-mail dated December 30, 2008, the Claimant stated that he had reviewed his hospital records from his admission on June 13, 1984 for emergency hemorrhoid removal and had noted that, in recording his history of illness, a nurse had referred to a blood transfusion in 1983.

[14] On January 7, 2009, the Claimant submitted hospital records relating to his admission to the hospital on June 13, 1984 for problems caused by hemhorroids. The Nursing Assessment/History Form, dated June 13, 1984, contained a handwritten note "Blood transfusion/83". A document dated June 13, 1984, completed by the physician in charge, outlined, among other things, the Claimant's past history and contained a note that stated as follows:

transfusions – after epistaxis
– after hemorrhoid [illegible]

[15] The records relating to his hospital admission from June 13 to June 20, 1984 confirm that the Claimant had a surgical procedure for hemorrhoids. However, none of the records made any reference to the Claimant receiving a Blood transfusion during this hospital stay. In addition, in the surgical record, the space entitled "Blood Loss" was left blank, as was the space entitled "Blood". The records therefore establish that the Claimant did not receive a Blood transfusion during his hospitalization from June 13 to June 20, 1984.

[16] On January 13, 2009, the Fund Counsel provided the Claimant with another Blood Transfusion History Form and suggested that he complete it, given the physician's

note, described in paragraph 14 above, of a transfusion “after epistaxis” (nose bleed). Although the Claimant did complete a further Blood Transfusion History Form, it did not contain any dates or timeframes for that transfusion. The Administrator was therefore unable to send that Blood Transfusion History Form to the Canadian Blood Services for further investigation, as it did not contain at least the month and year of hospitalization.

[17] By letter dated, January 15, 2009, the Claimant’s family physician wrote a letter stating, in part, as follows:

He has attended me as his family physician since 1978.

I can confirm that he has tested positive for Hepatitis C. The only blood transfusions that he has received to me knowledge occurred in March 1980. Other than his blood transfusions, I can find no other potential source of his Hepatitis C infection.

He has no tattoos and he does not have any body piercings. He denies ever using IV drugs or use of non-sterile needles of any sort.

[18] By e-mail dated February 14, 2009, the Claimant advised the Fund Counsel that his eldest sister said that he had received a blood transfusion “somewhere around 1971 to 1975” for a nose bleed.

[19] On February 18, 2009, the Fund Counsel advised the Claimant of the provisions of the *Proof of Receipt of Blood Protocol* that would permit him to deliver certain types of evidence, other than hospital or medical records, to establish the receipt of Blood during the Class Period.

[20] By letter dated February 18, 2009, the Claimant indicated that he had no more information to provide.

ISSUE

[21] There are two issues to be determined on appeal: whether the decision of the Administrator to deny the claim was reasonable on the basis of the evidence, and whether the supplementary evidence delivered by the Claimant establishes that he received Blood in Canada during the Class Period.

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 specific reference to the circumstances of the Claimant’s case. In the Reasons for Decision rendered on the appeal in Claim File 07-03416, I stated the following in a case where the Administrator had used the same 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]

[23] In applying the principles enunciated above, I have determined that there is sufficient evidence in the Appeal File to enable me to make the necessary factual findings and that it would be simpler and more expeditious for me to do so rather than to remit the matter to the Administrator.

iii) Sections 2.01 and 5.04 of the Settlement Agreement and the Traceback Protocol for Primarily-Infected Persons

[24] In order to determine whether the Claimant is eligible for compensation as a Primarily-Infected Class Member, the provisions in sections 2.01 and 5.04 of the *Settlement Agreement*, as well as various sections in *the Traceback Protocol for Primarily-Infected Persons* (“*Traceback Protocol*”), must be interpreted and applied to the facts. Those provisions “[...] must be interpreted in a textual, contextual and purposive way” [See *Pelletier v. Canada*, [2008] 3 F.C.R. 40 (F.C.A.) at paragraph 47].

[25] In my Reasons for Decision on the appeal in Claim File 07-03319, I analyzed sections 2.01 and 5.04 of the *Settlement Agreement*, as well as parts of the *Traceback Protocol*, and have reproduced my analysis from that decision in paragraphs 26 to 37 below for ease of reference.

[26] Under the terms of the judicially approved *Settlement Agreement*, a person claiming to be a Primarily-Infected Class Member, such as the Claimant, must satisfy the eligibility requirements in section 2.01 in order to make a successful claim for compensation. Section 2.01 states, in part, 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:

- a) medical, clinical, laboratory, hospital, The Canadian Red Cross Society, Canadian Blood Services or Hema-Quebec records demonstrating that the claimant received Blood in Canada during the Class Period; [...]

[27] Paragraph 2.01(1)(a) of the *Settlement Agreement* requires that a claimant must have “received Blood in Canada during the Class Period” in order to be eligible for compensation under the terms of the *Settlement Agreement*.

[28] With respect to the procedure to be followed in considering a claim made under paragraph 2.01(1)(a), paragraph 3(a) of the *Traceback Protocol* requires the Administrator to obtain and assess the results of a Traceback Procedure. Paragraph 3(a) states as follows:

3. In making its decision whether the Claim in respect of a person claimed to be a Primarily-Infected Person should be approved, the Administrator shall:

- a. obtain and assess the results of the stage or stages of the Traceback Procedure required by such of paragraphs 5 through 9 of this Protocol as are applicable to the claim in question; [Emphasis Added]

[29] The term “Traceback Procedure” is defined in both section 1.01 of the *Settlement Agreement* and paragraph 1(a) of the *Traceback Protocol*. For the purposes of the present appeal, it is unnecessary to refer to the definition in the *Traceback Protocol*. The

definition in section 1.01 of the *Settlement Agreement* states as follows:

“Traceback Procedure” means a targeted search for and investigation of the donor and/or the units of Blood received by an HCV Infected Class Member”.

The results of a Traceback Procedure therefore provide information that is crucial in determining the central question of whether a person claiming to be a Primarily-Infected Person was infected with Hepatitis C by Blood received through the blood system in Canada during the Class Period.

[30] As part of the application form prescribed by the Administrator, a claimant must sign a “Form 4 – Authorization to Initiate Traceback Procedure and/or to Release Traceback Information”. Form 4 authorizes the Canadian Blood Services and/or Héma Québec, among other things, to initiate a Traceback Procedure for Blood or blood products received by that person in Canada.

[31] In circumstances where the results of the Traceback Procedure do not support the claim, subsections 5.04(1) and (2) apply and state as follows:

5.04 Traceback Procedure

(1) Notwithstanding any other provision of this Agreement but subject to the provisions of Sections 5.04(2) and (3), the Administrator must reject the Claim of a Primarily-Infected Person (and all Claims pertaining to such Primarily-Infected Person or Primarily-Infected Opt-out Person, including Claims of Secondarily-Infected Persons, HCV Personal Representatives, Dependants and Family Members) if the results of a Traceback Procedure demonstrate that:

(a) where the Primarily Infected Person did not receive Blood prior to January 1, 1986, one of the donors or units of Blood received at any time between January 1, 1986 and July 1, 1990 inclusive, by the Primarily-Infected Person was HCV antibody positive; or

(b) that none of the donors or units of Blood received by the Primarily-Infected Person during the Class Period is or was HCV antibody positive.

(2) A claimant may prove that the relevant Primarily-Infected Person or Primarily-Infected Opt-out Person was infected, for the first time, with HCV by

receiving Blood in Canada during the Class Period, notwithstanding the results of the Traceback Procedure. For greater certainty, the costs of obtaining evidence to refute the results of a Traceback Procedure must be paid by the claimant unless otherwise ordered by a Court. [Emphasis Added]

[32] Where the results of the Traceback Procedure demonstrate that none of the donors or units of Blood received during the Class Period was HCV antibody positive, paragraph 5.04(1)(b) of the *Settlement Agreement* requires the Administrator, in mandatory terms, to reject a claim. Paragraph 5.04(1)(b) must be read in conjunction with paragraph 8(a) of the *Traceback Protocol* which reiterates the obligation of the Administrator to reject the claim in such circumstances. Paragraph 8(a) of the *Traceback Protocol* states as follows:

8. After reviewing the available Traceback Procedure Information, if any, and the results of the Unit Number Search or Records Search, if such were required, the Administrator shall:
 - a. where all of the donors or units of the Blood received by the person claimed to be a Primarily-Infected Person during the Class Period are determined not to be HCV antibody positive, reject the Claim as provided in Section 5.04(1) of the Settlement Agreement, subject to the claimant's right to provide evidence to refute the Traceback Procedure result as provided in Section 5.04(2) of the Settlement Agreement and paragraphs 15 to 18 of this Protocol;

[33] Despite the requirement in paragraph 5.04(1)(b) of the *Settlement Agreement* and paragraph 8(a) of the *Traceback Protocol* to reject the claim, subsection 5.04(2) nevertheless permits a claimant to prove that the Primarily-Infected Person was infected with HCV, for the first time, by receiving Blood in Canada during the Class Period, notwithstanding the results of the Traceback Procedure.¹ In the same vein, paragraph 8(a) of the *Traceback Protocol* refers to the right of a claimant to provide

¹ Subsection 5.04(1) begins with the words "notwithstanding any other provision of this Agreement". As a result, in circumstances where paragraph 5.04(1)(b) applies, a claimant may not resort to subsection 2.01(2) to deliver independent corroborating evidence; rather, a claimant must adduce the proof required by subsection 5.04(2) and paragraphs 15 to 18 of the *Traceback Protocol* in order to make a successful claim.

evidence to refute the Traceback Procedure result under both subsection 5.04(2) of the *Settlement Agreement* and paragraphs 15 to 18 of the *Traceback Protocol*.

[34] Paragraph 15 of the *Traceback Protocol* requires the Administrator, after making a determination to reject the claim based on the Traceback Procedure result, to advise the claimant of the right to provide “further evidence of first infection”, failing which the claim will be rejected. The expression “further evidence of first infection” is used in paragraphs 15 to 18 of the *Traceback Protocol*; it is not specifically defined in either section 1.01 of the *Settlement Agreement* or paragraph 1 of the *Traceback Protocol*. However, paragraph 15 of the *Traceback Protocol* refers to “further evidence of first infection” as evidence establishing that the claimant “[...] was infected for the first time with HCV by a Blood transfusion received in Canada during the Class Period notwithstanding the Traceback Procedure result [...]”. Paragraph 15 also makes reference to subsection 5.04(2), the provision in the *Settlement Agreement* that permits a claimant to prove first infection, notwithstanding the results of the Traceback Procedure.

Paragraph 15 of the *Traceback Protocol* provides as follows:

15. The Administrator shall, after determining in accordance with the provisions of Section 5.04(1) of the Settlement Agreement and paragraph 8(a) or 8(c)(i) above that a Claim must be rejected based upon the Traceback Procedure result, advise the claimant that, unless the claimant provides further evidence of first infection (“Further Evidence of First Infection”) which establishes to the satisfaction of the Administrator that the person claimed to be the Primarily-Infected Person was infected for the first time with HCV by a Blood transfusion received in Canada during the Class Period notwithstanding the Traceback Procedure result in accordance with Section 5.04(2) of the Settlement Agreement, his or her claim shall be rejected (a “Section 5.04 Letter”).

[35] Paragraph 16 of the *Traceback Protocol* requires the Administrator to send a letter to the claimant under section 5.04 advising of the right to elect to provide Further

Evidence of First Infection and the obligation to return the election form within a prescribed time period, failing which the claim will be rejected. Paragraph 17 provides, among other things, that a claimant who elects to provide Further Evidence of First Infection must submit the evidence within a period of six months, unless the time period is extended. Paragraphs 16 and 17 of the *Traceback Protocol* state as follows:

16. A Section 5.04 Letter shall advise the claimant that he or she may elect to provide Further Evidence of First Infection by returning the election form provided to the Administrator within thirty days from the date of receipt of the Section 5.04 Letter, failing which his or her claim shall be rejected.

17. If the claimant elects to provide Further Evidence of First Infection and returns the prescribed election form in the prescribed time, he or she must provide, within the following six months, his or her Further Evidence of First Infection, unless that time is extended with the consent of the Administrator or by the Court on a teleconference motion arranged at the request of the claimant.

[36] In circumstances where a claimant provides Further Evidence of First Infection, paragraph 18 of the *Traceback Protocol* requires the Administrator to accept or reject the claim “[...] based upon all of the information available and section 5.04 of the *Settlement Agreement*”. In addition, a claim will be rejected where a claimant fails to provide the Further Evidence of First Infection within the prescribed or extended time period.

Paragraph 18 of the *Traceback Protocol* states as follows:

18. The Administrator shall, following receipt and consideration of the Further Evidence of First Infection received from a claimant, accept or reject his or her Claim based upon all of the information available to the Administrator and Section 5.04 of the *Settlement Agreement*. If the claimant who elected to provide Further Evidence of First Infection does not provide the Further Evidence of First Infection within the six months following his or her election, or such further time as has been agreed or ordered, his or her Claim shall be rejected.

[37] In the present appeal, the related provisions in paragraph 5.04(1)(b) and subsection 5.04(2) of the *Settlement Agreement*, as well as paragraphs 3, 8(a) and

15 to 18 of the *Traceback Protocol*, must be read together. A textual reading of those provisions in their context and in conjunction with one another confirms that, where a Traceback Procedure demonstrates that none of the donors or units of Blood received by a Primarily-Infected Person during the Class Period is or was HCV antibody positive, a claimant has the opportunity to provide Further Evidence of First Infection in accordance with the requirements in the *Traceback Protocol*. The Further Evidence of First Infection must establish, to the satisfaction of the Administrator, that the person claiming to be the Primarily-Infected Person was infected for the first time with HCV by a Blood transfusion received in Canada during the Class Period; otherwise, the claim for compensation must be rejected. This interpretation is also consistent with the purpose of the *Settlement Agreement*, which is to settle all claims relating to or arising from the infection of persons with Hepatitis C through the Blood system in Canada during the Class Period, on the terms set out in the *Agreement*.

iv) Did Claimant provide Further Evidence of First Infection under subsection 5.04(2) of Settlement Agreement and paragraphs 8(a) and 15 to 18 of Traceback Protocol?

[38] In the present case, the evidence contained in the final Traceback report, as summarized in paragraph 5 above, confirmed that the Claimant had received three units of Blood during the Class Period, but that the three donors had tested negative for the Hepatitis C virus.

[39] In its letter dated July 10, 2008, the Administrator advised the Claimant that his claim would be rejected, unless he could provide evidence that he was infected for the first time with HCV by Blood received in Canada during the Class Period. The Administrator included a Further Evidence of First Infection Form with the decision and advised the Claimant that he had to return it within thirty days of the receipt of the letter.

[40] Unfortunately, the Claimant did not return the Further Evidence of First Infection Form to the Administrator and did not submit any Further Evidence of First Infection. In the circumstances, he has failed to prove, notwithstanding the results of the Traceback Procedure, that he was infected for the first time with HCV by receiving Blood in Canada during the Class Period. As a result, the Administrator was required to reject the claim for compensation by virtue of subsection 5.04(2) of the *Settlement Agreement* and paragraph 15 of the *Traceback Protocol*.

[41] The Administrator therefore committed no error in denying the claim for compensation and the decision was reasonable on the basis of the evidence.

v) Supplementary Evidence on Appeal - Subsection 2.01(2) of the Settlement Agreement and section 5 of the Proof of Receipt of Blood Protocol

[42] I have carefully considered all of the supplementary submissions and evidence delivered by the Claimant on appeal. In the Supplementary Evidence, there are two references to the existence of another blood transfusion. First, in the document dated June 13, 1984, as described in paragraph 14 above, the physician in charge outlined the Claimant's medical history and wrote, among other things, that there was a transfusion "after epistaxis" (nose bleed). Second, as summarized in paragraph 15, the Claimant stated that his sister recalled him receiving a blood transfusion "somewhere around 1971 to 1975". Given the imprecise time period, a Traceback could not be conducted and the Claimant was unable to produce any hospital records relating to that transfusion.

[43] Where a person claiming to be a Primarily-Infected Member cannot deliver records under paragraph 2.01(1)(a) of the *Settlement Agreement* to demonstrate the receipt of Blood during the Class Period, subsection 2.01(2) allows the delivery of

“[...] corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant [...]”. Subsection 2.01(2) states as follows:

(2) Notwithstanding the provisions of Section 2.01(1)(a), if a claimant cannot comply with the provisions of Section 2.01(1)(a), the claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant establishing on a balance of probabilities that he or she received Blood in Canada during the Class Period.

[44] Since no hospital records were available to demonstrate that the Claimant received a transfusion for a nose bleed sometime in 1971 to 1975, section 5 of the *Proof of Receipt of Blood Protocol* prescribes the alternate types of evidence that may be accepted by the Administrator as proof of the receipt of Blood. In the present appeal, paragraph 5(a) of the *Receipt of Blood Protocol* applies and states as follows:

No Hospital Records or Hospital Records Do Not Confirm Receipt of Blood and The Primarily-Infected Class Member Did Not Receive Notification As Part Of A Blood Recipient Notification Program

5. Subject to paragraphs 2 and 7 and the following constraints, the Administrator may accept any evidence it deems reliable as proof on the balance of probabilities of receipt of Blood in Canada during the Class Period in satisfaction of section 2.01(2) of the Settlement Agreement:

- a. evidence of the Primarily-Infected Class Member or a Family Member of the Primarily-Infected Class Member may not be considered. The claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the Primarily-Infected Class Member or any person who is the Family Member of the Primarily-Infected Class Member; and

The sister of the Claimant falls within the meaning of the term “Family Member”, as defined in section 1.01 of the *Settlement Agreement*. Unfortunately, her statement to the Claimant that he received a Blood transfusion for a nose bleed “somewhere around 1971 or 1975” therefore cannot be considered as evidence.

[45] With respect to the note made by a nurse in recording the Claimant's medical history, as described in paragraph 14 above, there is no other evidence to demonstrate that the Claimant received a blood transfusion in 1983. The note made by the nurse erroneously stated "1983" instead of "1980", the year when the Claimant received his three transfusions at the same hospital.

[46] Unfortunately, the supplementary evidence delivered by the Claimant on appeal Claimant does not establish on a balance of probabilities that he received Blood in Canada during the Class Period, as required by subsection 2.01(2) of the *Settlement Agreement*. In the circumstances, his claim for compensation regrettably cannot succeed.

v) *Compensation under another program*

[47] As indicated previously, the Claimant had applied for and received compensation under the terms of the *Red Cross Settlement*. In the Reasons for Decision rendered in Claim File 07-00464, I commented on the perception of inequity that may arise when compensation is awarded under one plan or agreement and denied under another. In particular, I stated as follows in paragraph 41 of that decision:

[41] I can appreciate the frustration and distress that this decision will cause to the Claimant, particularly given that the member of the provincial review committee found him to be eligible for a benefit under that program. It must be recognized that the framework governing eligibility for compensation under the terms of the *Settlement Agreement* is completely different from the one applied by the member of the review committee in the context of the provincial agreement.

Although I fully understand that it must be confusing and upsetting when compensation is granted under the auspices of one program or agreement and yet denied under another one, the terms of the *Settlement Agreement* govern the present claim and must be applied. It is also important to recognize that the terms of the *Settlement Agreement* are the result

of an agreement between the Parties which was approved by the Courts; neither the Administrator nor the Appeals Officer has any power or discretion to alter those terms.

CONCLUSION

[48] The appeal is dismissed.

"D. McGillis"

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

DATED April 7, 2009

TO: Claimant
Fund Counsel
Administrator