

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: 07-05244

REASONS FOR DECISION

INTRODUCTION

[1] The HCV Personal Representative has appealed a decision of the Administrator dated November 13, 2009, in which the application 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 there was no proof of an infection with the Hepatitis C virus.

FACTS

[2] On November 23, 2007, the HCV Personal Representative delivered an application for compensation under the *Settlement Agreement* on behalf of the HCV Infected Class Member, her father, who died on August 7, 1974. In the General Information Form, she stated, among other things, that he was a Primarily-Infected Hemophiliac who was infected with the Hepatitis C virus through blood transfusions received in Canada prior to January 1, 1986.¹ He had no other risk factors for Hepatitis C, and the beneficiaries of his Estate have received compensation under the *Red Cross Settlement* and a provincial plan in the amounts of \$10,450.00 and \$25,000.00 respectively. The only other required form that she delivered at that time was a Treating Physician Form that she had completed herself.

¹ The completed version of Form 1 was delivered on July 22, 2008.

[3] In support of the application, she also delivered on that date various documents, including a provincial Statement of Death and a card from the Canadian Hemophilia Society.

[4] The Statement of Death issued by the province confirmed that the HCV Infected Class Member had died on August 7, 1974. There was no indication of the cause of death.

[5] The card issued by the Canadian Hemophilia Society was dated March 25, 1970 and signed by a doctor in the Coagulation Laboratory at Hospital "A"; it also indicated the name of the doctor who had treated the HCV Infected Member at Hospital "A". The card stated, among other things, as follows:

THE BEARER HAS HEMOPHILIA
He is a bleeder and requires immediate medical attention in case of accident
[...]
TYPE OF HEMOPHILIA Factor VIII 18%
March /70 Bleeding time – 14 min (Duke)
Capillary [sic] fragility – weak pos.
P.T.T. 48 sec (control 36 sec)
Von Willebands Disease likeliest diagnosis
REMARKS Urticarial reactions
to plasma and cryoprecipitates [Emphasis Added]

[6] After the initial delivery of documents, the Administrator sent several deficiency letters. In response to the letters, the HCV Personal Representative delivered forms on several occasions, together with various documents.

[7] On March 13, 2008, the HCV Personal Representative delivered forms and documents including, among other things, a Blood Transfusion History Form, a Physician's Statement of Death and a letter entitled "Addendum" that was written by the HCV Personal Representative.

[8] The Blood Transfusion Form indicated that the HCV Infected Class Member was transfused with “200+” units of blood at Hospital “A” and “50+” at Hospital “B”; the dates of the transfusions were not specified.

[9] A “Physician’s Statement of Death” dated August 31, 1974 specified “chronic renal failure” as the disease or condition leading directly to the death, with an interval between onset and death of three to five years; the antecedent cause was “phenacstin nephritis” with an interval of ten years.

[10] An “Addendum” dated August 16, 2000 was signed by the HCV Personal Representative in the context of a provincial plan application for a benefit and stated, in part, as follows:

My father suffered from hemophilia; was hospitalized many times and received hundreds of blood transfusions over the years. [...]

In late 1969, my father was hospitalized at [Hospital “A”] where his illness became the focus of a forum on hemophilia treatment using Cryoprecipitates.

My father had exceeded the lifespan of most of most recorded haemophilia sufferers. His case is well documented in the hospital journals at [Hospital “A”] at that time as he permitted doctors to experiment with his treatment and use his statistics.

I recall being in my father’s hospital room with my father, my mother and my husband when Dr. [...] explained to all of us that the reason my father was not recovering was because he had contracted hepatitis through a blood transfusion.

He was in and out of hospital many times. [...] [Emphasis Added]

[11] On July 22, 2008, the HCV Personal Representative delivered various forms, including a Treating Physician Form that was not signed by a physician. The Blood Transfusion History Form indicated that the HCV Infected Class Member was transfused with “100’s” of units of blood at Hospital “A” and “many” at Hospital “B”; the dates of the transfusions were not specified.

[12] On September 15, 2009, the HCV Personal Representative delivered, among other things, a Treating Physician Form, documents from a provincial plan application for a benefit and responses concerning requests that she had made to three hospitals for the release of records relating to the HCV Infected Class Member.

[13] The Treating Physician Form was signed by a physician on September 8, 2009. In Section C of the Form, the physician checked the box to indicate “an episode of jaundice within three (3) months of receiving Blood in the absence of any other cause”. In Section D - Advanced Disease Levels, she checked response 7 under Disease Level 6 to indicate that the HCV Infected Class Member had been diagnosed with renal failure and wrote “No hospital records available”. In response to the statement under Disease Level 6 that “It is my opinion that the HCV Infected Class Member’s infection with HCV materially contributed to his or her Disease Level 6 condition”, she checked the box “Yes” and wrote “according to history provided by [the HCV Personal Representative]”. In Section E – Patient History, she wrote “N.A [not applicable]” above the question “How long have you treated the HCV Infected Class Member?” In Section F – Disease Verification, she indicated that the HCV Infected Class Member had no risk factors for the Hepatitis C virus and had received blood during the Class Period. In response to question 7 in that part, she checked the box “Yes” to indicate that the HCV Infected Class Member’s infection with HCV had materially contributed to his death and wrote “was likely a cause of his renal failure”. In Section G – Disability Information, she indicated that the percentage of disability was 100% and wrote “per [the HCV Personal Representative]. Similarly, in outlining the symptoms of the HCV Infected Class Member that had caused his disability, she wrote “symptoms reported by his daughter [the HCV

Personal Representative]”. In Section H – Certification by Treating Physician, she wrote “see attached letter of explanation”.

[14] The physician who signed the Treating Physician Form included a letter dated September 4, 2009 in which she stated as follows:

I have known [the HCV Personal Representative] for 23 years and have been her principal primary care provider since 1989. I know her to be a reliable historian.

At her request, I have reviewed the enclosed forms regarding her deceased father [...]. I support her historical claim that he died from complications due to hepatitis contracted from a blood transfusion. [Emphasis Added]

[15] With respect to the requests for the release of records, Hospital “A” responded that any transfusion records had been destroyed, Hospital “B” did not reply, and Hospital “C” stated that it did not have any Blood Bank records prior to 1985.

[16] The provincial plan documents included the Final Decision and Reasons of the [provincial] Review Committee. In the decision, the Review Committee allowed the appeal from a decision of an adjudicator and awarded an entitlement to benefit to the Estate of the HCV Infected Class Member, stating, in part, as follows:

Death Caused by HCV

The second half of this issue is whether the death of the father of the Applicant was caused by HCV. The evidence relating to this matter includes a death certificate completed on August 31, 1974, relating to the death of the Applicant’s father on August 7, 1974. This form indicates that the disease or condition which led directly to death was “Chronic renal failure” and it is noted that the interval between the onset of this condition and death was “3-5 years”.

Section 14.2 of the Policy states:

For the purposes of determining whether a person’s death was caused by HCV, it will be presumed that death was caused by HCV where the cause of death is listed in Schedule “A”.

Schedule A is worded as follows:

- 1) **Indications of Death Caused by Hepatitis C:** Liver failure, cirrhosis, jaundice, bleeding esophageal varices, bacterial peritonitis, liver cancer

2) **Indications of Death Caused by HCV which require additional evidence that HCV was present:** Kidney failure, non-Hodgkin's B-cell lymphoma

The Review Committee cannot, on the basis of the information on the death certificate alone assume that HCV was the cause of death.

Additional evidence to support such a finding is found in a statement submitted to the Program Office by the Applicant in a letter witnessed by her solicitor [...] and dated August 16, 2000. In this letter the Applicant states:

I recall being in my father's hospital room with my father, my mother, and my husband when Dr. [...] explained to all of us that the reason my father was not recovering was because he had contracted hepatitis through a blood transfusion.

This information is reiterated by the Applicant on her Form C response to the decision of the Program Office.

The evidence is that the Applicant's father died in 1974. At that time there were no tests for Hepatitis C and furthermore there are no medical records available to determine what tests were done on the now deceased person and/or what the findings of these tests were. It is the evidence of the Applicant on her Form C submission that efforts to obtain medical records from [Hospital "A"] and [Hospital "B"] in [...] were undertaken by her with the assistance of the law firm of [...]. Her submission says, "The search was unsuccessful due to the length of time since my father's death, records are not kept after a required period of time". This evidence has not been refuted and the Program Office responded to the Form C submission with the statement that they had no further comments to add.

The unrefuted evidence before the Review Committee is that the deceased suffered from hepatitis. An article in the Reference Literature by L.B. Seeff et al entitled, Long-Term Mortality After Transfusion – Associated Non A-Non B Hepatitis sheds some light on what the nature of the Applicant's father's hepatitis might have been. It states in part:

Non A, Non B Hepatitis was recognized in the mid-1970's during the course of several prospective studies of transfusion associated hepatitis in the United States. These studies found an incidence of hepatitis ranging from 7 to 17 per cent, 78 to 92 percent of which represented non-A, non-B hepatitis.

I would appear that, if indeed, the deceased was found to have hepatitis, as reported by his daughter, that there is a very high chance that he suffered what was then known as non-A, non-B hepatitis.

The evidence that would indicate that the Applicant's father died as a result of HCV includes that fact that kidney or renal failure, cited on the Death Certificate, is found on Schedule A and there is additional evidence that HCV was present. This evidence includes the witnessed statement of the Applicant concerning [the diagnosis of the doctor]and the statistical evidence cited in the article by Seeff et al.

On the basis of this evidence and none to the contrary, the Review Committee finds, on a balance of probabilities, that the death of the Applicant's father was caused by HCV.

2. Was There a Transfusion of Blood in Ontario During the Entitlement Period?

The information provided on the application form by the daughter of the deceased is that he was transfused in Ontario before 1985 at [Hospital "B"] and [Hospital "A"] for "various reasons".

There is evidence on the file that the deceased was a hemophiliac. This evidence was submitted by [the lawyer] on behalf of the Applicant. The evidence includes a photocopy of a card issued by the Canadian Hemophilia Society, apparently carried by the deceased which identified him as requiring immediate medical attention in case of accident. A section of the form which describes his problem in some detail was completed by the Coagulation Department of [Hospital "A"] in 1970 with Von Willebrands disease cited as "the most likely diagnosis".

This is not direct evidence of transfusion. However, the scientific literature supports a conclusion that hemophiliacs do often require transfusion or the administration of blood products.

There is an article in the Reference List identified in the index as Frequency of blood transfusion associated with selected procedures/diagnoses. The author is R.E. Remis and the document was published in 1999. Hemophilia and Von Willbrands disease are listed amongst the "selected procedures" but there are no statistics present to indicate the frequency of transfusion. Another article entitled Prevention and Control of Hepatitis C, Guidelines and Recommendations, published by Health Canada in 1995 contains further information. It lists *Guidelines on Factors to Consider in the Identification of Person with Increased Likelihood of HCV Infection: Indicators of Risk* and included in the list is the following: multiple transfusions (at any time), e.g., those with thalassemia and hemophilia.

The Review Committee believes that there is sufficient evidence to conclude that the Applicant's father, as a hemophiliac, received a transfusion in Ontario in the period of eligibility. There is no evidence to the contrary so this finding is made on a balance of probabilities.

Was the HCV Contracted Through a Transfusion?

There is no evidence on this file to suggest that there were means by which the deceased could have become infected with Hepatitis C other than by transfusion.

The scientific literature suggests that the deceased would have received multiple transfusions or the administration of blood products at a time when donors of blood were not being screened for Hepatitis C. The number of transfusions and the time frame in which they occurred raise the likelihood that transfusion or transfusions were the source of the Hepatitis C.

An article entitled Recommendations for Prevention and Control of Hepatitis C virus (HCV) Infection and HCV-Related Chronic Disease and published by the U.S. Department of Health and Human Services in 1998 has relevant statistical information. In a table *entitled Estimated average prevalence of hepatitis C virus (HCV) infection in the United States by various characteristics in the population*, Persons with hemophilia treated with products made before 1987 heads the list and it is noted that prevalence rate of HCV infection is 87%.

The Review Committee finds that the evidence which supports a finding that the HCV was caused by a transfusion or the administration of blood products is of considerable weight and, on a balance of probabilities finds that the HCV of the deceased was contracted through a transfusion.

This Application has, in the opinion of the Review Committee, met the criteria of the Policy which determines entitlement for the Estates of Primarily Infected Persons.

DECISION

I have considered the Review Record and applied the principles and policies set out in the Policy. Pursuant to Section 8.1 of the OHCAP External Review Procedures, the decision of the Program Adjudicator is reversed and entitlement to the benefit is granted.

[17] On September 29, 2009, the HCV Personal Representative delivered a letter from Hospital "A" that stated as follows:

As a result of your request, we have searched for the Medical Chart and Blood Transfusion Laboratory Records of your late father.

Unfortunately, his Medical Chart records for admission prior to 1974 have been destroyed.

Blood Transfusion Laboratory records are only available from 1982 to the present, so we cannot provide information about any blood transfusions he may have received in the 1970's.

DECISION OF THE ADMINISTRATOR

[18] In a decision dated November 13, 2009, the Administrator denied the application 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). [...]

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.

Information submitted in the original application confirmed that [the HCV Infected Class Member] had passed away on August 7, 1974, which was before testing for Hepatitis C was available. As noted in the previous paragraph, the Settlement Agreement indicates there is an alternative way to support he had Hepatitis C when he was never tested. You submitted a Treating Physician Form completed by your Family Doctor in September 2009. The doctor indicated that [the HCV Infected Class Member] had an episode of jaundice within three months of a transfusion in absence of any other cause and that he had Renal failure from his Hepatitis C. The doctor further noted that she had no records to support this but the information was “according to history provided by [the HCV Personal Representative]”. In addition to the Doctor’s Form you submitted a letter prepared by yourself indicating you recall being told by your father’s Doctor that he contracted Hepatitis as a result of a Blood transfusion. There were no medical records submitted to support this statement. After careful review the evidence submitted does not satisfy the criteria in The Settlement Agreement to support that [the HCV Infected Class Member] was infected with Hepatitis C. Based on this your claim for compensation must be rejected. [Emphasis Added]

REQUEST FOR REVIEW

[19] On December 4, 2009, the HCV Personal Representative delivered a Request for

Review in which she specified the reasons for appealing as follows:

1. Our appeal is based on section 2.01(1)(b) an episode of jaundice within three months of receiving blood in the absence of any other cause.
2. All blood records were destroyed by the hospitals, therefore no written data.

SUPPLEMENTARY EVIDENCE AND SUBMISSIONS

[20] In a letter delivered on January 5, 2009, the HCV Personal Representative made the following supplementary submissions:

We feel that our constitutional rights have been infringed upon when we were denied approval for compensation due to the reckless and careless destruction of blood product files at [Hospital "A"]. Totally out of our control!
My husband [...] and I were both present when Dr. [...] told (my Dad and Mom) that he had contracted Hepatitis C from blood transfusions. Dr. [...] had done many tests to find out why my Father had had jaundice for so long and was not responding to usual treatments. Further to this, contracting Hepatitis C lead to a very painful death, left a devoted wife devastated; a 15 year old son fatherless; as well as other siblings and a grandchild.

[21] In a letter to the Fund Counsel dated February 17, 2010, the HCV Personal Representative provided a copy of a book that was written by her mother in 1993 that contained the following sentence:

Sadly, [the HCV Infected Class Member] died in 1974 following a long and very difficult illness associated with his hemophilia problem. Of the many blood transfusions he required, one of them was contaminated. That was pretty hard to take".

ISSUE

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

ANALYSIS

i) Applicable provisions of the Settlement Agreement and the Proof of Receipt of Blood Protocol

[23] In the Reasons for Decision on the appeal in Claim File 07-07607, I analysed certain provisions in Article Three of the *Settlement Agreement* concerning the eligibility requirements and payment of compensation for a deceased HCV Infected Class Member and stated, in part, as follows:

ii) Eligibility Requirements in Article Three of the Settlement Agreement

[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; 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).

(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.

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.

[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.

[...]

iii) Compensation Provisions under Article Three of the Settlement Agreement

[...]

[33] [...]

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

(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.

[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.

ii) Did the Administrator err in denying the application for compensation?

[26] A review of the decision dated November 13, 2009, reproduced in paragraph 18, indicates that the Administrator denied the application for compensation on the basis that the evidence delivered by the HCV Personal Representative “[...] did not satisfy the

criteria in the Settlement Agreement to support that the [HCV Infected Class Member] was infected with Hepatitis C”.

[27] The evidence in the claim file indicates that there were no hospital records to demonstrate that the HCV Infected Class Member had received a blood transfusion. However, the card issued by the Canadian Hemophilia Society on March 25, 1970, described in paragraph 5, stated that the HCV Infected Class Member was a hemophiliac who had “urticarial reactions to plasma and cryoprecipitates”. The statement that the HCV Infected Class Member had experienced reactions to “plasma and cryoprecipitates” gives rise to the inference that he had received blood transfusions. There is therefore some evidence to demonstrate that the HCV Infected Class Member had received blood transfusions before 1970 due to his hemophilia. However, the HCV Infected Class Member died in 1974, prior to the existence of any tests for the HCV Antibody or the Hepatitis C virus. As a result, the HCV Personal Representative was unable to comply with the requirements in subparagraph 3.01(1)(b)(i) and paragraph 2.01(1)(b) of the *Settlement Agreement* to provide an HCV Antibody or PCR Test report to prove that the HCV Infected Class Member had an infection with HCV. In the circumstances, subsection 3.01(2) applied in order to permit the HCV Personal Representative to deliver one of the types of specified evidence, including evidence of “an episode of jaundice within three months of receiving blood in the absence of any other cause”, for the purposes of proving that the HCV Infected Class Member had an infection with HCV. By virtue of subsection 3.02(5), the evidence delivered by the HCV Personal Representative was required to constitute “proof acceptable to the Administrator” that the death of the HCV Infected Class Member was caused by an infection with HCV.

[28] There was very limited evidence in the claim file concerning the question of whether the HCV Infected Class Member had hepatitis. First, there were statements made by the HCV Personal Representative in both the Addendum and her letter containing supplementary submissions on appeal, reproduced in paragraphs 10 and 20 respectively. In the Addendum, she recounted her recollection that a doctor had explained to her and other members of the family in a hospital room, that the HCV Infected Class Member “[...] had contracted hepatitis through a blood transfusion”. She also stated that the HCV Infected Class Member was hospitalized “in late 1969” and “[...] his illness became the focus of a forum on hemophilia treatment using Cryoprecipitates”. Second, in the letter containing supplementary submissions, she recalled that the doctor had told the family members that the HCV Infected Class Member “[...] had contracted Hepatitis C from blood transfusions” and he [...] had done many tests to find out why [the HCV Infected Class Member] had had jaundice for so long”. Third, the physician indicated in the Treating Physician Form, described in paragraph 13, that the HCV Infected Class Member had experienced an episode of jaundice within three months of the receipt of blood. However, the physician had never treated the HCV Infected Class Member and a review of the Form in its totality indicates that she had relied on information provided by the HCV Personal Representative to complete the Form. In the letter dated September 4, 2009, reproduced in paragraph 14, the physician indicated that the HCV Personal Representative was a “reliable historian”; she supported the “historical claim” that the HCV Infected Class Member had died “[...] from complications due to hepatitis contracted from a blood transfusion”.

[29] I have carefully considered the evidence in the claim file and have concluded that it was reasonably open to the Administrator to conclude that there was insufficient acceptable proof of an infection with Hepatitis C. In particular, there was no medical evidence to indicate that the HCV Infected Class Member was infected with Hepatitis C. Furthermore, there was no indication in either the Addendum written by the HCV Personal Representative in 2000 or in the reasons of the provincial Review Committee that the HCV Infected Class Member had experienced an episode of jaundice related to a blood transfusion. Finally, the statement of the HCV Personal Representative in the Addendum that the HCV Infected Class Member was in the hospital in 1969 with “his illness” indicates that the HCV Infected Class Member was infected with hepatitis as early as 1969. Judicial notice may be taken of the fact that, “[...] by 1972, a test for Hepatitis B was fully implemented in all blood centres operated by the Canadian Red Cross Society (*Final Report of the Commission of Inquiry on the Blood System in Canada* at page 616”).² Given that the HCV Infected Class Member had contracted hepatitis at least by the year 1969, it would be impossible to state, on the basis of the evidence, whether he was infected with Hepatitis B or C. The evidence in the claim file therefore does not constitute acceptable proof that the death of the HCV Infected Class Member was caused by an infection with HCV, as required by paragraph 3.01(1) (d) and subsections 3.01(2) and 3.02(5) of the *Settlement Agreement*. Regrettably, the evidence in the claim file does not meet the requirements in sections 3.01 and 3.02 of the *Settlement Agreement*, and the appeal must be dismissed.

² See page 4 of the decision of Chief Justice Winkler on further appeal to the Court in claim file 07-04822, dated December 21, 2009.

iii) Compensation under another program

[30] As indicated previously, the beneficiaries of the Estate of the HCV Infected Class Member have received compensation under the terms of a provincial plan and 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

[31] The appeal is dismissed.

"D. McGillis"

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

DATED March 23, 2010

TO: HCV Personal Representative
Fund Counsel
Administrator